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ARCHBOLD'S

PRACTICE

OF

The Court of Queen's Bench,

IN

PERSONAL ACTIONS AND EJECTMENT.

The Eighth Edition,

BY THOMAS CHITTY, ESQ.,

OF THE INNER TEMPLE,

INCLUDING

THE PRACTICE

OF

The Courts of Common Pleas and Exchequer.

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PART I.

CHAPTER I.

PLEAS IN ABATEMENT, ETC.

WHEN the plaintiff has delivered or filed his declaration, the defendant, having appeared, may plead either to the *jurisdiction*, or in *abatement*, or in *bar*. The proceedings upon pleas in bar have already been fully considered in the first volume. We shall now treat of those upon pleas to the jurisdiction and pleas in abatement, under the following heads, *viz.:*—

Plea of Nonjoinder, 815.
„ *Misnomer*, 817.
„ *Privilege of Attornies*, 817.
The Plea, when and how pleaded, and Affidavit of Truth, &c., 817.
Amendment of, 820.
Replication, Demurrer, &c., 820.
Issue, &c., 820.
Judgment, 820.
Costs, 821.
Subsequent Proceedings, 821.

Nonjoinder. Statute as to.

Nonjoinder.]—By stat. 3 & 4 *W.* 4, *c.* 42, *s.* 8, "no plea in abatement for the *nonjoinder* of any person as a *co-defendant* shall be allowed in any court of common law, unless it shall be stated in such plea that such person *is resident within the jurisdiction of the court*, and unless the *place of residence* of such person shall be stated with convenient certainty in an affidavit verifying such plea" (*a*). And, by sect. 9, "to any plea in abatement in any court of law of the nonjoinder of another person, the plaintiff may reply, that such person has been discharged *by bankruptcy and certificate*, or *under an act for the relief of insolvent debtors*." And sect. 10 enacts, "that in all cases in which, *after such plea* in abatement, the plaintiff shall, *without having proceeded to trial upon an issue thereon*, commence *another action* against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea

(*a*) See forms of plea, replication, and affidavit, Chit. Forms, 289, 290.

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of abatement as joint contractors, if it shall appear by the pleadings in such subsequent action, or in the evidence at the trial thereof, that all the original defendants are liable, but that one or more of the persons named in such plea in abatement, or any subsequent plea in abatement, are not liable as a contracting party or parties, the plaintiff shall, nevertheless, be entitled to judgment, or to a verdict and judgment, as the case may be, against the other defendant or defendants, who shall appear to be liable; and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same as costs in the cause against the defendant or defendants who shall have so pleaded in abatement the nonjoinder of such person; provided, that any such defendant who shall have so pleaded in abatement shall be at liberty, on the trial, to adduce evidence of the liability of the defendants named by him in such plea in abatement." These provisions do not apply to any case of nonjoinder, except where the plaintiff can go on against the party pleading in abatement; therefore they do not apply to a plea of coverture (*b*).

Plea of coverture.

Residence of party not joined.

Inasmuch as the plea must accurately state *all* the contracting parties, so as to give a better writ, and if one be omitted the plea would fail (*c*), it seems, that, if any one of the contracting parties be not resident in England, the plea cannot be pleaded. As regards the nature of the residence required, it would seem, that, if a party be merely in England for a temporary purpose, and is not actually *residing* in it, the defendant could not plead his nonjoinder; and, on the other hand, he might so plead the nonjoinder of a party if his absence abroad was a merely temporary one, and he was really residing here. The fact of the party being resident or not would, it is conceived, be traversable. As to the *time* of the residence, regard being had to the words of the enactment, it would it seems be when the plea was pleaded, and not the commencement of the suit (*d*).

Where Statute of Limitations has run as against one.

By the 9 *G.* 4, *c.* 14, *s.* 2, "if any defendant or defendants in any action on any simple contract shall plead any matter in abatement, to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not, by reason of the said recited acts or this act, [the statutes of limitations,] or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same."

In actions against carriers.

By the Common Carriers Act, (11 *G.* 4 & 1 *W.* 4, *c.* 68, *s.* 5), "any one or more of such mail contractors, stage-coach proprietors, or common carriers, shall be liable to be sued by his, her, or their name or names only; and that no action or suit commenced to recover damages for loss or injury to any parcel, package, or person, shall abate for the want of joining any co-proprietor or co-partner in such mail, stage-coach, or other public conveyance by land for hire as aforesaid."

(*b*) *Jones* v. *Smith*, 6 Dowl. 557; 3 M. & W. 526, *S. C.*

(*c*) See *Abbott* v. *Smith*, 2 Bla. Rep. 951: *Godson* v. *Good*, 6 Taunt. 587; 2 Marsh. 299, *S. C.*: *Hill* v. *White*, 6 Bing. N. C. 23; 8 Dowl. 63, *S. C.*; and *Hill* v. *White*, 6 Bing. N. C. 26; 8 Dowl. 13, *S. C.*; *Ovelin* v. *Brook*, 1 Car. & K. 571.

(*d*) *Bannister* v. *Bannister*, C. P., 28 April, 1845.

Banking co-partnership.

It seems, that a member of a banking co-partnership, established under the 7 *G.* 4, *c.* 46, cannot plead in abatement the nonjoinder of other members of the partnership to a *scire facias quare executionem non*, brought on a judgment obtained against a public officer of the partnership (*e*).

Misnomer.

Misnomer.]—As regards pleas in abatement for a *misnomer*, the 3 & 4 *W.* 4, c. 42, *s.* 11, enacts, "that no such plea shall be allowed in any *personal* action, but that, in all cases in which a *misnomer* would, but for this act, have been by law *pleadable in abatement* in such actions, the defendant shall be at liberty to cause the declaration to be *amended, at the costs of the plaintiff*, by inserting the right name, *upon a judge's summons, founded on an affidavit of the right name* (*f*); and, in case such summons shall be *discharged*, the *costs* of such application shall be paid by the party applying, *if the judge shall think fit*" (*g*). Sect. 12 allows the plaintiff, in actions on written instruments where any of the parties' christian names are therein designated by initial letters or contractions, to make use of such initial letters or contractions (*h*).

Privilege of attornies.

Privilege of Attornies.]—An attorney, as we have seen, *ante*, Vol. 1, p. 60, must, except in certain cases, be proceeded against in a court of which he is an attorney. If sued in any other court, he may plead his privilege (*i*); and, it seems, by attorney (*j*), such a plea being a plea of privilege, and not a plea to the jurisdiction (*k*). This plea must be verified by affidavit (*l*).

The plea, when and how pleaded, &c.

The Plea, when and how pleaded, and Affidavit of Truth, &c.]—The defendant, if he intend to plead in abatement or to the jurisdiction, *must deliver his plea to the plaintiff's attorney, or, in country causes, to the agent in town, on or before the fourth day exclusive* (*m*) *after the delivery or filing and notice of the declaration*. And this, it seems, though no rule to plead be given or demand of plea made, these being required only as a preliminary to signing a judgment by default (*n*). If Sunday happen to be the *last* of the four days, the defendant is at liberty to plead upon the Monday (*o*). The defendant is not bound, unless otherwise ordered, to plead on any day between the 10th August and 24th October (*p*). And in case the time for pleading has not expired before the 10th August, the de-

(*e*) *Forster* v. *Rickerby*, 3 Scott, N. R., 139; 9 Dowl. 662, *S. C.* See *post*, Pt. 3, ch. 3.

(*f*) See forms, Chit. Forms, 289.

(*g*) See the enactment, and decisions thereon, *ante*, Vol. 1, p. 191.

(*h*) See this enactment, and decisions thereon, *ante*, Vol. 1. p. 144, 671.

(*i*) *Hunter* v. *Neck*, 3 Scott, N. R., 448. See *Percival* v. *Cooke*, 5 M. & W. 332; 7 Dowl. 500, *S. C.*

(*j*) *Hunter* v *Neck*, 3 Scott, N. R., 448; 3 Man. & G. 181: *Groom* v. *Wortham*, 5 Scott, N. R., 799; 2 Dowl., N. S., 657: *Higgs* v. *Harrison*, Styles, 413: Gilb. Hist. of C. P., pp. 187 *et seq.*: *Chapham* v. *Southall*, Hardres, 365. *Quære*, supposing the plea cannot be pleaded by attorney, how advantage is to be taken of the informality of a plea so pleaded, whether by application to the Court to set it aside, or by demurrer. (*Hunter* v. *Neck*, *supra*).

(*k*) *Hunter* v. *Neck*, *supra*. But see Com. Dig. "Abatement," (D. 6): *Grant* v. *Lord Sondes*, 2 W. Bl. 1094.

(*l*) *Davidson* v. *Watkins*, 3 Dowl. 129; 1 Bing. N. C. 297, nom. *Davidson* v. *Chilman*, *S. C.*

(*m*) *Ryland* v. *Wormland*, 5 Dowl. 581.

(*n*) *Anon.*, Cas. Pract. C. P. 28: *Biddleston* v. *Atherley*, Id. 63.

(*o*) See *Lee* v. *Carlton*, 3 T. R. 642; R. E., 5 A. s.

(*p*) See 2 W. 4, c. 39, s. 11, Vol. 1, p. 209.

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fendant has the same number of days for pleading after the 24th October as if the declaration had been delivered or filed on the 24th October (*q*). Where two actions had been vexatiously brought for the same cause, the Court allowed the defendant to plead in abatement, even after the four days had elapsed (*r*); and leave has been given to plead the nonjoinder of a co-contractor after the four days, such a plea being considered a plea in abatement more to be favoured than those which constitute a mere formal objection (*s*). If the defendant plead in abatement or to the jurisdiction, either wholly or in part, after the time above mentioned, without leave of the court or a judge, the plaintiff may treat the plea as a nullity, and sign judgment at the expiration of the time allowed for pleading (*t*).

Must be after appearance.

The defendant must, of course, enter a common appearance before he can be allowed to plead in abatement or to the jurisdiction (*u*). In bailable cases, before 1 & 2 *Vict. c.* 110, he must have put in bail: but it was not necessary that he should *justify* his bail before he pleaded (*x*). Since that act he may plead in abatement without reference to the state of the bailable proceedings.

And after declaration.

The plea cannot be delivered before the plaintiff has declared (*y*); and where the declaration has been filed, the plea cannot be delivered before the defendant has taken the declaration out of the office (*z*).

Where to be pleaded in person.

A plea to the jurisdiction must be pleaded in person, and not by attorney (*a*). If a *feme coverte* plead her coverture in abatement, she must plead it in person (*b*). But, in all other cases, pleas in abatement may be pleaded either by attorney or in person, or by guardian, if the defendant be an infant, in the same manner as pleas in bar (*c*).

Must be verified by affidavit.

The plea must be *verified by affidavit* (*d*); and this whether it be a plea of privilege (*e*), of infancy (*f*), of coverture (*g*), nonjoinder (*h*), or the like. But there is no occasion for such affidavit, if the matter of the plea appear upon the face of the record (*i*). The affidavit may be made either by the defendant or a third person (*j*). If it be annexed to a plea, and the

(*q*) R. M., 3 W. 4, r. 12, *ante*, Vol 1, p. 209.

(*r*) *Sowter* v. *Dunston*, 1 M. & R. 506, 510.

(*s*) See Chit. Sum. Pract. 130: *Sowter* v. *Dunston*, 1 M. & R. 506. And see per *Kenyon*, C. J., in *Milner* v. *Milnes*, 3 T. R. 632.

(*t*) *Brandon* v. *Payne*, 1 T. R. 689: R. E., 5 A.: *Martindale* v. *Harding*, 1 Chit. Rep. 716: *Nolleken* v. *Severn*, 1 Dowl. 320; 2 C. & J. 333, *S. C.*; 4 Dowl. 631.

(*u*) *Saunders* v. *Owen*, 2 D. & R. 252: *Wakefield* v. *Marden*, 2 Chit. Rep. 8.

(*x*) *Dimsdale* v. *Nielson*, 2 East, 406: *Cussen* v. *Bond*, 2 V. & J. 531: *Hopkinson* v. *Henry*, 13 East, 170.

(*y*) *Douglas* v. *Green*, 2 Chit. Rep. 7. And see *Bowyer* v. *Kemp*, 1 Dowl. 281; 1 C. & J. 287, *S. C.*

(*z*) *Bond* v. *Smart*, 1 Chit. Rep. 735: *Douglas* v. *Green*, 2 Id. 7. But see *White* v. *Dent*, 1 B. & P. 341: *ante*, Vol. 1, p. 268.

(*a*) Gilb. C. B. 187: 1 Bac. Abr. 2: *Grant* v. *Sandes*, 2 W. Bl. 1094. See the arguments of counsel in *Hunter* v. *Neck*, (3 Scott, N. R., 452; 3 Man. & G. 181), as to how an objection, that the plea is improperly pleaded by an attorney, should be taken advantage of.

(*b*) 2 Saund. 209 a.

(*c*) Ib. And see *Hunter* v. *Neck*, *supra*; *ante*, 817; and 1 Chit. Pl. 456.

(*d*) 4 Anne, c. 16, s. 11. As to the certainty required in the affidavit, see *Dobbin* v. *Wilson*, 3 Nev. & M. 269: *Pearce* v. *Davy*, 1 Ld. Ken. 304; Say. 293, *S. C.* An affidavit that the plea "*is a true plea*" will not suffice. (*Onslow* v. *Booth*, 2 Str. 705).

(*e*) *Davidson* v. *Chilman*, 1 Scott, 117; 3 Dowl. 129; 1 Bing N. C. 297, *S. C.*: *Stiles* v. *Mead*, 2 Str. 736: *Cunningham* v. *Johnson*, Say. 19.

(*f*) Pr. Reg. 5.

(*g*) *Lovell* v. *Walker*, 9 M. & W. 299; 1 Dowl., N. S., 952, *S. C.*

(*h*) Pr. Reg. 4. See form, Chit. Forms, 269.

(*i*) *Hughes* v. *Alvarez*, 2 L. Raym 1409. Pr. Reg. 5: *Gray* v. *Sidneff*, 3 B. & P. 397. See *Dobbin* v. *Wilson*, 3 Nev. & M. 260.

(*j*) Pr. Reg. 5, 6: *Lumley* v. *Foster*, Barnes, 344: *Anon.*, 1 Chit. Rep. 58: 2 Saund. 211 *f.* See the form, Chit. Forms, 269.

plea be properly intitled in the cause, it may be in a general form verifying the plea; and it would seem, that it need not, in such case, be intitled in the cause (*k*), though it is usual so to intitle it. But if it be not annexed to the plea, it must be intitled in the cause, and must contain a special statement of the facts contained in the plea (*l*). Where the affidavit verifying the plea was wrongly intitled, the Court set aside the plea, but granted leave to the defendant to plead afresh upon terms of his pleading issuably (*m*). The affidavit verifying a plea of nonjoinder of a co-defendant must state the place of residence of such party with convenient certainty (*n*). The actual residence must be stated; it is not sufficient to give the best statement of it that can be obtained (*o*). When ancient *demesne* is pleaded, the affidavit must state that the lands in question are holden of a manor which is ancient *demesne*, that the party has a freehold interest in it, and there is a court of ancient *demesne* regularly holden (*p*). The affidavit must not be sworn before the declaration is filed or delivered (*q*). But where it was sworn in Liverpool the very day the declaration was filed in London, the Court held it sufficient (*r*). And the same where it was sworn two days before the date of the plea (*s*).

Consequences if not.

If the plea be filed without an affidavit, or with an insufficient affidavit to verify it, the plaintiff may treat it as a nullity and sign judgment (*t*), or he may, it seems, get it set aside (*u*). No judgment of *nonpros* could be regularly signed for not replying to it (*x*), and the plea is such an absolute nullity, that the defect cannot be waived (*y*). Where, indeed, the affidavit was sworn before the defendant's attorney, it was held that the plaintiff could not treat the plea as a nullity on that account and sign judgment, although, probably, it might be a sufficient ground for setting it aside (*y*).

The plea, &c., how prepared and delivered, &c.

Ingross the plea on plain paper, and get it signed by counsel, or in the Common Pleas by a serjeant (z); write your affidavit on plain paper (a), annex it to the plea, and deliver them to the plaintiff's attorney or agent (b). If not delivered within the four days above mentioned, the plaintiff's attorney or agent should not receive it, though, indeed, it may be questionable whether

(*k*) See *Prince* v. *Nicholson*, 5 Taunt. 333. And a mistake is fatal. (*Richards* v. *Astrey*, 3 Price, 197).

(*l*) See *Dobbin* v. *Wilson*, 3 Nev. & M. 289, where the affidavit was special.

(*m*) *Fletcher* v. *Lechmere*, 2 Dowl., N. S., 863.

(*n*) 3 & 4 W. 4, c. 42, s. 8, *ante*, 815.

(*o*) *Wheatley* v. *Gubney*, 9 Dowl. 1019.

(*p*) *Doe d. Rust* v. *Roe*, 2 Burr. 1048.

(*q*) *Bear* v. *Kemp*, 1 Dowl. 281; 1 C. & J. 327; 1 Tyr. 260, S. C.: *Johnson* v. *Popplewell*, 2 C. & J. 545; 2 Tyr. 715, S. C.

(*r*) *Long* v. *Comber*, 4 East, 348. And see *Bankart* v. *Bernard*, 4 M. & Sel. 332.

(*s*) *Poole* v. *Pembray*, 1 Dowl. 693.

(*t*) *Cumming* v. *Broom*, Carth. 402: *Sherman* v. *Alvarez*, 1 Str. 639: *Hughes* v. *Alvarez*, 2 L. Raym. 1409: *Davidson* v. *Chilman*, 1 Bing. N. C. 297: *Richards* v. *Astrey*, 3 Price, 197: in which case it was wrongly intitled. And see *Long* v. *Comber*, 4 East, 348: *Poole* v. *Pembray*, 1 Dowl. 693; *Lovell* v. *Walker*, 9 M. & W. 239; 1 Dowl., N. S., 952. In the latter case, the defendant pleaded to part of the declaration her coverture in abatement, and to the remainder that she was never indebted, without an affidavit to verify it; and it was held, that the plaintiff was entitled to sign judgment, although part of the cause of action accrued after the coverture.

(*u*) *Fletcher* v. *Lechmere*, 2 Dowl., N. S., 863: *Pether* v. *Shelton*, 1 Str. 638: *Cunningham* v. *Johnson*, Say. 19, 233: *R.* v. *Grainger*, 3 Burr. 1617: *Poole* v. *Pembray*, 1 Dowl. 693. And see *May* v. *Holley*, 2 Moore, 213: *R.* v. *Cooke*, 2 B. & Cres. 618.

(*x*) *Garratt* v. *Hooper*, 1 Dowl. 28. The judgment was set aside without costs.

(*y*) *Horsefall* v. *Matthewman*, 3 M. & Sel. 154.

(*z*) See the form of a plea of nonjoinder, Chit. Forms, 289.

(*a*) See the form, Chit. Forms, 289.

(*b*) See *Jennings* v. *Webb*, 1 T. R. 278.

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the receipt of it would be deemed a waiver of his right to sign judgment after the time for pleading has expired, the plea being perhaps a *nullity*. We have seen (*ante*, 818) that if the declaration has been filed, the defendant must take it out of the office before he pleads, otherwise the plaintiff may sign judgment.

Amendment of.

Amendment of.]—Pleas in abatement are not, in general, amendable, because they are dilatory, and do not go to the merits of the action (*c*). A plea *puis darrein continuance* is not within this rule, if it be a plea in bar (*d*).

Replication, demurrer, &c.

Replication, Demurrer.]—The plaintiff replies or demurs to the plea in the same manner as to a plea in bar, except that the demurrer need not specially shew the causes of it in the body thereof (*e*). It seems that there is no such thing as a new assignment to a plea in abatement (*f*).

Cassetur breve.

If you cannot confess and avoid the plea, or deny it, or cannot safely demur to it, you should then enter on the roll a *cassetur breve*, as directed *post*, *Part 5*, *ch.* 19, and upon which neither party will be entitled to costs.

Issue, &c.

Issue, &c.]—If issue in fact be joined between the parties, the issue is made up, and they proceed to trial, as in ordinary cases (*g*). So, if there be a demurrer and joinder, the subsequent proceedings to judgment exclusive are the same as in ordinary cases, and as mentioned *post*, 830 (*h*).

As to which party is to begin on the trial, see *ante*, 365.

Judgment. For plaintiff.

Judgment.]—Judgment for the *plaintiff* upon verdict is peremptory, *quod recuperet* (*i*); and, therefore, care must be taken at the trial, in cases where damages are the principal object of the action, that the jury (if they find for the plaintiff) assess the damages; otherwise, as an omission in this respect cannot be supplied by a writ of inquiry, a *venire de novo* must be awarded (*k*). Judgment for the plaintiff upon demurrer, or on replication of *nul tiel* record, is not final, but merely a *respondeat ouster* (*l*). Where a plea for the misjoinder of parties was pleaded to several counts, and was bad as to some of them, it was held that the plea was bad altogether, and that

(*c*) Cas. Prac. C. P. 29; Tidd, 9th ed., 298.

(*d*) *Post*, 826.

(*e*) *Lloyd* v. *Williams*, 2 M. & Sel. 484: *Eadaile* v. *Lund*, 12 M. & W. 607; 2 D. & L. 565, *S. C.* Though the defendant has no right, on demurrer to a plea in abatement or to the jurisdiction, to object to the declaration, for the judgment is only *respondeat ouster*, (*infra*), he may do so, if the plea demurred to is in form a plea in abatement, but in substance a plea in bar. (*Dundalk Western Railway Company* v. *Tapster*, 1 Q. B. 667; 1 Gale & D. 657, *S. C.*) See, as to the replication, &c., *ante*, Vol. 1, p. 276, &c. See form of a replication to a plea of nonjoinder, Chit. Forms, 290; as to the demurrer, and proceedings thereon, see *post*, 827; and as to the issue, &c., see Chit. Forms, 290.

(*f*) *Hill* v. *White*, 8 Scott, 949; 6 Bing. N. C. 26; 8 Dowl. 13, *S. C.*

(*g*) See the form of the issue, notice of trial, *Nisi Prius* record, jury process, *postea*, judgment, and execution, Chit. Forms, 45, 53, 70, 73, 95, 106, 150.

(*h*) See Chit. Forms, 291, &c.

(*i*) *Bichorn* v. *Lemaitre*, 2 Wils. 367; Gilb. C. B. 53: *Bowen* v. *Shapcott*, 1 East, 542. See *France* v. *White*, 1 Man. & G. 731.

(*k*) *Bichorn* v. *Lemaitre*, 2 Wils. 367; *Forwist* v. *Tremaine*, 2 Saund. 211, n. 3; *post*, Pt. 2, ch. 5.

(*l*) *Thompson* v. *Coller*, Yelv. 112: *Barker* v. *Forrest*, 1 Str. 532: *Bowen* v. *Shapcott*, 1 East, 542. And see *Anon.*, 1 Wils. 302. See the forms, Chit. Forms, 290.

there must be a general judgment of *respondeat ouster*, although the plea would have been good if pleaded separately to the other counts (*m*).

For defendant.

Judgment for the *defendant*, in all cases, whether upon verdict, demurrer, or *nul tiel* record, is that the writ be quashed (*n*); unless where the matter pleaded in abatement is some temporary disability, such as infancy, &c., in which case the judgment is, that the plaint remain without day until &c. (*o*)

Costs.

Costs.]—Upon a *cassetur breve* entered by plaintiff, neither party is entitled to costs (*p*). If there be a verdict for the plaintiff upon a plea in abatement, as the judgment in that case is peremptory, *quod recuperet*, he is, of course, entitled to costs as in other cases; and if the plaintiff have a verdict against him, or be nonsuited, the defendant shall have costs for the same reason (*q*). Formerly, neither the plaintiff nor defendant was entitled to costs on a judgment on demurrer to a plea, &c. in abatement (*r*); but now, by the 3 & 4 *W.* 4, *c.* 42, *s.* 34, either party succeeding on such a demurrer is entitled to his costs, as in other cases.

Subsequent proceedings.

Subsequent Proceedings.]—After judgment of *respondeat ouster*, the defendant has four days to plead (*s*). This, however, it seems, is in the discretion of the Court (*t*); and it is said, that they will sometimes order the defendant to plead *instanter*, or on the morrow (*u*). The defendant must, it seems, plead within the four days without notice of the judgment, for the defendant is supposed to be attending his cause in the paper to maintain his plea (*x*).

Time for pleading.

Order of pleading.

The order invariably to be observed in pleading is thus:—

I. To the jurisdiction.
II. In abatement.
 I. To the person.
 1*st*. Of the plaintiff.
 2*nd*. Of the defendant.
 II. To the count.
 III. To the writ.
 1*st*. To the form of the writ.
 2*nd*. To the action of the writ.
III. In bar of the action (*y*).

Pleading a plea in any one of these classes is deemed an acknowledgment that you have no ground for pleading a plea in

(*m*) *Phillips* v. *Claggett*, 10 M. & W. 362; 2 Dowl., N. S., 256, *S. C.*

(*n*) Gilb. C. B. 52. See the forms, Chit. Forms, 291.

(*o*) Tidd, 642. See, upon this subject, Com. Dig., "Abatement," I, 14, 15.

(*p*) *Allen* v. *Massy*, M., 8 G. 2; Pr. Reg. 6; *Cromhill* v. *Shepherd*, 12 Mod. 145; Bullock, 126.

(*q*) *Affler* v. *Constable*, T., 13 G. 1; Hullock, 192; Ca. Pr. C. B. 35.

(*r*) *Garland* v. *Exton*, 2 L. Raym. 992; 1 Salk. 194, *S. C.*: *Thomas* v. *Lloyd*, 1 L. Raym. 336; 1 Salk. 194, *S. C.* And see *Michlam* v. *Bate*, 8 B. & C. 642; 3 M. & Ry. 91, *S. C.*

(*s*) 1 Sellon, 275: *Cantwell* v. *Earl of Stirling*, 8 Bing. 177; 1 Moo. & Sc. 365; 1 Dowl. 965, *S. C.*

(*t*) *R.* v. *Williams*, Comb. 19.

(*u*) Tidd, 641.

(*x*) Salk. 17; Bac. Ab., "Abatement," P. A notice of the judgment was given in the above case of *Cantwell* v. *Earl of Stirling*.

(*y*) Co. Litt. 303.

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any of the preceding classes, and a waiver of the right to do so. Therefore, after a judgment of *respondeat ouster*, you cannot plead a plea in the same or in any preceding degree or class with that which you have already pleaded; but you may plead one in any of the subsequent classes you please (*z*).

Entry of proceedings in second issue.

In making up the second issue, you must formerly have entered the plea in abatement and the proceedings on it to the judgment of *respondeat ouster* (*a*). But the omission of them was no ground for arresting the judgment, or for a new trial. And since *R. H.*, 4 *W.* 4, *r.* 15, it has been decided, that a plea in abatement, with judgment of *respondeas ouster*, need not now be entered on the issue or in the *Nisi Prius* record (*b*).

Declaration in second action.

We have seen, (*ante*, 816), that, by the 3 & 4 *W.* 4, *c.* 42, *s.* 10, after a plea in abatement of the nonjoinder of another person, if the plaintiff commence another action against the original defendant and the party not joined, he has some rights given him which did not exist before that act. And in pursuance of that act, one of the recent rules of pleading of *H. T.*, 4 *W.* 4, *r.* 20, has prescribed a form for the commencement of a declaration in such case (*c*).

(a) See Com. Dig., "Abatement;" 2 Saund. Rep., 5th ed., 40, 41.

(z, *Dobertson* v. *Chancellor*, 1 L. Raym. 329; Carth. 447, S. C.: *Addington* v. *Oakley*, 5 Mod. 399: *Anon.*, 7 Mod. 51.

(b) *Pepper* v. *Whalley*, 5 Nev. & M. 437; 1 H. & W. 480, S. C.

(c) See the form, Chit. Forms, 291.

CHAPTER II.

PLEAS PUIS DARREIN CONTINUANCE.

Plea puis darrein continuance.

If any matter of defence arise after the defendant has pleaded, and before the jury have actually delivered their verdict (*a*), the defendant may (within eight days after such matter of defence arose, unless a further time be allowed by the Court or a judge, *R. H.*, 4 *W.* 4, *r.* 2, *post*, 824) avail himself of it by a plea termed a "*plea puis darrein continuance.*"

What pleadable, &c.

Thus, if, after plea pleaded, the plaintiff give the defendant a release, the latter may within such eight days afterwards plead the release, and if he omit to plead it, it will not be otherwise available for him (*b*). So, if the plaintiff has become bankrupt, &c., or the defendant has become so, and obtained his certificate, the same may within that time be pleaded (*c*). If a defendant become bankrupt and obtain his certificate after plea and before verdict, and he does not plead the same, and judgment is obtained against him, he cannot afterwards do so to an action on such judgment (*d*). Where an action of ejectment was brought, and, after issue joined, the lessor of the plaintiff entered into part of the premises, the court held that the defendant might plead this matter (*e*). So, an award made in the cause after issue joined may be thus pleaded (*f*). So, in an action against an executor, the defendant may plead a judgment recovered against him after plea pleaded (*g*). But the defendant cannot plead a release by one of the lessors of the plaintiff in ejectment (*h*).

When it may be pleaded.

A plea *puis darrein continuance* may be pleaded, though the defendant be under terms of pleading issuably and taking short notice of trial (*i*). It may be pleaded after the jury are sworn (*k*), but not after a demurrer (*l*), nor after verdict (*m*). In an action which had been set down for trial in the term as undefended, and postponed on the condition of giving judgment of the term, a plea of *puis darrein continuance* of the de-

(*a*) 2 Lutw. 1143; Bull. N. P. 310: *Stamp* v. *Parker*, Cro. Jac. 646. See *Lovell* v. *Eastaff*, 3 Term Rep. 554: *Fitch* v. *Toulmin*, 1 Stark. 62. See, in case of reference to arbitration, *Alder* v. *Park*, 5 Dowl. 16; 2 H. & W. 78, *S. C.*

(*b*) See *ante*, Vol. 1, p. 271, as to setting aside a plea of release, fraudulently given by one of several plaintiffs, &c.

(*c*) See *Lovell* v. *Eastaff*, 3 T. R. 554: *Duff* v. *Campbell*, 3 B. & Ald. 577: *Biggs* v. *Cox*, 4 B. & C. 920; 7 D. & R. 409, *S. C.*: *Brotherton* v. *Osborne*, 1 Dowl. 467. See post, Pt. 4, ch. 12, as to staying the proceedings in an action where the defendant has become bankrupt, and obtained his certificate.

(*d*) *Todd* v. *Maxfield*, 6 B. & C. 105; 9 D. & R. 171, *S. C.*

(*e*) *Moore* v. *Hawkins*, Yelv. 180. *Hawkins* v. *Moore*, Cro. Jac. 261, *S. C.* But see *Doe* v. *Brewer*, 2 Chit. Rep. 323; 4 M. & Sel. 301, *S. C.*

(*f*) *Storey* v. *Bloram*, 2 Esp. 504.

(*g*) *Prince* v. *Nicholson*, 5 Taunt. 333; 1 Marsh. 70, *S. C.* And see *Prince* v. *Nicholson*, 5 Taunt. 665; 1 Marsh. 280, *S. C.*: *Lettleton* v. *Cross*, 3 B. & C. 317; 5 D. & R. 175, *S. C.*

(*h*) *Doe* v. *Brewer*, 2 Chit. Rep. 323; 4 M. & Sel. 301, *S. C.*

(*i*) *Bryant* v. *Perring*, 2 Moo. & P. 760; 5 Bing. 414, *S. C.* See *ante*, 219.

(*k*) *Todd* v. *Emly*, 1 Dowl., N. S., 598; 9 M. & W. 606, *S. C.*

(*l*) *Day* v. *Savage*, Moore, 871: *Martin* v. *Wyvill*, 1 Str. 492.

(*m*) 2 Lutw. 1143; Bull. N. P. 310: *Stamp* v. *Parker*, Cro. Jac. 646. See *Lovell* v. *Eastaff*, 3 T. R. 554.

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fendant's bankruptcy and certificate, the certificate having been obtained since the term, was held admissible (*n*).

Must be pleaded in eight days, &c.

By the rule of *H. T.*, 4 *W.* 4, *r.* 2, which prohibits the entry of *continuances* by way of *imparlance, curia advisari vult, vicecomes non misit breve*, or otherwise, on any roll or record, except the *jurata ponitur*, (*ante*, 286), it is provided, "that such regulation shall not alter or affect any existing rules of practice, *as to the times of proceeding in a cause;* provided also, that in all cases in which a plea *puis darrein continuance* is now by law pleadable *in banc* or at *Nisi Prius*, the same defence may be pleaded, with an allegation that the matter arose *after the last pleading*, or the *issuing of the jury process*, as the case may be (*o*); provided also, that no *such* plea shall be allowed, unless accompanied by an *affidavit* that *the matter thereof arose* within *eight* (*p*) days next before the pleading of such plea, or *unless* the *Court* or a *judge shall otherwise order.*" The Court permitted one of two defendants to plead his bankruptcy and certificate, without this affidavit, it appearing that the defendants had had reason to believe that the action would not be proceeded with; and this though it did not appear whether the demand was provable under the fiat (*q*). It seems that this affidavit is unnecessary, if the subject-matter of the plea arises at the trial in the presence of the judge (*r*).

Affidavit of.

How pleaded before trial.

Since the above rule, and the abolition of the entry of *continuances*, the plea must be pleaded within *eight* days after the matter of defence has arisen, unless the Court or a judge otherwise orders. In a country cause it should be so pleaded and the plea delivered within the eight days, though the subject-matter of defence arose after issue joined; and the defendant should not in that case delay pleading it beyond the eight days, in order to plead it at the assizes (*s*). *Ingross the plea on plain paper; get it signed by counsel, or in the Common Pleas by a serjeant, and deliver it in the same manner as other special pleas* (*t*). *Accompany it with an affidavit of its truth, and of the matters thereof having arisen within eight days next before the pleading of the plea, unless such affidavit be dispensed with by the order of the Court or a judge* (*u*).

How at Nisi Prius, or assizes.

The plea may, it should seem, be put in at Nisi Prius, or at the assizes, upon paper, either when the assize is called on, or at any other time before the jury have actually delivered their verdict (*x*), (*provided eight days have not elapsed since the subject-matter of*

(*n*) *Whitmore* v. *Bantock*, 1 M. & M. 122.

(*o*) See *Dunn* v. *Hill*, 11 M. & W. 470; 2 Dowl., N. S., 1062, *S. C.*

(*p*) The eight days are to be reckoned exclusive of the first, and inclusive of the last. (R. H., 2 W. 4, r. 8). And see *Duddon* v. *Triquet*, (4 M. & W. 676; 7 Dowl. 171), where, on the 14th of January, the 13th having been Sunday, the defendant pleaded *puis darrein continuance* a judgment recovered on the 5th of January; and *Parke*, B., seems to have been of opinion that the plea was delivered in time, the above 8th rule of H. T., 2 W. 4, having operated under those circumstances to extend the eight days to nine on account of the 13th falling on a Sunday. See as to the computation of time in general, *ante*, 130.

(*q*) *Kibblewhite* v. *Reynolds*, 7 Scott, 232. See *Sharp* v. *D'Almaine*, 8 Dowl. 664.

(*r*) *Todd* v. *Emly*, 1 Dowl., N. S., 306; 9 M. & W. 609, *S. C.*

(*s*) *Chandler* v. *Fry*, 25 Nov. 1844, Q. B.

(*t*) See *ante*, 262; and the form, Chit. Forms, 291.

(*u*) *Supra*: *Willoughby* v. *Wilkins*, 2 Smith, 398: *Prince* v. *Nicholson*, 5 Taunt. 333. See the form of affidavit, Chit. Forms, 292.

(*x*) See Bull. N. P. 310; Dyer, 361: *Duff* v. *Campbell*, 3 B. & Ald. 577: *Lovell* v. *Eastaff*, 3 T. R. 564: *Brotherton* v. *Osborne*, 1 Dowl. 457: and see *Todd* v. *Emly*, *supra*. Where counsel for the defendant at the assizes, before the cause had reached its turn, applied for leave to plead a release *puis darrein continuance*, *Wightman*, J., received it. (*Townsend* v. *Smith*, 1 Car. & K. 160).

the defence arose), *and it is the duty of the attorney afterwards to transcribe it on the Nisi Prius record* (*y*). An affidavit to verify such plea at the assizes, if sworn at the assize town on the commission day of the assizes, before a commission for taking affidavits, is bad; it should be sworn before one of the judges of assize; but the judge at *Nisi Prius* may allow it to be re-sworn before him (*z*). And where a plea *puis darrein continuance* stated that since the last *continuance* the plaintiff had recovered a judgment for the same cause of action, and the affidavit to verify the plea stated the time at which the judgment was recovered, which, by reference to the *Nisi Prius* record, appeared to be not since the last *continuance*, it was holden, that this affidavit did not verify the plea, and that the plea could not be received (*a*). If the plea be put in at the assizes, or at *Nisi Prius*, even after the jury are sworn (*b*), the judge has no discretion to refuse it, and no further proceedings can be had on it there; but it must be certified on the back of the record at *Nisi Prius*, and returned to the court above (*c*). And if one of two defendants plead a plea of bankruptcy *puis darrein continuance*, the plaintiff cannot, at *Nisi Prius*, confess this plea to be true, and go on with the case as to the other defendant (*d*). After the record is returned as above, the plaintiff may reply or demur to the plea, and then proceed as in ordinary cases (*e*).

Judge cannot refuse it.

When one of two defendants pleads.

Proceedings after record returned.

If the plea be accompanied with a proper affidavit, and be not a nullity, it must be accepted by the plaintiff's attorney, or by the judge at *Nisi Prius*, or the assizes, if there pleaded, though it be clearly bad on the face of it (*f*), or though there be reason to believe that it is pleaded for delay (*g*). In order, however, to prevent pleas of this kind being used for the mere purpose of delay, if the plaintiff demur to them, the Court may order them to be set down for argument for the first paper day in term, so that the plaintiff may have judgment as soon as he would have had if they had not been pleaded (*h*). But where the *venire* was sued out on the 31st of May, the defendant on the 7th of June, at *Nisi Prius*, pleaded *puis darrein continuance;* on the 9th the plaintiff delivered a demurrer to the plea; and on the 11th a rule was obtained to shew cause why the plea should not be set aside, unless the defendant agreed to join in demurrer, and set the demurrer down for argument on the 12th, the last day of term, the Court discharged the rule with costs (*i*).

How treated when pleaded for delay, or when clearly bad.

The defendant can, it seems, plead but one plea *puis darrein continuance*, that the plaintiff may not be delayed *in infinitum*, for if he made a second change, he might have made a third, and so *in infinitum;* but some have held, that he might plead

Defendant can plead but once.

(*y*) See *Myers* v. *Taylor*, R. & M. 404; 2 C. & P. 396, *S. C.*

(*z*) *Bartlett* v. *Leighton*, 3 C. & P. 408.

(*a*) *Minshall* v. *Evans*, 4 C. & P. 555.

(*b*) *Todd* v. *Emly*, 1 Dowl., N. S., 598; 9 M. & W. 606, *S. C.*

(*c*) *Corporation of Ludlow* v. *Tyler*, 7 C. & P. 537: *Abbott* v. *Rugeley*, 2 Mod. 307; Freem. 228: *Townsend* v. *Smith*, 1 Car. & K. 169.

(*d*) *Pascall* v. *Horsley*, 3 C. & P. 372.

(*e*) See, upon this subject generally, 1 Chit. Plead., 6th ed., 657—661.

(*f*) *Paris* v. *Salkeld*, 2 Wils. 137: *Lovell* v. *Eastaff*, 3 T. R. 554: *Fitch* v. *Toulmin*, 1 Stark. 62: *Prince* v. *Nicholson*, 5 Taunt. 387; 1 Marsh. 401, *S. C.* But see Bull. N. P. 309; and perhaps the Court might now hold differently. (See *ante*, 265).

(*g*) *Corporation of Ludlow* v. *Tyler*, 7 C. & P. 537.

(*h*) *Fitch* v. *Toulmin*, 1 Stark. 62.

(*i*) *Hall* v. *Poppiewell*, 5 M. & W. 341. See per *Parke*, B., *S. C.*

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an outlawry after the last continuance, because *nullum tempus occurrit regi*, though this seems questionable (*k*).

Amendment of.

If pleaded at the assizes, it is said the plea cannot be amended in matter of substance after the assizes (*l*), but it may, it seems, be so amended in matters of form. When pleaded *in banc*, the Court have allowed it to be amended, upon the terms of the defendant taking short notice of trial (*m*). And as a general rule, if a plea in bar, it may be amended (*n*).

Is a waiver of former pleas.

By pleading *puis darrein continuance* you waive your former pleading (*o*); and the case then stands in the same state as if this had been the plea originally put in. Also, if this be even a plea in abatement, if the original plea have been a plea in bar, the judgment on demurrer, as well as on verdict, will be peremptory, *quod recuperet*, and not a *respondeas ouster* (*p*); therefore, before you plead *puis darrein continuance*, you should, in general, be satisfied that the matter of such plea will be a better and safer defence to the action than the plea originally pleaded.

Costs on.

As regards the *costs* on a plea *puis darrein continuance*, as a general rule, where the defendant pleads such a plea, confessing, as it does, the plaintiff's right of action, when the action was commenced he cannot force him to reply or go on with the action, and the plaintiff is entitled to discontinue without paying or receiving costs (*q*). But if the plaintiff does reply or demur to it, then he must proceed accordingly, and the defendant will become entitled to his costs if he succeeds, excepting, however, the costs incurred prior to the plea (*r*).

(*k*) Bro. "Continuance," 5, 41; Gilb. C. P. 105: 1 Salk. 178.

(*l*) Bull. N. P. 309; Freem. 252: *Moore* v. *Hawkins*, Yelv. 181.

(*m*) *Lindo* v. *Simpson*, 2 Smith, 659.

(*n*) See *Hawkins* v. *Moor*, 2 Cro. 261: *Holroyd* v. *Reed*, 1 Dav. & Mer. 483; 13 Law J., N. S., Q. B., 130, *S. C.*

(*o*) *Barber* v. *Palmer*, 1 L. Raym. 693; 1 Salk. 178, *S. C.*: *Dunn* v. *Hill*, 11 M. & W. 470.

(*p*) Gilb. C. P. 105; Freem. 252.

(*q*) *Wollen* v. *Smith*, *Horncastle* v. *Smith*, and *Price* v. *Morgan*, 1 Per. & D. 374; 9 Ad. & E. 505, *S. C.*: *Baker* v. *Murray*, 1 Moo. & P. 138.

(*r*) *Lyttleton* v. *Cross*, 4 B. & C. 117; 6 D. & R. 81, *S. C.*

CHAPTER III.

PROCEEDINGS UPON DEMURRER.

Demurrer, Form of, &c., 827.
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Demurrer, form of, &c.

Demurrer, Form of, &c.]—A demurrer is a pleading, which admits the facts as stated in the pleading of the opponent, and refers the law arising thereon to the judgment of the Court (*a*). It is either to the whole or a part of the declaration, or to the whole of the plea, replication, &c., or to the whole or part of a divisible plea or replication, &c.

When general or special.

It is either *general* or *special;* the former being for some defect in substance, the latter for some defect in form (*b*). By *R. H.*, 4 *W.* 4, the form of a demurrer shall be as follows :—

Form of, &c.

"The said defendant, by ——, his attorney [*or*, 'in person,' &c., *or*, 'the said plaintiff'], says that the declaration [*or*, 'plea,' &c.] is not sufficient in law, shewing the special causes of demurrer, if any." *It must be intitled of the day of the month and year when the same is delivered* (*c*). *Get the demurrer framed by counsel or special pleader. Ingross it and the marginal note on plain paper. Get the draft or ingrossment signed by counsel, or in C. P. by a serjeant* (*d*), *and deliver the ingrossment to the attorney or agent of the opposite party* (*e*). If the demurrer is not signed by counsel or serjeant, the opposite party may, after the time for pleading is out, treat it as a nullity, and sign judgment (*f*). Where, the declaration being demurred to for a substantial defect, the plaintiff obtained an order to amend on payment of costs, and, on attending the taxation, having discovered that the demurrer was not signed by counsel, signed judgment for want of a plea, the Court set aside the judgment on payment of costs, and gave the plaintiff leave to amend on payment of costs (*f*).

Marginal note, stating ground of demurrer.

By the rule of *H. T.*, 4 *W.* 4, *r.* 2, "in the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated: and if any demurrer shall be delivered without such statement, or with a frivolous

(*a*) Co. Litt. 71. b. See *Wheeler* v. *Haynes*, 9 Ad. & E. 286, n.
(*b*) Co. Litt. 72. a.
(*c*) See *ante*, Vol. 1, pp. 193, 223.
(*d*) R. E., 18 C. 2, Q. B.; R. E., 33 Geo. 3, C. P.: *Neal* v. *Richardson*, 2 Dowl. 89; Tidd, New Pract. 439. See *ante*, 247.
(*e*) By R. H., 4 W. 4, r. 1, "no demurrer shall in any case be *filed* with any officer of the court, but the same shall always be *delivered* between the parties." See the forms of demurrers and joinders in demurrer, Chit. Forms, 293.
(*f*) *Pocock* v. *Shell*, 7 Scott, 229.

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statement, it may be set aside as irregular by the Court or a judge, and leave may be given to sign judgment as for want of a plea. Provided, that the party demurring may, at the time of the argument, insist upon any further matters of law, of which notice shall have been given to the Court in the usual way." A special demurrer is within this rule, but in such a case the rule is satisfied by a reference in the margin to the causes stated in the body of the demurrer, without otherwise expressly stating them (*g*). The rule must be substantially complied with; therefore, where the marginal note of a demurrer to a plea of justification of a libel merely stated as cause "that it is no justification of the libel," it was holden insufficient (*h*). Only one ground of demurrer need be specified (*h*); and, if several grounds be stated, it need not also be stated on which of them the party intends to rely (*i*). The want of a marginal note is no ground for objecting to the argument of the demurrer when called on; the only effect of the rule is, that a demurrer without such a note may be set aside as irregular (*k*).

Setting it aside as frivolous, or for want of marginal note.

Setting it aside as frivolous, or for want of marginal Note.]—The Court or a judge will not entertain an application under the above rule to set aside a demurrer, unless it omit the marginal note, or unless it be palpably frivolous: if it raise a reasonable doubt, the matter will be referred to the regular judgment of the Court on argument (*l*). In support of an application to the Court, there must be an affidavit, stating the substance of the pleadings, or annexing a copy of them to it; and the rule must be drawn up on reading such affidavit (*m*). The rule is *nisi* only in the first instance (*n*). As the above rule of *H. T.*, 4 *W.* 4, says that the demurrer may be set aside as *irregular*, the application to set it aside should be made promptly, and within the time limited by the rule of *H. T.*, 2 *W.* 4, *r.* 33, noticed *post*, *Pt. 5*, *ch.* 16. It is too late to apply after taking any further step in the cause, as joining in demurrer (*o*), or the like.

Withdrawing demurrer.

Withdrawing Demurrer, &c.]—The party demurring may, in general, before argument, obtain leave of a judge to withdraw his demurrer upon payment of costs. But such leave may be refused if the application be made by the defendant, and he requires to be let in to plead, and more especially if the plaintiff has by the demurrer lost a trial; at all events, it will not be granted unless it be made appear, by an affidavit of merits or otherwise, that there is a good defence, and that the object of the demurrer was not to delay the proceedings; and in all cases the judge would impose such reasonable terms on the defend-

(*g*) *Verbecke* v. *Pearse*, 6 Scott, 406: *Lindus* v. *Pound*, 2 M. & W. 240; 5 Dowl. 459, *S. C.*: *Berridge* v. *Priestley*, 5 Dowl. 306.

(*h*) *Ross* v. *Robeson*, 1 Gale, 102; 3 Dowl. 779, *S. C.*

(*i*) *Whitmore* v. *Nicholls*, 5 Dowl. 521.

(*k*) *Lacy* v. *Umbers*, 3 Dowl. 732.

(*l*) A great variety of instances are to be found in the reports, in which the courts have set aside, or refused to set aside, demurrers as frivolous, but it is not thought worth while to encumber this work with a detail of them.

(*m*) *Hamer* v. *Anderton*, 9 Dowl. 119: *Daniels* v. *Lewis*, 1 Dowl., N. S., 542: *Howarth* v. *Hubbersty*, 3 Dowl. 455; 1 C., M., & R. 900 a, *S. C.*

(*n*) *Spencer* v. *Newton*, 14 Leg. Obs. 82: *Kinnear* v. *Keane*, 3 Dowl. 154.

(*o*) *Norton* v. *Mackintosh*, 7 Dowl. 529.

ant as he may think fit (*p*). As to withdrawing pleas, see *Vol.* 1, *p.* 274.

Amending.

Amendment before Argument.]—As to amending of pleadings in general, see *post*, *Pt.* 5, *ch.* 30; as to amendment after argument of the demurrer, see *post*, 834. A judge at chambers may allow an amendment after a demurrer, on payment of only a nominal amount of costs; and the Court will not overrule his exercise of discretion (*q*). In general, however, the amendment is allowed only on payment of costs generally. As to the time for pleading after an amendment of the declaration, see *Vol.* 1, *p.* 211.

Joinder in demurrer.

Joinder in Demurrer.]—By rule of all the courts of *H. T.*, 4 *W.* 4, *r.* 3, "*no rule for joinder in demurrer shall be required, but the party demurring may demand a joinder in demurrer* (*r*), *and the opposite party shall be bound within four days after such demand to deliver the same, otherwise judgment*" (*s*). A judge will in most cases, on motion for that purpose, grant further time beyond these four days to join in demurrer. Neither party can add a joinder in demurrer for the opposite party (*t*); nor can either party be compelled to join in demurrer before the expiration of four days after the demand (*u*). The defendant, being under terms to "rejoin gratis," is not thereby bound to join in demurrer gratis (*x*). Where a defendant, after the time for joining in demurrer had expired, but before judgment signed, obtained a rule *nisi* to set aside the proceedings, with a stay of proceedings in the meantime; upon the rule being afterwards discharged, it was holden that the defendant had the whole of the day on which the rule was disposed of to join in demurrer (*y*). Where in trespass the defendant pleaded two pleas, upon one of which the plaintiff joined issue, and replied to the other; the defendant rejoined, and the plaintiff demurred to the rejoinder; the defendant did not join in demurrer, but gave notice to the plaintiff that he should take no further steps in respect of his second plea; the Court set aside, for irregularity, a judgment signed by the plaintiff upon the *whole* record (*z*).

Form of joinder.

By rule of *H. T.*, 4 *W* 4, *r.* 14, "the form of a joinder in demurrer shall be as follows:—'The said plaintiff [*or*, 'defendant'] says that the declaration [*or*, 'plea,' &c.] is sufficient in law.' *Ingross it on plain paper, and deliver it to the opposite attorney, or agent. When the defendant demurs, the plaintiff need not deliver separately a joinder in demurrer; he may add it in making up the demurrer-book.*

No signature necessary.

By *R. H.*, 4 *W.* 4, "to a joinder in demurrer no signature of a serjeant or other counsel shall be necessary, nor any fee allowed in respect thereof."

(*p*) See *Wilson* v. *Tucker*, 2 Dowl. 83: *Dunnah* v. *Roberts*, 1 Scott, 364: *Underwill* v. *Harvey*, 3 Dowl. 495: *Cooper* v. *Hawkins*, 1 C. & J. 219.

(*q*) *Tomlinson* v. *Bollard*, 4 Q. B. 642.

(*r*) See form, Chit. Forms, 294.

(*s*) As to the form of the judgment, see *Rankin* v. *Richton*, 11 A. & E. 250, per Tindal, C. J. Before this rule, in the Q. B., when either party demurred, he obtained a rule from the Master, and entered it with the clerk of the rules for the opposite party to join in demurrer, a copy of which rule was duly served. In the C. P., a rule to join in demurrer was given by the secondaries in like manner as the rule to plead, and a joinder in demurrer must have been demanded before judgment.

(*t*) *Billing* v. *Kightly*, 7 Scott, 844; 5 Bing. N. C. 639; 7 Dowl. 660, nom. *Mullins* v. *Cox*. See *Baylis* v. *Hayward*, 3 Dowl. 533.

(*u*) *Hall* v. *Popplewell*, 5 M. & W. 341.

(*x*) *Jones* v. *Key*, 2 Dowl. 265, 2 C. & M. 340, *S. C. Ante*, Vol. 1, pp. 221, 222.

(*y*) *Vernon* v. *Hodgens*, 4 Dowl. 654.

(*z*) *Hitchcock* v. *Walford*, 9 M. & W. 792. See *M'Intyre* v. *Miller*, 13 M. & W. 725. See *ante*, 274, as to withdrawing pleas.

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Notice of inquiry.

Notice of Inquiry.]—By a rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 59, "in all cases where the defendant demurs to the plaintiff's declaration, replication, or other subsequent pleading, the defendant's attorney, or the defendant if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of the joinder in demurrer; and in case the defendant pleads a plea in bar or rejoinder, &c., to which the plaintiff demurs, the defendant's attorney, or the defendant if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of such demurrer" (*a*). In most cases, especially where there is no argument to be had on the demurrer, it is advisable to give this notice where an inquiry is necessary before judgment, as it may materially expedite the plaintiff's execution, in the event of a judgment in his favour.

Demurrer-book.

Form of, &c.

Demurrer-book.]—The demurrer-book is *made up by the attorney or agent* (*b*) *on plain paper.* It may be made up by either party. Where the demurrer is to the *whole* declaration or other pleading, the demurrer-book is the same as the issue on an issue in fact, as far as the entry of the pleadings inclusive (*c*). Where the demurrer is to *part* only of the declaration or other pleadings, the demurrer-book is the same; *but those parts only of the pleadings to which the demurrer relates are to be copied into it;* and if any other part be copied therein, the costs thereof shall not be allowed on taxation, either as between party and party, or as between attorney and client (*d*). If a plea demurred to, contain a reference to something partly answered in another plea, this rule does not prevent the insertion of such other plea in the demurrer-book (*e*). The Court will also, in all cases, if necessary, look to the other parts of the pleadings not set out (*f*). *Insert the names of the counsel who have signed the pleadings on both sides* (*g*). *Deliver a copy of this demurrer-book to the opposite attorney or agent.*

Where there are issues in fact and in law.

If there be also *issues in fact as well as in law*, and it is intended to try the issue in *fact* before the demurrer shall be determined, then make up the issue as usual, copying *all* the pleadings, demurrer, and joinder, and, immediately after, enter an award of a *venire* as well to try the issues in fact, as to assess contingent damages upon the issue in law, in case it should be found for the plaintiff (*h*). And in such case, all the proceedings, not only as to the issue in fact, but as to the issue in law also, must be entered on the *Nisi Prius* record, when you are preparing for trial of the issue in fact, in the same order as they appear in the issue (*i*). If the demurrer has been determined *before* the trial of the issue in fact, the judgment should be stated on the issue (*k*) and *Nisi Prius* record. When

(*a*) The rule contains other provisions as to notice of trial, &c, which see *ante*, Vol. 1. p. 292. See the former practice and old rules, Tidd, 9th ed., 574; Jervis's Rules, 77. See a form of notice, Chit. Forms. 294. As to the time and form of the notice, see *post*, Pt. 2, ch. 5.

(*b*) By R. H., 4 W. 4, r. 5, "the *issue or demurrer-book* shall on all occasions be *made up* by the *suitor*, his *attorney* or *agent*, as the case may be, and not, as heretofore, by any officer of the court."

(*c*) See *ante*, Vol. 1, p. 281, &c. See the form of demurrer-book, Chit. Forms, 294.

(*d*) R. H., 8 & 9 G. 4: 7 B. & C. 642: 1 M. & R. 662, Q B.: 1 Moo. & P. 401: 4 Bing. 449, 450. C. P.: 2 Y. & J. 530, Exch. See *Jones* v. *Roberts*, 2 Dowl. 374.

(*e*) 9 Ad. & E. 499, n. (*a*), per Patteson, J.

(*f*) *Burroughs* v. *Hodson*, 1 P. & D. 398.

(*g*) K. B. and C. P., and R. M., 9 G. 4, Exch.; R. E., 18 Car. 2. 1666, K. B.

(*h*) See form of this award of the *venire*, Chit. Forms, 48.

(*i*) Imp B R. 47.

(*k*) See the form, Chit. Forms, 48.

Which to be tried first, &c.

there are thus several issues in law and in fact, it is optional with the plaintiff which he will have determined first, subject to the discretion of the Court (*l*); and he may make up his issue or demurrer-book accordingly. It is, in general, preferable to have the demurrer argued first, and the Court, in the exercise of its discretion, will in general so direct it to be done where the cause may be decided thereby, and the trial become unnecessary, and also because, after verdict, there can be no amendment on the demurrer (*m*). And where three actions were brought against three several defendants, for different parts they had taken in the same transaction, in one of which issue was joined on a demurrer, and issues in fact on the other two, the Court, upon application of the defendant, ordered the demurrer to be argued first, as the point of law involved in it was the foundation of the plaintiff's right to damages in the other two actions (*n*). And the Court will interfere with this option of the plaintiff where there is a distinct issue in fact not affected by the issues in law (*o*). When it is certain that the issue in fact will be determined in favour of the plaintiff, and that the demurrer must also be determined for him, or that the latter may be safely abandoned, then it may be advisable first to try the issue in fact (*p*). Where there are several issues in law and in fact, and the issues in fact are tried first, if the plaintiff be nonsuit, contingent damages cannot be assessed for him on the demurrer (*q*). As to the proceedings after judgment on a demurrer, where there are also issues in fact, see *post*, 835.

Copies of demurrer-book to be delivered to judges.

By rule of all the courts of *H. T.*, 4 *W.* 4, *r.* 17, "*four clear days* (Sunday, however, is now, by order of the judges of the 12th June, 1845, to be counted, unless it be the last of the days (*r*)) *before the day appointed for argument, the plaintiff shall deliver copies of the demurrer-book, special case, or special verdict, to the Lord Chief Justice of the King's Bench or Common Pleas, or Lord Chief Baron, (as the case may be), and the senior judge of the court in which the action is brought; and the defendant shall deliver copies to the other two judges of the court next in seniority;* and in default thereof by either party, the other party may on the day following deliver such copies as ought to have been so delivered by the party making default; and the party making default shall not be heard (*s*) until he shall have paid for such copies, or deposited with the clerk of the rules in the King's Bench and Exchequer, or the secondary in the Common Pleas, as the case may be, [now, since the 7 *W.* 4 & 1 *Vict. c.* 30, in either court, one of the Masters,] a sufficient sum to pay for such copies" (*t*). *If a cause be entered for argument for a Monday, then the copies of the demurrer-books ought to be delivered on the preceding Tuesday;*

(*l*) *Roberts* v. *Taylor*, 13 Law J., N. S., C. P., 188: 8 Scott, N. R., 269, *S. C.*; *Cruckshank* v. *Trueman*, 9 M. & W. 684; 2 Dowl., N. S., 276; 12 Law J., N. S., 31, Exch., *S. C.*; *Bulwing* v. *Page*, 2 T. R. 264; 2 Saund. 290, n. (3): *Bird* v. *Higginson*, 5 A. & E. 83.

(*m*) *Cruckshank* v. *Trueman*, 9 M. & W. 684; 2 Dowl., N. S., 276, *S. C.*

(*n*) *Burdett* v. *Colman*, 13 East, 27. See, however, *Bird* v. *Higginson*, 5 A. & E. 83.

(*o*) *Roberts* v. *Taylor*, 13 Law J., N. S., C. P., 188.

(*p*) Chit. Sum. Prac. 144.

(*q*) *Stocco* v. *Cano*, 1 Str. 507.

(*r*) See the rule, 14 M. & W. 121, n.: and see *Hodgins* v. *Hancock*, Id. 120.

(*s*) The opposite party is entitled to judgment. *Witton* v. *Scarlet*, 1 Dowl. & L. 810: *R.* v. *Forman*, 11 Price, 161: *Fulham* v. *Bagshaw*, 1 B. & P. 293; 1 Selkon, 336; R. M., 17 Car. 1.

(*t*) See *Darker* v. *Darker*, 2 Dowl. 88,

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if for a Tuesday, the copies of the demurrer-book must be delivered to the judges on the preceding Thursday; and if entered for argument for a Friday, then on the preceding Saturday. The party who delivers his books in proper time should, on the following morning, search at the chambers of the other judges, to ascertain if his opponent has delivered his copies, in order that he may be prepared in case of his deponent's default with copies for the other judges on that day. Pay to each judge's clerk his fee with the demurrer-book (*u*). If a party seek to make his opponent pay the costs of copies of demurrer-books delivered for him, he must deliver them on the day after the time for his opponent delivering them expires (*x*); and if he intends objecting to his opponent being heard on the argument until the costs are paid, he must, before the day of argument, give notice to him of the intention to make such objection (*y*). If all the demurrer-books are not delivered to the judges by one party or the other, the case will be struck out of the paper (*z*). But where the defendant neglected to deliver his demurrer-books, and did not appear at the argument to support his pleadings, but had offered to give a *cognovit*, the Court gave judgment for the plaintiff without requiring the delivery of the defendant's demurrer-books (*a*).

Points for argument to be stated in margin.

By a rule in the Queen's Bench, (*R. E.*, 2 *J.* 2; *R. M.*, 38 *G.* 3), in all books to be delivered to the judges, *the exceptions intended to be insisted upon in argument must be marked by the party who objects to the pleadings in the margin of the books he delivers;* and he must leave copies of such exceptions with the other two judges (*b*). This rule is said to be followed, in practice, in the Exchequer; but if so, it is not very strictly adhered to in that court. There is also a similar rule in the Common Pleas, (*H. T.*, 11 *G.* 4; and see *H. T.*, 48 *G.* 3), which orders, that "in all special arguments in this court notice in writing of the points which are intended to be insisted upon by each of the parties be delivered to the judges at their chambers *two* days before the day on which the case shall be set down for hearing, either by marking the points in the margin of the books delivered to the judges, or on separate paper; and that each of the parties do within the same time leave a copy of such notice at the chambers of the Lord Chief Justice, to be delivered to the adverse party upon his application." As a matter of courtesy, it is usual for each party to give a copy of these points for argument to his opponent; but this is not necessary, and each party may obtain a copy of the points of his opponent by applying to the judges' clerks for one (*c*). These rules require the points intended to be argued on each side to be stated in the margin or notice; therefore, if the plaintiff demurs to the defendant's plea, and the defendant intends objecting to the sufficiency of the declaration, the plaintiff should state the points of objection to defendant's plea, and

(*u*) See Chap. Prac. 3, Add. 80.
(*x*) *Fisher* v. *Snow*, 3 Dowl. 27.
(*y*) *Sandall* v. *Bennett*, 4 Nev. & M. 89; 2 A. & E. 204, *S. C.*
(*z*) *Abraham* v. *Cook*, 3 Dowl. 215. But see *Somers* v. *Miller*, 2 H. & W. 117.
(*a*) *Scott* v. *Robson*, 2 C., M., & R. 29; 5 Tyr. 717, *S. C.*
(*b*) Per *Lawrence*, J., in *Appleton* v. *Binks*, 1 Smith, 361; 5 East, 148, *S. C.* The rule was intended for the advantage of the Court, and not of the parties. Per v. *Backhouse*, 8 Ad. & E. 793: *Scott* v. *Chappelow*, 2 Dowl., N. S., 78; 5 Scott, N. R., 148; 4 Man. & G. 336, *S. C.*
(*c*) *Scott* v. *Chappelow*, *supra*, per *Maule*, J. And see *Garrard* v. *Hardey*, 1 Dowl. & L. 51.

the defendant the points of objection to the declaration (*d*). It has even been held by the Court of Common Pleas that a defendant whose plea was demurred to, and who had not delivered any points, was confined to *answering* the arguments adduced by the plaintiff (*e*). As regards the form of the points, they should be specifically notified. A general form, such as "For points of demurrer, see grounds of demurrer," will not suffice (*f*). But where to a declaration in a *qui tam* action for delivering coals short of weight, the defendant demurred generally, and the point for argument stated in the margin was, "that the declaration and the several counts thereof do not allege any matters which constitute an offence within the statute therein mentioned;" this was held a sufficient statement to let in an objection, that the coals were not stated to have been weighed in the presence of an indifferent and credible person (*g*). And on a demurrer to a plea, a notice by the plaintiff that he means to insist that "the plea is bad in substance, and affords no answer to the action," will suffice to let him in to argue in favour of any substantial objection to the plea available on general demurrer (*h*). It seems that if the party demurring omit to state his objections in the margin, as above directed, he will not be allowed to argue on them, even though available on general demurrer (*i*). But it would seem that the Court will adjudicate without argument upon a substantial point which suggests itself to the judges, though such point is not stated (*k*). The Court of Queen's Bench, in one instance, postponed a case in order that an objection might be stated in the margin (*l*).

Brief for counsel.

A copy of the demurrer-book should also be made out for and delivered to counsel, to which you may add such observations as you think necessary. Mark on the back of it when the demurrer will be argued.

Argument.

Setting down for.

Notice of.

Argument.]—By rule of all the courts of *H. T.*, 4 *W.* 4, *r.* 6, "no motion or rule for a *concilium* (*m*) shall be required; but demurrers, as well as all special cases and special verdicts, shall be set down for argument at the request of either party, with the clerk of the rules in the King's Bench and Exchequer, and a secondary in the Common Pleas [now, since the 7 *W.* 4 & 1 *Vict. c.* 30, in either court, one of the Masters], upon payment of a fee of one shilling; and notice thereof shall be given forthwith by such party to the opposite party." Where the defendant, two days before the end of term, de-

(*d*) *Arbouin* v. *Anderson*, 1 Q. B. 498: *Coles* v. *Dance*, 7 Taunt. 72: *Bayley* v. *Rowson*, 3 Scott, 384: *Parkes* v. *Riley*, 3 M. & W. 230.

(*e*) *Cuthill* v. *Bourne*, 5 Scott, 674, *sed quære*.

(*f*) The *Scriveners' Company* v. *Brooking*, 6 Jur. 894, Q. B., n. And in several recent instances the Court of Queen's Bench have required most strict compliance with the rule in regards the form of the points. See *Barker* v. *Screech*, 9 Jur. 177.

(*g*) *Brand* v. *Butterfield*, 11 Ad. & E. 961, per Denman, C. J.

(*h*) *Bott* v. *Chappelow*, *ante*, p. 832. n. (*b*). *Arbouin* v. *Anderson*, 1 Q. B. 498: *Parkes* v. *Riley*, 3 M. & W. 230. And see *Grettick* v. *Phillips*, 3 Moo. & Sc. 136; 9 Bing. 723, *S. C.*: *Brogden* v. *Marriot*, 2 Scott, 708: *Darling* v. *Gurney*, 2 Dowl. 101.

(*k*) See *Arbouin* v. *Anderson*, *supra*: *Deseus* v. *Anstice*, C. P., 3 Dec. 1840, in which case the Court of C. P. considered that they could not abstain from noticing a ground for general demurrer, even by consent.

(*l*) *Colsby* v. *Graves*, cited by Knowles (*amicus curiæ*) in 3 M. & W. 235. And see *Brookes* v. *Humphries*, 8 Law J., N. S., C. P., 34, *S. P.*

(*m*) Or *dies concilii*, or day to hear counsel of both parties.

PART I.

murred for the purpose of gaining time, the Court allowed the case to be set down for argument on the last day of term, and refused to allow the defendant to withdraw the demurrer and plead the general issue (*o*). But, in ordinary cases, the notice must be given in sufficient time to enable the opposite party to prepare his demurrer-books, otherwise the Court will refuse to hear the demurrer, and probably allow the objecting party his costs of appearing to make the objection (*p*). The demurrer cannot be set down for argument before joinder in demurrer, and, consequently, notice that the demurrer has been so set down cannot be given at the time of the delivery of the joinder in demurrer (*q*). *Set down the demurrer for argument, and give notice thereof accordingly to the opposite attorney or agent* (*r*).

Time and manner of argument.

Afterwards, upon some "paper day" in term, (*ante*, 135), the demurrer will be called on for argument, in the order in which it stands in the paper. A special application for an adjournment must be made two days before the time appointed for argument. All causes remaining undetermined at the end of the term will come on in the next term in the order they stand. In general, no argument will be heard on the first four or last four days of the term (*s*). On the argument, the counsel for the party demurring, or, where there are cross demurrers to the pleadings, the counsel for the party first demurring (*t*), is first heard; next, the counsel for the other party is heard in answer; and, lastly, the former counsel is heard in reply. One counsel only on each side (usually the junior, where there is more than one) is allowed to argue the demurrer. Where defendants plead, separately, pleas which are demurred to, the pleas and demurrers being substantially the same, each defendant is not entitled to appear by separate counsel on the argument of the demurrer (*x*). The Court, after argument, deliver their opinion, according to which the judgment is afterwards entered for the plaintiff or the defendant. It may be as well here to mention, that the plaintiff may be nonsuited on demurrer (*y*).

Plaintiff may be nonsuited.

Amendment after an argument, &c.

Amendment after Argument, &c.]—Frequently, on the case coming on for argument, when the judges, on perusal of the demurrer-books or hearing counsel, think that the objection is well founded, they will express that opinion, and suggest to the opposite counsel the expediency of amending, and which, if acceded to, will be permitted on payment of costs. But, if counsel, after such a suggestion, persist in arguing in support of the pleading, and the Court have delivered their opinion, they will seldom permit an amendment (*z*). However a party

(*o*) *Wilson* v. *Tucker*, 2 Dowl. 83.

(*p*) *Britten* v. *Britten*, 2 Dowl. 239.

(*q*) *Gibbons* v. *Mottram*, 1 Dowl. & L. 815; 7 Scott, N. R., 535: *Hall* v. *Popplewell*, 5 M. & W. 341: *Howorth* v. *Hubbert*, 3 Dowl. 457.

(*r*) See form of notice, Chit. Forms, 295.

(*s*) M. T., 30 G. 2, *ante*, 135; Lofft, 370.

(*t*) *Hilton* v. *Earl of Granville*, 13 Law J., N. S., 193, Q. B.: *Earl Falmouth* v. *Thomas*, 3 Tyrw. 26; 1 Cr. & M. 89. But see *Williams* v. *Jarman*, 14 Law J., N. S., 156, Exch.; 2 D. & L. 212, *S. C.*, where it was ruled, that, where there is a demurrer to one count of a declaration, and a demurrer by the plaintiff to a plea to another count, the plaintiff, on argument, is entitled to begin.

(*x*) *Wilson* v. *Carey*, 10 M. & W. 641; 2 Dowl., N. S., 531; 12 Law J., N. S., 17, Exch., *S. C.* See *Perry* v. *Jackson*, 4 T. R. 517.

(*y*) Co. Litt. 139. b.: *Nesbit* v. *Rickson*, 11 Ad. & E. 246, per *Tindal*, C. J.

(*z*) 9 Tidd, 710: Chit. Sum. Prac. 142. See *Straus* v. *Davis*, 10 Ad. & E. 635; 7 Dowl. 774, *S. C.*

has been allowed to amend after argument, and after a *cur. adv. vult* (*a*), but before judgment, where the justice of the case required it (*b*). Thus the defendant has been allowed to withdraw his demurrer and plead *de novo* after argument. But the Court, in general, before giving a defendant leave (*c*) to amend after argument, will require him to produce an affidavit, distinctly shewing a ground of defence upon the merits (*d*). And in one case the Court, after argument of a demurrer to a replication, and after they had expressed their opinion that the replication was bad, allowed the plaintiff to amend on payment of costs, and gave him leave to demur specially to the plea (*e*). The Court have refused leave to amend after argument to a plaintiff in a *qui tam* action (*f*), in an action against bail (*g*), and in a hard action (*h*), and to a defendant after the plaintiff had lost a trial (*i*), and after argument of a second demurrer to the same pleading (*k*). An amendment of a plea has been allowed even after judgment on demurrer, though this seems an extreme case (*l*). If there be issues in law and in fact, and the latter be tried first, and contingent damages assessed as to the demurrer, the Court, it seems, will not allow either of an amendment, or of the demurrer being withdrawn (*m*).

Judgment.

Judgment.]—*In the evening of the day of, and after the argument, obtain from one of the Masters a peremptory rule, "that judgment be entered for the plaintiff or defendant," as the case may be* (*n*). *Serve a copy thereof on the opposite attorney or agent.* A judgment for the plaintiff upon demurrer is interlocutory or final, in the same manner and in the same cases as a judgment by default (*o*). If interlocutory, *proceed to execute your writ of inquiry, or to have principal and interest computed by the Master, according to the nature of the case, and sign final judgment, and tax your costs, as directed, post*, 880. If final, *sign it with the Master, as directed, post* 880, *for which the rule above mentioned will be his authority*. As to the judgment for plaintiff on a demurrer to a plea in abatement, see *ante*, 820 (*o*). If, besides the issue in law on the demurrer, there are issues in fact, and judgment has been given for the plaintiff on the former, then this judgment is interlocutory, and plaintiff should proceed to a trial of

For plaintiff.

(*a*) *Rivis* v. *Watson*, 5 M. & W. 255: *Wheeler* v. *Senior*, 7 M. & W. 562. 3 Saund., 6th ed., 402, and cases there cited: *Bishop* v. *Stacy*, 2 Str. 954: *Read* v. *Sowerby*, 6 T. R. 173: *Maltraccers* v. *Boutt*, 3 Wils. 226: *Hamilton* v. *Wilson*, 1 East, 391: *Patten* v. *Bradley*, 2 Moo. & P. 78, 81: *Edwards* v. *Walter*, 2 Chit. Rep. 322: *Morant* v. *Sign*, 2 M. & W. 95, and note. And the Court have allowed the amendment, without costs. (*Heydon* v. *Thompson*, 1 Ad. & E. 210; 1 Nev. & P. 289. And see *Solomons* v. *Lyon*, 1 East, 360: *Patten* v. *Bradley*, 2 Moo. & P. 78.

(*b*) *Ayres* v. *Wilson*, 1 Doug. 385: *Warne* v. *Ogden*, 2 Ld. 452: *Alder* v. *Chi.*, 2 Burr. 756: *Chelmsley* v. *Paxton*, 3 Bing. 1; 1 Moo. & P. 127, *S. C.*: *Howell* v. *M'Leers*, 6 T. R. 630: *Giddings* v. *Giddings*, Say. 222: *Collins* v. *Collins*, 2 Burr. 820; 2 Ld. Ken. 330, *S. C. Anon.*, 2 Wils. 173: *Alexander* v. *Townley*, 6 Scott, N. R., 135. But see, per *Littledale*, *J.*, *Hensworth* v. *Parker*, 1 Nev. & M. 330.

(*c*) *Brunsh* v. *Roberts*, 1 Scott, 364; 1 Bing. N. C. 481, *S. C.* See *Morant* v. *Sign*, 2 M. & W. 95: *Gibbons* v. *Mottram*, 7 Scott, N. R., 543.

(*d*) *Wheeler* v. *Senior*, 7 M. & W. 562. And see *Stevens* v. *Hudson*, 2 Ld. Raym. 1137.

(*e*) *Rex* v. *Holland*, 4 T. R. 459: *Evans* v. *Stevens*, Id. 228: *Wood* v. *Grimwood*, 10 B. & C. 689.

(*f*) *Saxby* v. *Kirkus*, Say. 117.

(*g*) *Noble* v. *King*, 1 H. Bl. 37; Pr. Reg. 21: 1 Selkon, 275.

(*h*) *Jordan* v. *Twells*, Hardw. 171.

(*k*) See *Kinder* v. *Paris*, 2 H. Bl. 561.

(*l*) *Atkinson* v. *Baymtum*, 1 Scott, 424; 1 Bing. N. C. 740, *S. C.* See per *Tindal*, C. J., *Brunah* v. *Roberts*, *supra*.

(*m*) *Robinson* v. *Rayley*, 1 Burr. 322: *Baden* v. *Fight*, 4 Bing. N. C. 35: *Pearson* v. *Rogers*, 9 Ad & E. 310: *Cruckmell* v. *Trueman*, 9 M. & W. 684.

(*n*) See form of rule, Chit. Forms, 295.

(*o*) See the forms of judgments on demurrer, Chit. Forms, 296—300.

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the issues in fact (*o*), and to inquire of the damages upon the issue in law (*o*). But if the issue in fact to be tried do not go to that part of the cause of action as to which the judgment has been given on the demurrer, and the plaintiff be content to take damages upon the judgment on demurrer only, he may execute a writ of inquiry as to that judgment, or, in the case of a bill of exchange or the like, may have it referred to the Master, and he may enter a *nolle prosequi* as to the issues in fact (*p*). And even if the issues in fact do go to the whole or to that part of the cause of action as to which the judgment has been given on the demurrer, the plaintiff may enter a *nol. pros.* to the whole action, except as to the costs to which he is entitled on the judgment on the demurrer (*q*); or he may obtain the usual side-bar rule to discontinue, and he would still be entitled to those costs (*r*).

For defendant.

If the judgment on a single issue be for the defendant, it is a final judgment of *nil capiat per breve* (*s*). If a defendant plead several pleas to the same, or several, counts of a declaration, and the plaintiff demur to some of the pleas, and take issue upon others, if the defendant succeed upon any of the pleas demurred to, and that plea be an answer to the whole action, the plaintiff shall not have judgment upon the issues in fact, should they be found for him (*t*), but the only judgment that shall be entered is *nil capiat per breve*. Where the defendant obtains judgment on one of several pleas going to the whole cause of action, the Court will allow him to strike out the other pleas on paying the costs of the issues joined on them. Where judgment had been given for the defendant on an argument on demurrer, and the plaintiff brought a writ of error, the Court, by consent of the defendant (*u*), ordered issues in fact, which were upon the record, to be struck out, with liberty to replace them, in order that the judgment of the Court of error might be obtained before they were tried (*u*).

Costs.

Costs.]—By stat. 8 & 9 *W.* 3, *c.* 11, *s.* 2, if either plaintiff or defendant have judgment upon demurrer, he shall be entitled to costs, and may have execution for the same by *ca. sa.*, *fieri facias*, or *elegit*. This statute, however, did not extend to demurrers in abatement, nor to actions where the plaintiff would not be entitled to damages if he had a verdict (*x*); but now, by the 3 & 4 *W.* 4, *c.* 42, *s.* 34, "where judgment shall be given either for or against a plaintiff or demandant, or for or against a defendant or tenant, upon any demurrer joined in any action whatever, the party in whose favour such judgment shall be given shall also have judgment to recover his costs in that behalf." It would seem that this enactment renders it compulsory on the Court, in all cases, to give costs to the party who succeeds in obtaining a judgment on a demurrer. The plain-

(*o*) See *Gregory* v. *Duke of Brunswick*, 8 Jur. 148, M. T., C. P.

(*p*) 1 Saund. 109, n. (1). And see *Fleming* v. *Langton*, 1 Str. 533: *Anon.*, 1 Salk. 210; *ante*, 831; *post*, 910. See the form, Chit. Forms, 299, &c. See the form of the jury process, where there are issues in fact and in law, Chit. Forms, 74.

(*q*) *Williams* v. *Vines*, Q. B., E. T., 1845.

(*r*) See *Mayor, &c. of Macclesfield* v. *Gee*, 14 Law J., N. S., Exch., 44.

(*s*) See the form, Chit. Forms, 296.

(*t*) 1 Saund. 80, n. (1). *Young* v. *Beck*, 3 Dowl. 804.

(*u*) *Beckham* v. *Knight*, 7 Scott, 346; 7 Dowl. 409, *S. C.*: and see *Carden* v. *The General Cemetery Company*, 7 Scott, 348; 7 Dowl. 425, *S. C.*

(*x*) Hullock, 145.

tiff would, as we have just seen, be entitled to them on such a judgment, even though he afterwards entered a *nol. pros.*, except as to the costs (*y*); or though he obtained the usual side-bar rule to discontinue (*z*); or though in an action of trespass, or on the case, he recovered in a writ of inquiry, executed on the judgment, less than 40*s.* damages, and there was no certificate of the sheriff under the 3 & 4 *Vict. c.* 24, *s.* 2, as that statute does not apply to judgments upon demurrer or inquiries on them (*a*). Also, if there be issues in law and in fact, and the plaintiff obtained judgment on the former, he would also, it is apprehended, be entitled to the costs of the judgment on the demurrer, notwithstanding he afterwards wholly failed at the trial of issues in fact. In such a case the plaintiff is not entitled to enter up judgment for the costs until after the trial of the issues in fact, for if the defendant should succeed on these issues, he would be entitled to set off the costs of them against the costs of the judgment on the demurrer (*b*).

Execution.]—The execution is the same as in other cases. Execution.

(*y*) *Williams* v. *Vivian*, *supra*.

(*z*) *The Mayor, &c. of Macclesfield* v. *Cox*, 14 Law J., N. S., Exch., 44.

(*a*) *Taylor* v. *Reife*, 13 Law J., N. S., Q. B., 28.

(*b*) *Burdon* v. *Fleeter*, 7 Dowl. 786. In that case it was held that the withdrawal of a juror was not a sufficient decision of the issues.

CHAPTER IV.

PROCEEDINGS UPON NUL TIEL RECORD.

1. *When a Record of the same Court is pleaded.*
Issue, &c., 838.
Trial, 839.
Amendment, 840.
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Costs, 841.
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2. *When a record of another Court is pleaded.*
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Trial and subsequent Proceedings, 843.

1. *When a Record of the same Court is pleaded.*

PART I.

Issue, form of, &c.

Issue, &c.]—On a record of the same court being pleaded, when the plaintiff replies *nul tiel* record, or when he replies to a plea of *nul tiel* record, he concludes his replication that the record may be inspected; and a day in court is accordingly given to the parties for that purpose (*a*). As this completes the pleadings, *you may make up the issue and deliver it as in ordinary cases* (*b*). It is the same in form as in an issue triable by the country, excepting the conclusion (*c*). *Enter the issue on a roll; carry in your roll and docket your entry.*

Demand of term and number of the roll.

The plaintiff, however, when the defendant pleads a record of the same court, *instead of replying nul tiel record, may demand of the defendant a note in writing of the term or date and number of the roll whereon such judgment or matter of record is entered, or matter of record is entered or filed, or, in default thereof, the plea is not to be received, and the plaintiff may sign judgment* (*d*). But this cannot be done when the defendant pleads a record of *another* court; and as to which, see *post*, 841.

Rule to produce the record.

Where the plaintiff replies *nul tiel* record, and the defendant has to produce the record, he should, in the Queen's Bench and Exchequer, *obtain from one of the Masters a rule to produce the record, usually on the back of the issue* (*e*); *enter it with him and serve a copy of it on the defendant's attorney or agent. It is*

(*a*) See the form, Chit. Forms, 301, 302.

(*b*) R. H., 4 W. 4, r. 5, *ante*, Vol. 1, p. 281. It has been held in the Common Pleas, that, as the issue is complete by the prayer of the inspection of the record, though the defendant demur to the replication, the plaintiff may, nevertheless, sign judgment on the production of the record on the given day. See *Tipping* v. *Johnson*, 2 B. & P. 302: *Jackson* v. *Wicker*, 2 Marsh. 354; 7 Taunt. 30, *S. C.*

(*c*) See the form, Chit. Forms, 303.

(*d*) R. T., 5 & 6 G. 2, Q. B.; Tidd, 9th ed., 742: *Theobald* v. *Long*, 1 Ld. Raym. 347; Holt, 557, *S. C.*: *Cremer* v. *Wicket*, Id. 550; 12 Mod. 350, *S. C.*: *Wilson* v. *Ingoldsby*, 2 Mod. 1179: *Hunter* v. *Wiseman*, 2 Str. 823; 1 Saund. 92, n. (3). See a form of demand, Chit. Forms, 302.

(*e*) See the form, Chit. Forms, 303. *Barbie* v. *Grenville*, 8 Dowl. 502: *Sacis-burne* v. *Taylor*, 9 M. & W. 43; 1 Dowl. N. S., 349, *S. C.* A notice by plaintiff of defendant to produce the record would be irregular in these courts. (Ib.)

four-day rule. In the Common Pleas *it seems sufficient to serve a notice on the defendant's attorney or agent requiring him to produce the record (f); a four-days' notice would suffice.* But if a day is named in the issue for the defendant's production of the record, no further *notice* to produce the record is necessary.

Notice by plaintiff of production of.

When the plaintiff replies to a plea of *nul tiel* record, and the plaintiff has to produce the record, he must, in the Queen's Bench and Exchequer, *give a notice in writing to the defendant's attorney or agent that he will produce it on the day therein mentioned (g).* In the Common Pleas *he obtains a rule for judgment, and serves a copy on the defendant's attorney or agent.*

Trial.

The Trial.]—*The issue, whether there is in fact a record or not, must be tried by the Court and not by a jury, and must be proved by the production of the record itself. Let the party who has to produce the record bespeak it at the Treasury, and desire that it may be delivered to the Master and brought into court, upon the day appointed by the notice or rule above mentioned. Let the party entitled to judgment instruct counsel to move for it; and the opposite party, if he contest it, will instruct counsel to oppose the motion. On the motion being made, the Master will certify whether the record is in court or not. If the record be not produced, or if produced and found not to maintain the issue, judgment of failure of record is given for the opposite party (h), otherwise judgment that the party hath perfected the record will be given for the party who pleaded it.* If the Master certifies the record to be correct, the party averring the record is entitled to judgment, although cancellations appear on it (*i*). If the defendant begins by taking a preliminary objection, he is entitled to reply in the same way as at *Nisi Prius* (*j*). Upon a plea in abatement of another action pending in another court for the same cause, concluding with a *prout patet per recordum*, it is sufficient to satisfy the plea, if a record of a writ be produced (*k*). If there be a material variance between the record itself and the record pleaded, the opposite party will be entitled to judgment of failure of the record (*l*); but the Court may, it seems, prevent this by allowing the variance to be amended (*m*). If a record be produced which ought not to be, the course will be to apply to the Court from which the record is produced, to quash the roll (*n*). Where the plaintiff issued two writs, one out of the Common Pleas, which was never served, and the other out of the Exchequer, on which he pro-

Quashing record improperly produced.

(*f*) See *per* Parke, B., in *Swinburn* v. Taylor, 8 M. & W. 44; 1 Dowl., N. S., 30, S. C.

(*g*) See *Swinburn* v. *Taylor*, *supra*: *Hughes* v. *Francis*, 2 D. & L. 664; Tidd, 9th ed., 763. See the form, Chit. Forms, 8th.

(*h*) *Isaac* v. *Hay*, Fort. 353: *Russell* v. *Lane*, Latv. 945. See *Monkenbeck* v. *Barnard*, 4 Dowl. 139, and *Fox* v. *Buckingham*, 3 Ad. & E. 789.

(*i*) *Bridgman* v. *Chetwynd*, 14 Law J., N. S., 125, Exch.; 3 D. & L. 45, S. C.

(*j*) *Gates* v. *Brewer*, *infra*.

(*k*) See *Nash* v. *Swinburne*, 4 Scott, N. R., 562; *post*, 843: *Kerbey* v. *Siggers*, 2 Dowl. 813; 4 M. & Scott, 481, *S. C.*

(*l*) Com. Dig., Record (C.) See instances of no variance in *Cocks* v. *Brewer and Wife*, 11 M. & W. 51; 2 Dowl., N. S., 759; 12 Law J., N. S., 225, Exch. And see cases there cited. And see *Phillips* v. *Smith*, 2 Dowl., N. S., 688: *Hopkins* v. *Francis*, 2 D. & L. 664.

(*m*) See Vol. 1, pp. 388, 391.

(*n*) *Kerbey* v. *Siggers*, 2 Dowl. 813; 4 M. & Scott, 481, *S. C.* See *Nash* v. *Swinburn*, 4 Scott, N. R., 562; *post*, 843.

PART I.

ceeded to declare; and the defendant pleaded to the action in the Exchequer, another action pending for the same cause in the Common Pleas; the plaintiff replied *nul tiel* record, and served the defendant with a rule to produce the record; and the defendant having made up a roll from the *præcipe* on the file of the Common Pleas, that Court ordered it to be cancelled with costs (*o*).

Amendment.

Amendment.]—As to allowing an amendment of a variance at the trial, see *Vol.* 1, *pp.* 388, 391.

When, in consequence of a variance, the defendant is entitled to judgment of failure of record, the Court will, in some cases, on a special application for that purpose, give the plaintiff leave to amend, even after judgment. Thus, an amendment has been allowed after judgment of failure of record, where, in an action on a judgment, the declaration stated it to have been recovered in a term different from that which appeared on the record, and that it was against one defendant only, where it was against more than one (*p*). Also, where in debt, on a recognisance of bail, the declaration stated it to have been entered into in an action of debt, and, on trial by the record, it appeared to have been in an action of *assumpsit* (*q*).

Judgment, &c.

For plaintiff.

Judgment, &c.]—Judgment for the plaintiff is interlocutory or final in the same manner, and in the same cases, as judgment upon demurrer or default (*r*). If interlocutory, *make an incipitur on plain paper, and take it to the Master, as directed post*, 880, *and he will sign judgment. Then, if there be no other issue to be tried, proceed to sue out and execute a writ of inquiry, or have principal and interest computed by the Master, according to the nature of the case, and sign final judgment, as directed post*, 890, 900, 910, *&c.* (*s*) *In the Queen's Bench or Exchequer it is not necessary to have a rule before interlocutory judgment can be signed. If there be other issues to be tried by a jury, proceed to the trial of them accordingly; and the jury who try the issues will assess the damages on the interlocutory judgment.* If the judgment be final, *write out a præcipe of a rule for judgment* (*t*) *on a slip of paper, and take and enter it with the Master; and in the Common Pleas, you must get the Master, upon the expiration of the rule, to certify on the back of it that no cause has been shewn.* The rule is a four-day rule. *After the expiration of these four days, make an incipitur on plain paper, and take it to the Master, who will sign the judgment; proceed to tax the costs in the usual way, and, on the day named for such taxation, take the judgment paper to the Master, who will tax the costs, and mark them on it* (*u*). *You may then sue out execution.* Judgment upon a replication of *nul tiel* record to a plea in abatement is, we have seen, (*ante*, 820), not final, but merely a *respondeas ouster*.

(*o*) *Kerby* v. *Siggers*, 2 Dowl. 659.

(*p*) *Rastall* v. *Stratton*, 1 H. Bl. 49. And see *Fox* v. *Backhouse*, 8 Ad. & E. 789: *Cocks* v. *Brewer*, 11 M. & W. 51.

(*q*) *Munkenbeck* v. *Bushnell*, 4 Dowl. 130: *Rastall* v. *Stratton*, 1 H. Bl. 49. See *Blackmore* v. *Flemyng*, 7 T. R. 447 a, and *Page* v. *Townsend*, 7 Jur. 627, B. C.

(*r*) See forms of judgment, Chit. Forms, 306, 307.

(*s*) See *Moses* v. *Compton*, 6 M. & Sel. 381.

(*t*) See the form of the memorandum, Chit. Forms, 305.

(*u*) As to the taxation of costs in general, see *post*, part 5, ch. 31.

Judgment for the defendant is, if there be no other issue to be tried, of course, final; and signed as above directed, a rule for judgment having been previously given (*v*). For defendant.

Costs.]—The party in whose favour judgment is given is, in general, entitled to costs as on a trial by jury. However, in debt on judgment recovered by plaintiff, (in which this issue frequently arises), the plaintiff will not be entitled to costs, unless the Court or a judge thereof shall otherwise order (*x*). Costs.

Execution.]—The execution is the same as in ordinary cases. Execution.

2. *When a Record of another Court is pleaded.*

Plea of Judgment recovered in another Court.]—The plea of judgment recovered in another court used to be frequently adopted for delay, when, in truth, no such judgment ever existed. To prevent this, the rule of *H. T.*, 4 *W.* 4, *r.* 8, requires, that, "where a defendant shall plead a plea of judgment recovered in another court, he shall in the margin of such plea state the date of such judgment, and if such judgment shall be in a court of record, the number of the roll on which such proceedings are entered, if any; and in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer, or person having the custody of the records or proceedings of the court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea, by leave of the Court or a judge" (*y*). This rule applies only to a plea of judgment recovered, strictly so called; therefore it does not apply to a plea by an executor of judgments recovered against the testator, whereby the assets are absorbed (*z*); nor to a plea, that the debt for which the action is brought was set off in an action brought by the defendant against the plaintiff, in which action the defendant obtained a verdict (*a*). Where the defendant pleaded a plea, to which the plaintiff objected this rule applied, without complying with the terms of the rule, and also a plea of set-off, *Parke*, B., held that the plaintiff, by taking out a summons for particulars of defendant's set-off, had admitted that the only question between him and the defendant related to that set-off, and, therefore, that he had waived his objection (*b*). It seems doubtful whether the defendant may produce at the trial, in support of his plea, a judgment of a different date or roll than that mentioned in the margin of the plea (*c*). Plea of judgment recovered in another court. Marginal note in plea, of number of roll. Producing at trial a judgment of a different roll.

Issue and Proceedings before Trial.]—The issue is made up Issue.

(*v*) See Forms, Chit. Forms, 305, 306.
(*x*) 43 G. 3, c. 46, s. 4. See further, as to this, post, part 5, ch. 21.
(*y*) See form of plea and marginal notes, Chit. Forms, 201.
(*z*) Pearse v. Insol. 3 Dowl. 140; 1 Bing. N. C. 394; 1 Scott, 119, *S. C.*
(*a*) *Brokenshir* v. *Mongre*, 9 M. & W. 111; 1 Dowl., N. S., 376, nom. *Brokenshire* v. *Morgan*.
(*b*) *Brokenshir* v. *Monger*, *supra*.
(*c*) See per *Patteson*, J., *Few* v. *Beckhouse*, 8 Ad. & E. 794: *Rastall* v. *Stratton*, 1 H. Bl. 49.

PART I. and delivered as in ordinary cases (*d*). You cannot, in this case, demand a note in writing of the term and number of the roll, &c., as mentioned *ante*, 838; but you must reply *nul tiel* record, and so proceed to trial.

How proved. The issue in this case, where the record of another court is pleaded, must be tried by the Court and not by a jury, and must be proved by the production of a transcript or exemplification of the record in open court.

Certiorari. The only way of bringing in this transcript or exemplification is by writ of *certiorari* (*e*). This writ must be sued out by the party who has to produce the record, directed to the chief justice, judge, or officer of the court below, in whose custody the record is supposed to be (*f*). If it be the record of an *inferior court*, it may be sued out either in the court in which the action is pending or with the cursitor; if the latter, it is an original writ, tested in or out of term, returnable on a general return day, and made out by the cursitor, upon you furnishing him with a *præcipe*. If sued out in the court in which the action is pending, it is a judicial writ, tested in the name of the Chief Justice or Chief Baron on some day in term, and returnable on a day certain in term, and signed and sealed as in ordinary cases. It is sufficient to return the tenor of the record upon this writ, without certifying the record itself (*g*). But if the record be the record of a *superior court*, as, for instance, if the action be in the Common Pleas, and the record be one of the Queen's Bench, you must first sue out, with the cursitor, a *certiorari*, directed to the Chief Justice of the Queen's Bench, returnable in Chancery; and, upon the record being certified into that court (*h*), an exemplification or transcript of it, under the seal of the Chancellor, will be sent by *mittimus* (sued out with the cursitor) into the court in which the action is pending, to be produced upon the day given (*i*). If the action be in the Queen's Bench, and the record be in the Common Pleas or Exchequer, it seems that you may proceed either by *certiorari* out of Chancery, and *mittimus* thereon, or by *certiorari* from the Queen's Bench in the first instance (*k*).

An action being brought in the Exchequer against a party and his attorney, for causing the plaintiff's goods to be taken in execution under a *fi. fa.*, upon a judgment in the Common Pleas, which a judge at chambers afterwards ordered to be set aside for irregularity, the defendants pleaded a justification under the judgment; the plaintiff replied *nul tiel* record; a day was given to produce the record, and the plaintiff in the suit in the Common Pleas ruled to carry in the roll; his attorney, however, delayed it until the day before that appointed for the trial by the record in the Court of Exchequer, and then carried it in without a suggestion that the judgment had been set aside, and in that state caused the transcript to be returned under a writ of *certiorari* into the Court of Exchequer. The Court

(*d*) See *Newbery* v. *Strudwick*, Barnes, 335. See the forms, Chit. Forms, 303, 45.
(*e*) *Hewson* v. *Brown*, 2 Burr. 1034.
(*f*) See the form of it, Chit. Forms, 303.
(*g*) *Hambleden* v. *Lancashire*, 3 Salk. 296: Gilb. Execution, 143.
(*h*) See the form, Chit. Forms, 303—305.
(*i*) See *Luttrell* v. *Lee*, Cro. Car. 297.
(*k*) See the form, Chit. Forms, 312; and Tidd, 268.

of Common Pleas quashed the judgment, with costs to be paid by the plaintiff in the action in the Common Pleas, or his attorney (*l*). CHAP. IV.

Trial and subsequent Proceedings.]—Give notice of your bringing in the record, or rule the other party to bring it in, as the case may require, and proceed to trial, judgment, &c., as directed *ante*, 838, 839. Trial and subsequent proceedings.

(*l*) Nash v. Swinburne, 4 Scott, N. R., 562. See *ante*, 839.

PART II.

PROCEEDINGS UPON JUDGMENT BY CONFESSION OR DEFAULT.

CHAP. I. *Judgment by Cognovit.*
II. *Judgment on a Warrant of Attorney.*
III. *Judgment on a Judge's Order.*
IV. *Judgment by Default.*
CHAP. V. *Writ of Inquiry.*
1. *In Ordinary Cases.*
2. *In Debt on Bond.*
VI. *Reference to the Master.*

CHAPTER I.

JUDGMENT BY COGNOVIT.

The Cognovit, 844.
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The cognovit.

The Cognovit.]—Where the defendant has no defence to the action, it is not unusual for him, instead of proceeding to trial, or of allowing judgment to pass against him by default, to give the plaintiff a *cognovit* or written confession of the action, usually upon condition that he shall be allowed a certain time for the payment of the debt or damages, the amount of such debt or damages being, in general, first ascertained and agreed upon. It may be of part of the cause of action only, in which case the plaintiff can only sign judgment for the part confessed, and proceed in the action as to the residue (*a*).

A *cognovit* is supposed to be given by the defendant in court, and it impliedly authorizes the plaintiff's attorney to do everything necessary for proceeding with the action in order to obtain judgment, and, consequently, to enter an appearance, if neces-

(*a*) 1 Sellon, 373; Tidd, 9th ed., 560.

sary (*b*). It may be given at any time after the process is sued out (*c*), and even before it is served (*d*), and even after four months have elapsed from its *teste* (*e*). It may be given before declaration (*f*); but this is not very usual: moreover, if the defendant be a trader, and subject to the bankrupt laws, an execution under it would come within the meaning of the 108th section of the Bankrupt Act, (6 *G.* 4, *c.* 16), and, probably, be unavailable, unless the *cognovit* were given *after* declaration, as required by the 1 *W.* 4, *c.* 7, *s.* 7 (*g*). If given after plea pleaded, it usually contains an agreement to withdraw the plea; in which case it is termed a *cognovit actionem relictâ verificatione*, from the form of the entry of it upon the roll (*h*); but, inasmuch as there is now no entry on the roll until judgment, it seems unnecessary to notice in the *cognovit* this withdrawal of the plea.

At what stage of proceedings given.

If the action be against two or more defendants, the *cognovit* should be signed by all, to warrant a judgment against them. It should seem that one partner cannot bind his co-partner by a *cognovit*, without his consent; at all events, after a partnership is dissolved, one of the partners has no power to bind the other by giving a *cognovit* to pay costs as between attorney and client (*i*). Where one of several parties signs after the others, his signing relates back to the time of their signing (*k*). It will be invalid if given by an infant (*l*), or by a married woman, not being a sole trader in London (*m*). It may be doubtful whether, since the 1 & 2 *Vict. c.* 110, *s.* 9, (*post*, 854), an execution of a *cognovit* by an agent, unless in the presence of the party, will suffice: that enactment evidently supposes the presence of the party himself at the time of the execution.

By whom executed.

No prescribed form of *cognovit* is, in general, requisite (*n*). It ought, however, always expressly to shew the terms upon which it is given. If any agreement or understanding be entered into, contrary to the express terms of it, the Court will not, in general, regard such agreement, but put the party to his remedy, if any, by action (*o*). In some cases, however, they will set aside a judgment entered up, and execution issued out, contrary to the express agreement or understanding of the parties at the time of confessing the judgment (*p*). Where the plaintiff, on the eve of trial, accepted from the defendant a *cognovit* for a certain sum payable at a future day, in full discharge of the action, and the Master, on taxing costs, allowed the plaintiff costs previous to the *cognovit*, the Court refused

Form of, and how affected by collateral agreement.

(*b*) Richardson v. *Daly*, 4 M. & W. 384; 7 Dowl. 29, *S. C.*

(*c*) *Kirby* v. *Jenkins*, 2 Tyr. 499. And see *Wade* v. *Smith*, 8 Price, 513.

(*d*) Richardson v. *Daly*, *supra*.

(*e*) Not before; see *Shanley* v. *Colwell*, 6 M. & W. 349; 8 Dowl. 372, *S. C.* But perhaps no objection to this can be taken after judgment signed; see 18 *Eliz.* c. 14, s. 1, and 4 & 5 *Anne*, *c.* 16, *s.* 2.

(*f*) *Morley* v. *Hall*, 2 Dowl. 494: *Clarke* v. *Jones*, 3 Dowl. 277: *Webb* v. *Aspinall*, 7 Taunt. 761; 1 Moore, 493, *S. C.* And see *Bate* v. *Hughes*, 7 T. R. 207, n. (*a*): *Hurst* v. *Jennings*, 5 B. & C. 656: Tidd, 9th ed., 559.

(*g*) *Ante*, 834.

(*h*) See form, Chit. Forms, 309, 310.

(*i*) *Bentinck* v. *Drakeford*, 4 Moo. & P. 5; 6 Bing. 375, *S. C.* See *Bruton* v. *Burton*, 1 Chit. Rep. 767: *Stead* v. *Salt*, 10 Moore, 389; 3 Bing. 101, *S. C.*: *Adams* v. *Bankart*, 1 C., M., & R. 48: *Beckham* v. *Knight*, 4 Bing. N. C. 243. Affirmed in error, 1 Scott, N. R., 675: *Beckham* v. *Drake*, 9 M. & W. 79.

(*k*) *Parry* v. *Turner*, 1 Dowl. 300; 2 C. & J. 89; 2 Tyr. 126, *S. C.*

(*l*) *Oliver* v. *Woodruffe*, 6 Dowl. 166; 4 M. & W. 650, *S. C.*: *Sanderson* v. *Marr*, 1 H. Bla. 75.

(*m*) *Fairthorne* v. *Blagraire*, 6 M. & Selw. 73: *M'Lean* v. *Douglas*, 3 B. & P. 128.

(*n*) See *Hurst* v. *Jennings*, 5 B. & C. 650; 8 D. & R. 494, *S. C.* *Beckham* v. *Knight*, 4 Bing. N. C. 243. See the forms in debt, Chit. Forms, 309.

(*o*) See *Anon.*, 1 Salk. 400.

(*p*) *Dillon* v. *Browne*, 6 Mod. 14: *Hatton* v. *Young*, 2 W. Bla. 943: *Woodman* v. *Ford*, 2 Q. B., M., 1837; 2 Jurist, 1, *S. C.*

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to admit the plaintiff's affidavit, stating a verbal agreement, that he should have such costs in case the defendant made default in payment, and that he had made such default, and made the rule for the disallowance of such costs absolute (*q*).

The condition of it must be written on same paper.

By statute 3 *G.* 4, *c.* 39, *s.* 4, in order to make a *cognovit* which is to be filed according to that act (*post*, 847) available against creditors, in the event of the bankruptcy of the defendant, if the same be given subject to a condition, such condition must be written on the same paper or parchment on which the *cognovit* is, before filing it; otherwise it will be void as against the assignees (*r*). This provision is extended in favour of the creditors of an insolvent debtor by the 1 & 2 *Vict. c.* 110, *s.* 60 (*s*), and in favour of the assignees of insolvent petitioners, under the 7 & 8 *Vict. c.* 96, by the 20th section of that act.

Agreement to waive writ of error and sci. fa.

The *cognovit* generally contains an agreement upon the part of the defendant that no writ of error shall be brought, nor bill in equity filed, nor other matter or thing done to delay judgment or execution (*t*); and if, notwithstanding this, the defendant does bring a writ of error, the allowance of such writ is no *supersedeas* of execution; for a writ of error is no *supersedeas* where it appears to have been brought for delay or against good faith (*u*). It was made a question, but not decided, in a recent case, whether a stipulation that the defendant would not "bring any writ of error, or file any bill in equity, or obtain any summons or rule of court to set aside any proceedings for irregularity, or otherwise," is a legal stipulation, and can be enforced (*x*). It would seem that it can as against the defendant (*y*), though not as against his personal representatives (*z*).

Stamp on.

The *cognovit* may be written upon plain paper, if it contain no terms of agreement, to the amount of 20*l.*, between the parties; but if it contain such terms, as if it be conditioned for the payment of the debt, (to the amount of 20*l.* or more), or debt and costs, (to that amount or more), by instalments (*a*), or for the postponement of the day of payment, or the like, it must be stamped as an agreement (*b*). A stipulation not to take advantage of the *cognovit* being given before declaration, does not render a stamp necessary (*c*). The want of, or a defect in, the stamp, will not render the *cognovit* unavailable, for a proper stamp may be procured on payment of the penalty, (now 10*l.*), and this even after a rule *nisi* obtained, or summons

(*q*) *Anon.*, 7 D. & R. 375.

(*r*) See *Bennett* v. *Daniel*, 10 B. & C. 500: *Green* v. *Gray*, 1 Dowl. 350.

(*s*) See *Morries* v. *Mellin*, 6 B. & C. 446; 9 Dowl. & Ry. 503, decided before the 7 G. 4, c. 57.

(*t*) But this stipulation does not, it should seem, oust the superior courts of their jurisdiction. (See *Wade* v. *Rogers*, 2 W. Bla. 780: *Kill* v. *Hollister*, 1 Wils. 129: *post*, 853). And see this stipulation commented on in the case of *Shaw* v. *Marquis of Worcester*, (4 Moo. & P. 21; 6 Bing. 367, S. C.) It should seem from that case, that it would not deprive the defendant of taking advantage of the plaintiff not executing a writ of inquiry, or of not suggesting breaches under the 8 & 9 W. 3, c. 11, when necessary. And see *Howell* v. *Stratton*, 2 Smith, 69.

(*u*) *Best* v. *Gemparts*, 2 Dowl. 395: 2 C. & M. 427, S. C. *Ante*, Vol. 1, pp. 483, 490.

(*x*) *Webb* v. *Taylor*, 1 D. & L. 696; 13 Law J., N. S., Q. B., 94, S. C.

(*y*) *Sherran* v. *Marshall*, 1 D. & L. 689: 13 Law J., N. S., Q. B., 66, S. C.: *Howell* v. *Stratton*, 2 Smith, 65: *Merries* v. *Jones*, 2 B. & C. 243; 3 D. & R. 603, S. C.: *Hiscocks* v. *Kemp*, 3 Ad. & E. 676.

(*z*) See *Heath* v. *Brindley*, 2 A. & E. 368: *Mann* v. *Audley*, 5 Dowl. 393.

(*a*) *Ames* v. *Hill*, 2 B. & P. 150: *Reardon* v. *Swaby*, 4 East, 188: *Jay* v. *Warren*, 1 C. & P. 532: *Morley* v. *Hall*, 2 Dowl. 494.

(*b*) *Pitman* v. *Humfrey*, 2 Tyr. 508.

(*c*) *Green* v. *Gray*, 1 Dowl. 350.

taken out to set aside a judgment entered upon it (*d*); though, in such a case, the Court would discharge the rule without costs (*e*). But the Master will not, in general, allow a *cognovit* to be filed, unless duly stamped.

How attested.

How attested.]—By stat. 1 & 2 *Vict. c.* 110, *s.* 9, the *cognovit*, if in a personal action, is required to be executed in the presence of, and to be attested by an attorney, nominated and appointed by the party executing it, and who should subscribe the attestation as such attorney. This enactment, and its application, and the decisions upon it, together with the consequences of non-compliance with it, will be found hereafter, (*post*, 854), while treating of warrants of attorney. It may be as well here to remark, however, that a *cognovit*, if not thus duly attested, would be of no force whatever, and the plaintiff might proceed in the cause notwithstanding it was given. But if the invalidity of the execution arose in any way from his or his attorney's act, then, perhaps, before proceeding it would be proper to require the defendant to re-execute the *cognovit* properly.

Filing of.

Filing of.]—By a rule of the Court of Queen's Bench of *H. T.*, 2 & 3 *G.* 4 (*f*), no judgment can be signed upon any *cognovit*, without such *cognovit* being first produced to the clerk of the docket, (now one of the Masters), and after taxation of the costs, filed with him (*g*). This rule is acted on, in practice, in the other courts. There are also statutory provisions contained in the 3 *G.* 4, *c.* 39, rendering it expedient to file *cognovits* and warrants of attorney, in order to render them operative in case of bankruptcy or insolvency, but which will be found more conveniently treated of in the next Chapter, upon judgments on warrants of attorney.

Judgment, when it may be signed.

Judgment on.]—If the *cognovit* be made unconditionally, the plaintiff may of course sign judgment and sue out execution when he pleases (*h*); though, if four terms be suffered to elapse, it may, perhaps, be necessary to give a term's notice, before signing the judgment, of plaintiff's intention to sign it: and after that period, if the *cognovit* were given before declaration, perhaps the cause would be deemed altogether out of court; but neither of these points has been decided. Judgment, of course, cannot be signed, or execution sued out, contrary to the terms of the *cognovit* (*i*). Under a *cognovit*, by which it is agreed that no judgment is to be signed or execution issued unless default made in payment of a certain sum, with costs, by instalments, the plaintiff may sign judgment and issue execution for the whole sum, if default is made in one instalment, unless there be clear words restraining him from so doing (*j*). Where judgment was not to be entered up until

(*d*) See *Burton* v. *Kirkby*, 7 Taunt. 174; 1 March. 480, *S. C.*; *Clarke* v. *Jones*, 3 Dowl. 277: *Rose* v. *Tomblinson*, Id. 49: *Pitman* v. *Humfrey*, 2 Tyr. 500.

(*e*) *Bramridge* v. *Wildman*, 1 Dowl., N. S. 774.

(*f*) 6 B. & Ald. 860.

(*g*) As to the validity of a judgment signed without such filing, see *Laurence* v. *Laurence*, 1 D. & L. 219; 12 Law J., N. S., Q. B., 346, *S. C.*

(*h*) *Calvert* v. *Tomlin*, 5 Bing. 1; 2 Moo. & P. 1, *S. C.*

(*i*) *Ante*, 845: *Hatton* v. *Young*, 2 W. Bl. 943: *Perry* v. *Turner*, 2 Tyr. 121.

(*j*) *Rose* v. *Tomblinson*, 3 Dowl. 49: *Barrett* v. *Partington*, 5 Bing. N. C. 467; 7 Dowl. 447, *S. C.*

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the final hearing of a Chancery suit, it was held, that the plaintiff was not authorized to enter up judgment pending an appeal (*k*). In one case the defendant gave a *cognovit*, whereby it was stipulated that no judgment should be entered up, unless default should be made in payment of the debt, with interest and costs, on the 9th November; and, in case the defendant made default in payment, the plaintiff was to be at liberty to enter up judgment and proceed to execution. It was held, that no default could be made until the plaintiff had furnished the defendant with a bill of the costs, and given notice of taxation; and, not having done so, that judgment signed on the 10th November was irregular, although the defendant had paid no part of either the debt or costs (*l*). But, had there been a stipulation for payment by instalments, it seems the plaintiff might have signed judgment, though not issued execution, without taxation (*m*); and in either case the plaintiff might, if he thought fit to waive his costs, sign judgment and issue execution for the debt, only first giving defendant notice of such waiver (*n*). If, before judgment signed, the defendant tender the amount of the *cognovit* to the plaintiff or his attorney, any judgment signed afterwards will be irregular, unless the plaintiff have made a subsequent demand, and payment has been refused (*o*). It seems that parol evidence is inadmissible to shew that a *cognovit*, absolute in its terms, was given upon a condition that the defendant should have three months' time (*p*).

After death of parties.

Formerly, judgment might have been entered up after the death of the plaintiff or defendant, at any time before the first day of the term next following his death, as a judgment then related to the first day of the term in which, or in the vacation of which, it was signed (*q*). Now, however, as judgments have not, since the rule of *H. T.*, 4 *W.* 4, *r.* 3, relation to the first day of the term, but to the day on which they are actually signed, this cannot be done (*r*). If judgment has not been signed in the lifetime of the plaintiff or defendant, by reason of the laches of the former (*s*), or if the money payable on the *cognovit* did not become due until after the death of one of them (*t*), the Court will not allow judgment to be entered up *nunc pro tunc* (*u*).

After removal of public officer in action by a banking company.

A *cognovit* having been given in an action brought by the public officer of a banking company, under the 7 *G.* 4, *c.* 46, by which it was provided, that, upon default in payment of a sum of money, the plaintiff should be at liberty to enter up judgment and issue execution, it was held to be sufficient to authorize signing judgment in the name of another public officer, upon a suggestion being entered of the removal of the original plaintiff (*v*).

(*k*) *Jones* v. *Reynolds*, 3 Nev. & M. 465; 1 A. & E. 384, *S. C.* See *Dunmer* v. *Pitcher*, 3 B. & Adol. 347.

(*l*) *Booth* v. *Parker*, 3 M. & W. 54; 6 Dowl. 87, *S. C.* And see *Wilson* v. *Northern*, 4 Dowl. 812.

(*m*) *Barrett* v. *Partington*, 5 Bing. N. C. 487; 7 Scott, 895; 7 Dowl. 447, *S. C.*

(*n*) *Booth* v. *Parker*, *supra*.

(*o*) *Anon.*, 1 Dowl. 173.

(*p*) *Woodman* v. *Ford*, Q. B., M., 1837; 2 Jurist, 1, *S. C.*; *ante*, 845.

(*q*) *Blackburn* v. *Godrick*, 9 Dowl. 337: *Bragner* v. *Langmead*, 7 T. R. 20: *Calvert* v. *Tomlin*, 5 Bing. 1; 2 Moo. & P. 1, *S. C.*: *Cowie* v. *Allaway*, 8 T. R. 257.

(*r*) See *Heath* v. *Brindley*, 2 A. & E. 365; 4 Nev. & M. 255: *Lamman* v. *Lord Audley*, 2 M. & W. 535; 5 Dowl. 596, *S. C.* nom. *Mann*; *ante*, 468.

(*s*) *Lamman* v. *Lord Audley*, 2 M. & W. 535.

(*t*) *Blackburn* v. *Godrick*, 9 Dowl. 337.

(*u*) As to when the Court will allow judgment to be entered up *nunc pro tunc* in general, see *ante*, 460; *post*, Pt. 5, ch. 33.

(*v*) *Webb* v. *Taylor*, 1 Dowl. & L. 676; 13 Law J., N. S., Q. B., 94, *S. C.*

As to the Mode of signing Judgment, and the Practice to be adopted on it.]—If the defendant has not appeared, you must *take common appearance* (*x*) *for him, in pursuance of the statute, before you can sign judgment* (*y*). If the *cognovit* has been given before declaration, there is no occasion actually to file or deliver any declaration (*z*). *If, by the terms of the* cognovit, *the costs are ascertained, they must be taxed accordingly before you can sign judgment* (*a*), *unless the plaintiff chooses to waive his right to them; in which case, express notice of such intention should be given to the defendant before signing judgment for the debt* (*b*). *A notice of taxation must, it seems, be given, and the costs taxed as in other cases* (*c*). *In order to sign the judgment, make an incipitur of the declaration on plain paper,* (then called "the judgment paper" (*d*)). *Take it and the cognovit to one of the Masters, and he will sign the judgment, and file the cognovit* (*e*). *If the cognovit agree on a fixed sum for costs, then you sign your judgment and file the cognovit in the same way, except that the Master taxes only the usual costs of signing the judgment, and marks them on the judgment paper; and it is not necessary to give notice of taxing these costs* (*f*). If the *cognovit* have been given after plea pleaded, *the practice is for the defendant* (*g*), *or his attorney, to attend with you before one of the Masters, for the purpose of withdrawing the plea* (*h*); *and the Master will accordingly enter the related verifications in the margin of the judgment-paper, and will sign judgment as above directed.*

How signed.

Execution on.]—*After signing judgment,* (which is always a final one, unless the *cognovit* is in an action for damages, and it does not in any way fix the amount of them), *you may at once proceed to sue out execution, if the terms of the cognovit do not prohibit it; otherwise, according to those terms* (*i*). Where the *cognovit* is given to secure the payment of a sum by instalments, and default is made, the defendant may, it seems, be charged in execution for each of these defaults, as they are made, without any leave of the Court or a judge (*k*). If the judgment be not final, in consequence of the *cognovit* not agreeing upon the amount of

Execution on.

(*x*) See Vol. 1, p. 167.

(*y*) *Hoskin* v. *Hasselin*, 1 D. & L. 1006; 13 M. & W. 776, *S. C.*: *ante*, Vol. 1, p. 167. The appearance must be entered before judgment signed; the plaintiff cannot enter it afterwards *nunc pro tunc*. (See Vol. 1, p. 353. In *Davies* v. *Hughes*, (7 T. R. 206), where a judgment was irregularly signed, without filing common bail for the defendant in due time, the defendant was held to be estopped from objecting to the irregularity, having given a *cognovit*, and the plaintiff having, before the objection was made, filed common bail *nunc pro tunc*; but when that case was decided, there was a relation to the first day of the term. See further, Vol. 1, p. 168.

(*z*) *Morley* v. *Hall*, 2 Dowl. 494: *Clarke* v. *Jones*, 2 Dowl. 277.

(*a*) *Wilson* v. *Northern*, 4 Dowl. 272: *Smith* v. *Parker*, 3 M. & W. 54.

(*b*) *Smith* v. *Parker*, *supra*.

(*c*) R. M., 4 W. 4, r. 7; and see *Clarke* v. *Jones*, 2 Dowl. 277: *Clothier* v. *Eee*, 3 Man. & Sc. 216: *Griffiths* v. *Liversedge*, 2 Dowl. 143; 3 Moo. & Sc. 217, *S. C.*

(*d*) See R. M., 5 Anne, r. 1.

(*e*) See R. H., 2 & 3 G. 4, Q. B., 5 B. & Ald. 560; 1 D. & R. 471; 2 Chit. Rep. 377. And see 25 G. 3, c. 80, s. 29.

(*f*) *Griffiths* v. *Liversedge*, 2 Dowl. 143. And see *Clothier* v. *Eee*, 3 M. & Sc. 316.

(*g*) R. H., 2 W. 4, r. 100. "Where the defendant, after having pleaded, is allowed to confess the action, he may withdraw his plea in person, without the appearance of the attorney or his clerk for that purpose before the officer of the court." Before this rule, when the confession was after plea pleaded, the defendant's attorney or his clerk used to come in person before the Master to withdraw it, in the Queen's Bench; (*Anon.*, 1 L. Raym. 345); but this was unnecessary in the C. P. (Tidd, 9th ed., 560).

(*h*) *Anon.*, 1 L. Raym. 345.

(*i*) See the form of the entry of the judgment, &c. in debt, Chit. Forms, 311; the like in *assumpsit*, Id. 310; the like with a *relicta verificationes*, Id. 311; the like in ejectment, Ib.; of the docket paper, Id. 312.

(*k*) *Davis* v. *Gomperts*, 2 Dowl. 407; 2 N. & M. 607, *S. C.* And see *Atkinson* v. *Baynton*, 1 Hodg. 7; *post*, 878.

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the damages, you must proceed to execute a writ of *inquiry*, *&c.*, as pointed out, *post*, *Ch.* 5 of this Part. The observations already made as to executions in ordinary cases will be, for the most part, applicable to executions on a judgment by *cognovit*. (*See Vol.* 1, *p.* 526, *&c.*) We have already pointed out how far the plaintiff is at liberty to avail himself of an execution under a *cognovit*, in the event of the defendant becoming bankrupt, or being discharged under the Insolvent Act, or filing a petition for protection under the 7 & 8 *Vict. c.* 96. (*Ante*, *Vol.* 1, *pp.* 584 *to* 589).

In what cases it may be set aside, &c.

In what Cases it may be set aside, &c.]—In some cases the Court will order the *cognovit* to be delivered up or taken off the file to be cancelled, or set aside a judgment and execution thereon: *ex. gr.* if it were given by an insolvent, before his discharge under the Insolvent Act, for a debt purposely omitted in his schedule (*l*), or by an infant (*m*), or were obtained by fraud or duress, or the like (*n*). Where the plaintiff brought an action on a promissory note for which defendant gave a *cognovit*, the Court refused to set aside the *cognovit* on the ground that part of the note had been paid, or that it was given for an illegal consideration (*o*). See the cases as to warrants of attorney, *post*, 852.

Where it is against good faith.

Also, if the execution be against good faith, or contrary to the terms of the *cognovit*, or the express understanding of the parties, the Court, we have seen (*p*), will sometimes set it aside. Where the defendant, in an action on the case, gave a *cognovit* for 200*l.*, with a defeazance conditioned for the performance of various matters by a given time, and performed the matters, in part, at least, in two months after the time stipulated, the plaintiff having issued execution on the *cognovit*, the Court of Common Pleas referred it to the prothonotary, to see how much, if anything, ought to be paid to the plaintiff (*q*). If the plaintiff be guilty of any excess in the amount for which he ought to have levied, the Court will either set the execution aside (*r*), or, in case of a mistake, refer it to one of the Masters, or, if necessary, to a jury, to ascertain for what sum the execution ought to stand (*s*); and an action might, perhaps, be supported against the plaintiff by the defendant, at least if there was malice (*t*).

Excessive levy.

Implied confession of action.

Implied Confession of Action.]—Besides the case of judgment by default, where the defendant's default is deemed tantamount to a confession, (and which shall be fully considered in *Ch.* 4 of this Part), there is also a confession of action in

(*l*) *Tubman* v. *Freeman*, 2 Dowl. 375: *Collins* v. *Benton*, 9 Dowl. 905. But see *Philpot* v. *Aslett*, 1 C., M., & R. 85.

(*m*) *Oliver* v. *Woodroffe*, 6 Dowl. 166; 4 M. & W. 650, *S. C.*

(*n*) *Anon.*, 1 Chit. 998. Fraud and imposition are exceptions to all rules whatever. (Per Cur. in *Pell* v. *Riley*, Cowp. 281).

(*o*) *Bligh* v. *Brewer*, 3 Dowl. 266; 1 C., M., & R. 651, *S. C.*, but not *S. P.* And see *Philpot* v. *Aslett*, 1 C., M., & R. 85: *Lane* v. *Chapman*, 11 A. & E. 966: *Wade* v. *Simeon*, 2 D. & L. 660; 13 M. & W. 647, *S. C.*

(*p*) *Ante*, p. 845.

(*q*) *Charrington* v. *Laing*, 3 Moo. & P. 587; 6 Bing. 242, *S. C.*: *Wilson* v. *Price*, 4 Dowl. 213. And see *Doe Holt* v. *Roe*, 4 Moo. & P. 177; 6 Bing. 447, *S. C.*

(*r*) See *Tilby* v. *East*, 16 East, 163: *Amory* v. *Smethridge*, 2 W. Bl. 760; *post*, 875.

(*s*) See per *Tindal*, C. J., in *Shaw* v. *Marquis of Worcester*, 3 Moo. & P. 567; 6 Bing. 389, *S. C.*: *Evans* v. *Pugh*, 2 Dowl. 360.

(*t*) *Wentworth* v. *Bullen*, 9 B. & C. 840.

some cases implied in the defendant's pleading; as, where an executor or administrator pleads *plenè administravit* or *plenè administravit præter*, without pleading in bar, this is impliedly a confession of the action; and, upon the plea of *plenè administravit*, the plaintiff may take judgment of assets *in futuro*; or, upon *plenè administravit præter*, take judgment presently of the assets acknowledged to be in the hands of the defendant, and of assets *in futuro* for the residue. (*See further upon this subject, post, Part* 4, *ch.* 7).

Writ of inquiry.

Writ of Inquiry.]—In all these cases of implied confessions, and also of express confessions, which do not ascertain the amount of the damages, the plaintiff must enter up interlocutory judgment only, and then execute a writ of inquiry, except in most actions of debt and in ejectment; in which cases, as the damages recoverable are not of consequence sufficient to warrant the expense of a writ of inquiry, the plaintiff may sign final judgment in the first instance; and except also in a few other cases hereinafter mentioned in Chapter 4 of this Part. After the entry of the interlocutory judgment on the roll, follow the award of the writ of inquiry, the sheriff's return to it, and final judgment. (*See further upon this subject, post, Ch.* 5 *of this Part*).

CHAPTER II.

JUDGMENT UPON A WARRANT OF ATTORNEY.

The Warrant, Form of, &c., 852.
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How far revocable, and how affected by Death, Marriage, &c., 858.
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The warrant of attorney.

Form of the Warrant, &c.]—A warrant of attorney is a written authority directed to one or more attornies to appear for the party executing it, and receive a declaration for him in an action at the suit of a person therein mentioned, and thereupon to confess the same, or to suffer judgment to pass by default. It also usually authorizes the attorney to execute a release of errors.

What, and form of.

When given.

It may be given whether an action be depending or not (*a*).

Consideration for, &c.

It must be given voluntarily and for a good consideration, and by a party capable of appointing an attorney, or it will be voidable; and the Court or a judge will order it to be delivered up, and set aside the judgment and proceedings, if any, which have been had under it. (*See post*, 860, 861). If, therefore, it be given by an infant (*post*, 861), or married woman, unless a sole trader in London, (*post*, 862), it will be invalid.

By infant, &c.

By one partner.

It should seem that one partner cannot give a warrant of attorney to bind his co-partner without his consent; at all events, he could not do so after the partnership is dissolved (*b*). But a warrant, executed by one person for himself and his partner, in the absence of the latter, but with his consent, is a sufficient authority for signing judgment against both (*c*).

Stamp on.

It must be on a proper stamp (*d*).—The defeazance does not require a separate stamp from that upon the warrant (*e*). But, although the warrant be not stamped at all, or be improperly stamped, and therefore unavailable, yet it may be made available on payment of the usual penalty, (*5l.*), and the proper stamp affixed; and this may be done, even after a rule *nisi* obtained to set aside a judgment on the warrant for the want of,

(*a*) See *Baddely* v. *Shafto*, 8 Taunt. 434: *Reeves* v. *Slater*, 7 B. & C. 486; 1 M. & Ry. 265, S. C. See the form, Chit. Forms, 313.
(*b*) See *ante*, 845, as to *cognovits*.
(*c*) *Bruton* v. *Burton*, 1 Chit. Rep. 707. See *Hunter* v. *Parker*, 7 M. & W. 322.
(*d*) See *Pierpoint* v. *Gosser*, 5 Scott, N.R., 605; 2 Dowl., N. S., 652; 4 M. & Gr. 795, S. C. When given by a party in custody, see *Hartley* v. *Manson*, 4 M. & Gr. 172.
(*e*) *Cawthorne* v. *Holben*, 1 N. R. 279.

or a defect in, the stamp (*f*), and the Court would discharge the rule without making the plaintiff pay the costs of it (*g*).

Defeasance to be written on same paper, &c.

By rule of *M.*, 42 *G.* 3, *Q. B. and C. P.*, and *R. M.*, 43 *G.* 3, *Exch.*, every attorney who shall prepare any warrant of attorney to confess a judgment, which is to be subject to any defeasance, *shall cause such defeasance to be written on the same paper or parchment on which the warrant of attorney shall be written*; or cause a memorandum in writing to be made on such warrant of attorney, containing the substance and effect of such defeasance (*h*). Part of the defeasance may be written on a separate paper annexed (*i*). If the attorney omit to write the defeasance as directed by this rule, the omission does not avoid the warrant, but merely renders the attorney answerable, on motion, for the neglect of a duty thus imposed on him by the Court (*k*). Where, however, the warrant of attorney, or a copy of it, is to be filed, pursuant to 3 *G.* 4, *c.* 39, and 1 & 2 *Vict. c.* 110, *s.* 60, (*post*, 863, 865), if it have been given subject to a defeasance, the defeazance must be written on the same paper or parchment on which the warrant is written, before the same or the copy thereof is filed, otherwise the warrant will be void as against the assignees of the defendant if he become a bankrupt or insolvent (*l*), though not so as between the parties themselves (*m*). And it would seem that the *true* defeazance must be written, or the warrant might be void as against such assignees; though, where the defeazance stated a greater sum than was really due, the Court held it not void on that account (*n*). Where the defeasance stated that the warrant was given for the purpose of securing a specific sum, and the plaintiff nevertheless issued execution for a further sum, the Court, at the instance of the assignees of the defendant, who became bankrupt after the execution was executed, ordered the plaintiff to refund such last-mentioned sum, although the plaintiff swore that it was understood between him and the defendant, that the warrant was given as a security for it (*o*).

Clause dispensing with scire facias.

The defeazance, also, usually contains a stipulation that no *scire facias* shall be necessary to revive a judgment; also, that judgment may be entered up after a year, without leave of the Court or a judge; and such stipulation will, it seems, be binding on the defendant, though not on his personal representatives (*p*). Also, if the warrant be given for the purpose of securing the payment of an annuity, or of money by instalments, it is usual to insert a clause in it dispensing with the necessity of a suggestion of breaches and *scire facias* thereon, under 8 & 9 *W.* 3, *c.* 11, *s.* 8 (*q*); though, from several cases decided in the Court of Common Pleas, this clause seems to be

(*f*) *Barton* v. *Kirby*, 7 Taunt. 174; 2 Marsh. 439, *S. C.*: *Brembridge* v. *Wildman*, 1 Dowl., N. S., 774: *Rose* v. *Tomblinson*, 3 Dowl. 49: *Clarke* v. *Jones*, Id. 277; ante, 847: *Pittman* v. *Humfrey*, 2 Tyr. 290.

(*g*) *Brembridge* v. *Wildman*, *supra*.

(*h*) See the form, Chit. Forms, 314.

(*i*) *Bardsley* v. *Potter*, 1 Dowl., N. S., 128.

(*k*) *Shaw* v. *Evans*, 14 East, 576: *Partridge* v. *Fraser*, 7 Taunt. 307; 1 Moore, 56, *S. C.* And see *Sansom* v. *Goode*, 2 B. & Ald. 388; 1 Chit. Rep. 311, *S. C.*: *Barber* v. *Barber*, 3 Taunt. 465.

(*l*) 3 G. 4, c. 39, s. 4: 1 & 2 V. c. 110, s. 60.

(*m*) *Bennett* v. *Daniel*, 10 B. & C. 500: *Morris* v. *Mellon*, 6 B. & C. 446: *Airston* v. *Davis*, 3 Moo. & Sc. 138; 9 Bing. 740, *S. C.*

(*n*) *Robinson* v. *Robinson*, Q. B., 23rd May, 1845. See *Barber* v. *Barber*, 3 Taunt. 465.

(*o*) *Bell* v. *Tidd*, 9 Dowl. 949.

(*p*) *Ante*, 846.

(*q*) See forms, Chit. Forms, 315.

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unnecessary; that Court having determined that a warrant of attorney is not within the stat. 8 & 9 *W.* 3, *c.* 11, *s.* 8, which requires suggestions of breaches and the *scire facias* (*r*), even although it be given as a collateral security with a bond (*s*).

How executed.

How executed.]—The warrant of attorney is signed, sealed, and delivered; the defeazance only signed. It is not necessary, however, that the warrant should be sealed, unless for the purpose of the release of errors (*t*). It would seem that since the enactment of the 1 & 2 *Vict. c.* 110, *s.* 9, *infra*, the warrant must be executed by the party himself or in his presence, and that an execution of it by an agent, in his absence, will not suffice. Neither the warrant nor the defeazance need be read over to the party previously to its being executed, as was formerly required by the Court of Common Pleas (*u*). A warrant, purporting to be given by three parties, but executed by two only, the third having refused, has been holden to be an incomplete instrument, and not enforceable (*x*). But it might be otherwise, if the warrant authorized a judgment against any one or more of the parties, and not simply a judgment against all (*y*).

How attested.

How attested.]—By rule of *H. T.*, 2 *W.* 4, *r.* 72 (*z*), a warrant of attorney or *cognovit* given by a prisoner in custody on *mesne* process must have been executed in the presence of his attorney, and been attested by him. Now, however, by the 9th sect. of the stat. 1 & 2 *Vict. c.* 110, this mode of attestation is no longer confined to the case of a prisoner. That section, after reciting "that it is expedient that provision should be made for giving every person executing a warrant of attorney to confess judgment, or a *cognovit actionem*, due information of the nature and effect thereof," enacts, "that, from and after the time appointed for the commencement of this act, [1st Oct. 1838,] no warrant of attorney to confess judgment in any *personal* action, or *cognovit actionem* given by any person, shall be of any force, unless there shall be present some attorney of one of the superior courts on behalf of such person, expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or *cognovit*, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney." And the 10th section enacts, "that a warrant of attorney to confess judgment, or *cognovit actionem*, not executed in manner aforesaid, shall not be rendered valid by proof that the person executing the same did, in fact, understand the nature and effect thereof, or was fully informed of the same."

1 & 2 Vict. c. 110, ss. 9, 10.

(*r*) See *post*, Part 3, ch. 3: *Shaw* v. *Marquis of Worcester*, 6 Bing. 385; 4 Moo. & P. 21, *S. C.*: *Cox* v. *Rodbard*, 3 Taunt. 74: *Kinnersley* v. *Mussen*, 5 Taunt. 264, and MS., E., 814, S. P. dict. in B. R. And see *Tilby* v. *Best*, 16 East, 163.

(*s*) *Amesbury* v. *Morgan*, 2 Taunt. 196.

(*t*) *Kinnersley* v. *Mussen*, 5 Taunt. 264: *Bruston* v. *Burton*, 1 Chit. Rep. 707.

(*u*) See *Taylor* v. *Parkinson*, 2 H. Bl. 383.

(*x*) *Harris* v. *Wade*, 1 Chit. Rep. 382.

(*y*) See *Jordan* v. *Farr*, 2 A. & E. 437; 4 N. & M. 347, *S. C.*

(*z*) Jervis's Rules, 83. The rule was always strictly enforced. (Ib.)

The object of the enactment was the protection of the debtor, and that he might have professional aid and advice while executing the warrant or *cognovit*. It does not, therefore, apply where the debtor himself is an attorney (*a*). The enactment, as far as regards warrants of attorney, applies only to a warrant to confess a judgment in a *personal* action; and, therefore, does not extend to a warrant of attorney to confess a judgment in ejectment (*b*). But, as regards *cognovits*, it applies to all *cognovits*, whatever may be the nature of the action, and it extends to a *cognovit* in ejectment (*c*). It extends, it seems, to warrants and *cognovits* executed in Ireland (*d*) or Scotland, or elsewhere out of the jurisdiction of the Court (*e*). A consent of a defendant to a judge's order for payment of debt and costs, and for judgment in default of payment, is not a *cognovit* within the meaning of the act (*f*).

What warrants or cognovits within the act.

The principal requisitions of the statute, and the cases decided on it, will now be stated. A strict compliance with it is required.

Principal requisitions of the statute.

1stly. There must be present an attorney of one of the superior courts. He need not be an attorney of the court in which the judgment is signed (*g*). An attorney's clerk is clearly insufficient (*h*); and it appears to have been decided, before the 6 & 7 *Vict. c.* 73, that an attorney who had not taken out his certificate within a year was not sufficient (*i*). Even where the *cognovit* was executed by a person whom the defendant, without fraud, and in ignorance that he was not an attorney, expressly represented as an attorney, *Coleridge*, J., held that he was entitled to the protection of the rule of 2 *W.* 4, and set aside the *cognovit* (*k*). Where, however, in a case under that rule, the defendant, on being informed that an attorney must be present on his behalf, knowingly and for the purpose of cheating the plaintiff, produced as an attorney a person whom he knew not to be so, and in his presence executed the warrant, the Court refused to set aside proceedings on the warrant on the ground that the person so produced was not an attorney (*l*). And, in another case under the rule, where an uncertificated attorney, who was also a prisoner, was introduced by the defendant himself as his attorney, and described himself and witnessed the warrant as such, the Court refused to interfere (*m*). Whether the defendant can, even by fraud, divest himself of the protection of the statute, remains to be decided. It seems, however, that he ought not to be allowed to pervert the statute any more than the rule into an instrument of fraud.

1. An attorney of a superior court must be present.

2ndly. The attorney must be present on behalf of the person who executes (*n*). It is clear, for instance, that the presence

2. He must be present on behalf of the

(*a*) *Chipp* v. *Harris*, 5 M. & W. 430: *Dunnar* v. *Garbutt*, 12 Law J., N. S., Q. B., 220: 2 Dowl., N. S., 939.

(*b*) *Doe* v. *Kingston*, 1 Dowl., N. S., 262.

(*c*) *Doe* v. *Hoswell*, 4 P. & D. 361; 12 A. & E. 695, S. C.

(*d*) *See Fitzgerald* v. *Plunkett*, 2 Stra. 1249.

(*e*) *Dunbar* v. *Trevannion*, 14 Law J., N. S., Q. B., 126.

(*f*) *Baker* v. *Flower*, 8 M. & W. 670: *Bray* v. *Manson*, Id. 668.

(*g*) *Bland* v. *Pakenham*, 1 Str. 530: *Villmot* v. *Barry*, Barnes, 44.

(*h*) *Barnes* v. *Ward*, Barnes, 42: *Paul* v. *Clewer*, 2 Taunt. 390.

(*i*) *Verge* v. *Dodd*, Tidd, Supp. 87.

(*k*) *Wallace* v. *Brockley*, 5 Dowl. 695.

(*l*) *Jayes* v. *Booth*, 1 B. & P. 97.

(*m*) *Cox* v. *Cannon*, 6 Dowl. 625; 4 Bing. N. C. 453, S. C.

(*n*) *Cooke* v. *Edwards*, 2 Dowl., N. S., 55: *Durrant* v. *Blurton*, 9 Dowl. 1015: *Teal* v. *Gumperts*, 6 Dowl. 295.

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executing party, and not as plaintiff's attorney.

of the *plaintiff's* attorney, or plaintiff's attorney's agent (*o*), will not be sufficient, even though the defendant consent at the time to his acting as his attorney also (*p*). Where the attorney who attested the execution of the warrant was London agent to the plaintiff's attorney, (who mentioned the name and address in town), and acted as such in filing the instrument, and made charges against the country attorney, with which he was debited, it was held, that the attorney so attesting was, in substance, the plaintiff's attorney, and that the attestation was bad (*q*). Several defendants, though one be the principal and the other his sureties, may be attended by the same attorney (*r*).

3. He must be named by, and attending at the request of, the executing party.

3rdly. The attorney must be expressly named by, and attend at the request of, the person who executes. It is necessary that there should be some distinct *expression* of request or appointment by the person who executes, and that such request or appointment should be the result of a free choice. In the earlier cases decided after the passing of the act, it was held, that, unless there was an express nomination originating with the party, the attestation was insufficient. The later cases, however, lay it down, that if, where an attorney appears, the party clearly adopts him as his attorney for purpose of the attestation, it is, in the absence of fraud, sufficient (*s*). Therefore, where a party went to an attorney's office for the purpose of executing a warrant of attorney, and found the plaintiff and the plaintiff's attorney, and the attorney's brother, also an attorney, there, and the plaintiff's attorney read from the warrant, and the defendant repeated after him, a form of words nominating the brother as the defendant's attorney, it was held, that such nomination was sufficient (*t*). But the adoption of the attorney by the party should be clear and unequivocal; and, if it is to be implied only from the party allowing the attorney to attest the instrument or the like, or if the party had no fair opportunity to exercise his discretion in the employment of him for the purpose, the attestation by such attorney will be insufficient (*u*).

4. He should inform his client of the nature and effect of warrant.

4thly. The attorney should inform the person about to execute of the nature and effect of the warrant or *cognovit*, before the same is executed. If, however, there be no collusion with the plaintiff, a neglect of the attorney's duty in this respect will not vitiate the instrument (*v*). If there be collusion, then the warrant would be void on the ground of fraud, and not for non-compliance with the act (*x*). It is not necessary that it

(*o*) *Rice* v. *Linsted*, 7 Dowl. 153: *Mason* v. *Riddle*, 5 M. & W. 513; 8 Dowl. 207, *S. C.*

(*p*) *Sanderson* v. *Westley*, 6 M. & W. 98: *Rising* v. *Dolphin*, 8 Dowl. 309.

(*q*) *Pryor* v. *Swaine*, 2 Dowl. & L. 37; 13 Law J., N. S., Q. B., 214, *S. C.*

(*r*) See *Haigh* v. *Frost*, 7 Dowl. 743.

(*s*) See per *Tindal*, C. J., in *Walton* v. *Chandler*, 14 Law J., N. S., C. P., 149; 1 Man. & Gr., N. S., 306; 2 D. & L. 802, *S. C.*: *Barnes* v. *Pendrey*, 7 Dowl. 747. See the prior cases of *White* v. *Cameron*, 6 Dowl. 476: *Fisher* v. *Nicholas*, 2 C. & M. 215; 4 Tyr. 44; 2 Dowl. 251, *S. C.*: *Walker* v. *Gardiner*, 4 B. & Ad. 371.

(*t*) *Walton* v. *Chandler*, *supra*. And see *Bligh* v. *Brewer*, 3 Dowl. 265; 1 M. & Ry. 651, *S. C.*: *Oliver* v. *Woodroffe*, 7 Dowl. 166: *Taylor* v. *Nicholls*, 6 M. & W. 91: *Hale* v. *Dale*, 8 Dowl. 599. There is no objection to the plaintiff paying the defendant's attorney for his attendance. (*Pease* v. *Wells*, 8 Dowl. 696).

(*u*) *Gripper* v. *Bristow*, 6 M. & W. 807: *Rice* v. *Linsted*, 7 Dowl. 153: *Barnes* v. *Pendrey*, Id. 747.

(*v*) *Haigh* v. *Frost*, 7 Dowl. 743.

(*x*) Per *Parke*, B., in *Taylor* v. *Nicholls*, 6 M. & W. 96.

should be read over to the defendant (*y*), except, perhaps, he be a marksman (*z*).

Lastly. He should attest and declare himself to be attorney for the executing party.

Lastly. The attorney should subscribe his name as a witness to the due execution of the instrument, and should, *in the attestation*, declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney (*a*). An attestation in the following form:—"Signed in the presence of me, A. C.; and I declare myself to be the attorney of the said R. G., expressly named by him, and attending at his request, and subscribe myself accordingly," has been held sufficient (*b*). It will be sufficient to declare that he is attorney for the party, and that he subscribes his name as such attorney, without declaring that he is appointed by him, or the like (*c*). The declaration that he is such attorney, and that he subscribes as such, must appear in the attestation in express and unequivocal terms (*d*). An attestation in the following form:—"Signed, sealed, and delivered by J. A., in my presence; and I subscribe myself as attorney for the said J. A., expressly named by him to attest his execution of these presents," was held by *Alderson*, B., to be insufficient, for not stating he was attorney for the party; *Parke*, B., *dubitante* (*e*). And the same where the attestation was "Witnessed by me, W. P., as the attorney of the said A. B., attending at the execution hereof at his request, and expressly named by him" (*f*). So, an attestation in the following form:—"Signed, sealed, and delivered by the above-named C. P., in the presence of me, the attorney expressly named by him, and acting at his request, and by whom the above-written warrant of attorney was read over, and the nature and effect thereof explained to the said C. P., before the execution thereof by him," and subscribed by the attorney, has been held insufficient (*g*). But, where it was "in the presence of me, J. N., attorney of the said W. H.," &c., it was holden sufficient (*h*). It is not, it seems, necessary, though it is usual, to state in the attestation that the attorney is an attorney of one of the superior courts (*h*). Where, after a warrant was regularly executed and attested, but being afterwards altered, the defendant again executed it by tracing his signature with a dry pen, and the attorney did the same with the attestation, the Court held that this was not a compliance with the statute, and that there should have been a new attestation (*i*). There being two attestations, the second added on account of the first being insufficient, has been held not to affect the validity of the instrument (*k*).

Who may take advantage of non-

The enactment was passed for the benefit of the debtor only; and, therefore, a third party, who may be prejudiced by a judg-

(*y*) *Oliver v. Woodroffe*, 7 Dowl. 166; 4 M. & W. 650, *S. C.*

(*z*) *Jones v. Harris*, 6 Dowl. 184. *Stats v. Hobbs*, 6 Dowl. 113; *Potter v. Rickford*, 6 M. & W. 294; 9 Dowl. 606, *S. C.*

(*a*) *Bailey v. Gledhill*, 1 Dowl. & L. 69; 12 Law J., N. S., Q. B., 55, *S. C.* And see *Knight v. Hasty*, 12 L. J., N. S., Q. B., *S. C.*: *Ledgard v. Thompson*, 11 M. & W. 40.

(*b*) See per *Parke*, B., in *Oliver v. Woodroffe*, 7 Dowl. 166.

(*c*) *Hibbert v. Barton*, 10 M. & W. 678; 2 Dowl., N. S., 434, *S. C.*: *Poole v. Hobbs* and *Potter v. Nicholson*, *supra*.

(*d*) *Elkington v. Brown*, 9 M. & W. 659; 1 Dowl., N. S., 643, *S. C.*

(*e*) *Hibbert v. Barton*, 10 M. & W. 678; 2 Dowl., N. S., 434, *S. C.*

(*f*) *Everard v. Popleton*, 13 Law J., N. S., Q. B., 1.

(*g*) *Knight v. Hasty*, *supra*.

(*h*) *Bailey v. Bellamy*, 9 Dowl. 507; 10 Law J., N. S., Q. B., 41.

(*i*) *Ledgard v. Thompson*, 12 Law J., N. S., 229, Exch.; 2 Dowl., N. S., 766; 11 M. & W. 40, *S. C.*

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compliance with act.

ment against his debtor, cannot object to the invalidity of th warrant for want of a due attestation (*m*). But the assigne of the defendant can, in case he becomes bankrupt or inso vent (*n*). So may, it seems, any person duly authorized b him, or claiming under him, provided such authority or clai be clearly made out (*o*). The defendant may apply, notwith standing a fiat in bankruptcy is issued against him (*p*).

Time of application to set it aside.

As the warrant is a nullity if not duly attested, the applic tion to set aside the judgment, and execution signed and issue on it, may be made at any time (*q*). It would seem, fro what fell from *Alderson*, B., in a recent case, that the objectio is one that cannot be waived (*r*). Where two parties, as sur ties, entered into a warrant of attorney, and one of them pai the amount, and afterwards brought an action and obtained verdict against his co-surety for half the amount so paid, th Court refused, after such verdict, to entertain an objectio against the sufficiency of the attestation of the warrant (*s*).

How far revocable, &c.

How far revocable. How affected by Death, Marriage, &c.]—A warrant of attorney to confess a judgment cannot be ex pressly revoked; or, if the defendant do that which purport to be a revocation of it, the plaintiff may enter up judgmen notwithstanding (*t*). There are some cases of implied revoca tion, however, which it may be here necessary to mention.

Effect of death of parties on.

The *death* of either party is, in general, a revocation of th warrant (*u*). Formerly, indeed, this might, in general, hav been remedied, if the plaintiff were entitled to enter up judg ment at the time, by entering up the judgment as of the ter in or after which the party died, before the first day of th following term (*x*): now, however, since the rule of *H. T* 4 *W.* 4, *r.* 3, orders that the relation of judgments shall onl be had to the day on which they are actually signed, this ca no longer be done (*y*). If it became necessary to obtain th leave of the Court to enter up the judgment, even before the rule, they would seldom grant it after the death of the plain tiff, particularly where the application was not made unt

(*m*) *Chipp* v. *Harris*, 5 M. & W. 430.

(*n*) *Cocks* v. *Edwards*, 2 Dowl., N. S., 55.

(*o*) See *Lewis* v. *Earl of Tankerville*, 12 Law J., N. S., 234, Exch.; 2 Dowl., N. S., 754; 11 M. & W. 109, *S. C.*

(*p*) *Taylor* v. *Nicholls*, 6 M. & W. 91: *Pinches* v. *Harvey*, 1 Q. B. 868.

(*q*) *Cocks* v. *Edwards*, 2 Dowl., N. S., 55.

(*r*) *Gripper* v. *Bristow*, 6 M. & W. 307; 8 Dowl. 707, *S. C.*

(*s*) *Kemp* v. *Finden*, 13 L. J., N. S., Exch., 137; 12 M. & W. 421, *S. C.*

(*t*) *Oden* v. *Woodward*, 2 L. Raym. 850; 1 Salk. 87, *S. C.*; 2 Esp. Rep. 555.

(*u*) Co. Lit. 52. b.; Ventr. 310. See *Heath* v. *Brindley*, 2 A. & Ell. 365.

(*x*) *Oden* v. *Woodward*, 1 Salk. 87; 2 L. Raym. 766, *S. C.*: *Price* v. *Hughes*, 1 Dowl. 448: *Heapy* v. *Parrie*, 6 T. R. 368: *Calvert* v. *Tomlin*, 5 Bing. 1; 2 Moo. & P. 1, *S. C.*; 1 Saund. 219 *a*.

(*y*) *Heath* v. *Brindley*, 2 A. & E. 365: *Blackburne* v. *Godrich*, 9 Dowl. 307. In the former of these cases, the defendant was dead when the judgment was entered up, and the warrant expressly allowed t judgment to be signed notwithstandi his death. But the Court held the jud ment irregular, and set aside the exec tion, saying that this allowance by t defendant was not binding on his rep sentatives, and still less on the Cou Where an insolvent debtor, before his d charge, had given a warrant of attorn to enter up judgment against him, in t name of the provisional assignee, und statute 7 G. 4, c. 57, s. 57, the Cou of Queen's Bench held, that a judgme entered up under the warrant, by or of the Insolvent Debtors Court, was ir gular, and refused to grant a rule nisi entering up judgment *nunc pro tunc*, o term previous to the death; though ans had not accrued until after the death, a though the Insolvent Debtors Court h made an order for execution on the jud ment, but suspended it, that the opini of the Court might be taken on the v lidity of such judgment. (*Harden* v. F ceth, 1 Ad. & Ell., N. S., 177. See 1 & Vict. c. 110, s. 87).

after the first day of the term following the death (*z*); and in no case would they allow it to be entered up after the death of a sole defendant (*a*). If the warrant, however, in its terms, expressly authorizes the judgment to be entered up by the plaintiff's representatives, the Court or a judge may allow them to enter it up; as, if it be to enter up judgment "at the suit of A., his heirs, executors, or administrators (*b*)," or the like. Where the warrant merely empowered the plaintiff to enter up judgment, without mentioning his executors, although the defeazance stated the judgment was to secure the payment of 200*l.* "to plaintiff, his executors," &c., the Court refused to allow them to enter up judgment (*c*). If the warrant be given to two or more, and one of them die, the survivor may obtain leave to enter up judgment at his suit (*d*). But, if the warrant be given *by* two, and one of them die, the plaintiff cannot afterwards, unless the terms of the warrant allow it, obtain leave to enter up the judgment; not against both, on account of the rule above mentioned; nor against the survivor, for the judgment would not, in that case, pursue the authority (*e*). But, if the warrant be to enter up judgment "against us or either of us," judgment may be entered up against one only (*f*). And where a warrant was given by two persons, to enter up judgment on a joint bond against *me*, not *us*, the Court, after the death of one of them, allowed judgment to be entered up against the other (*g*).] If given by one person, the Court will not give leave to enter up judgment after his death, even though it were stipulated for by the defeazance (*h*).

Effect of marriage of parties on.

If a *feme sole* give a warrant of attorney, it has been holden, that her subsequent marriage, before judgment is entered up, is a revocation of the warrant (*i*) But, from subsequent cases, it appears, the Court or a judge will, notwithstanding the marriage, allow the judgment to be entered up against the husband and wife (*k*). And in *Walter* v. *White and Wife* (*l*), the Court of Queen's Bench, on an affidavit intitled as against both husband and wife, gave the plaintiff leave to enter an appearance for, and enter up judgment against, the husband and wife, on a warrant of attorney executed by the wife whilst unmarried; and the rule was made absolute in the first instance (*m*), though the Master suggested a doubt whether it

(*z*) Cowie v. *Allaway*, 8 T. R. 257: *Wild* v. *Sands*, 2 Str. 718. And see *Harden* v. *Pengelly*, 1 Ad. & Ell., N. S., 177.

(*a*) Chancey v. *Needham*, 2 Str. 1081: *Short* v. *Tomlin*, 5 Bing. 1; 2 Moo. & P. 1, S. C.: *post*, 868.

(*b*) Cole v. *Haden*, Barnes, 44. And see *Goldwin* v. *Atkin*, 2 Dowl. 591: *Edwards* v. *Holden*, 8 Dowl. 1023.

(*c*) *Hemhall* v. *Matthew*, 7 Bing. 337; 1 Moo. & P. 157; 1 Dowl. 217, S. C. And see *Manville* v. *Manville*, 1 Dowl. 544, 1 C. P.: *Foster* v. *Cleggett*, 6 Dowl. 524; though the *defeazance* in that case stated that the executors and administrators might enter up judgment. And see *Short* v. *Tomlin*, 1 Anst. 225: *Cowie* v. *Allaway*, 8 T. R. 257.

(*d*) *Fendall* v. *May*, 2 M. & Sel. 76: *Johnson* v. *Jenkins*, 1 Dowl. 367: *Build* v. *Hightman*, Id. 545: *Futcher* v. *Smith*, 2 W. Bl. 1301: *Todd* v. *Dodd*, 1 Wils. 312; Barnes, 48, *S. C.*: *Hind* v. *Kingston*, 6 Dowl. 532.

(*e*) *Cox* v. *Lane*, 15 East, 592: *Rose* v. *Alderson*, 7 Taunt. 453; 1 Moore, 145, *S. C.*: *Gainsborough* v. *Follyard*, 2 Str. 1121: *post*, 868.

(*f*) *Jordan* v. *Farr*, 2 A. & E. 437; 4 Nev. & M. 347, *S. C.*: —— v. *Hobson*, 1 Chit. Rep. 314.

(*g*) *Gladwin* v. *Scott*, Barnes, 53, C. P.

(*h*) *Mason* v. *Audley*, 5 Dowl. 596: *Heath* v. *Brindley*, 2 A. & Ell. 365.

(*i*) *Anon.*, 1 Salk. 117.

(*k*) *Staples* v. *Purser*, 2 Dowl. 764; 3 M. & Scott, 800, *S. C.*: *Higginbotham* v. *Higginbotham*, 8 Dowl. 126: *Pocock* v. *Fry*, 1b.: *Anon.*, 1 Show. 89: *Hartford* v. *Mattingly*, 2 Chit. Rep. 117.

(*l*) K. B., 24th June, 1839.

(*m*) See *Staples* v. *Purser*, 2 Dowl. 764; 3 M. & Scott, 800, *S. C.*

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ought not to have been made a rule *nisi*. The judgment would be bad, if entered up against the wife alone; though she, and not her husband, is liable to execution (*n*). If a warrant of attorney be given to a *feme sole*, her subsequent marriage will not be a revocation of it (*o*); and, upon application to the Court or a judge, founded upon a proper affidavit of the marriage, the execution of the warrant, and the non-payment of the debt (*p*), they will grant a rule absolute in the first instance, allowing the judgment to be entered up in the names of the husband and wife (*q*). And, if one *feme sole* give a warrant of attorney to another, and they both marry, the Court will allow judgment to be entered up by husband and wife against husband and wife.

In what cases it may be set aside, &c.

Where consideration illegal or fraudulent.

In what Cases it may be set aside, &c.]—If the warrant of attorney have been obtained by fraud (*r*) or misrepresentation (*s*), or given for an usurious consideration (*t*), or for a gambling debt (*x*), or to compound a felony (*y*), or to stay an application to strike an attorney off the roll (*z*), or to induce the plaintiff to live in a state of prostitution (*a*), or to defraud creditors, and the application be made on their behalf (*b*), or if given by an insolvent debtor previous to his discharge, it being agreed that the debt should be omitted in his schedule (*c*), or if given in consideration of foregoing an opposition to his discharge (*d*), or for a debt discharged by the Insolvent Debtors Act (*e*), or if given expressly and in terms for creating a charge on an ecclesiastical benefice (*f*), or for securing an annuity void by

(*n*) *Read* v. *Jewson*, 4 T. R. 362.

(*o*) *Anon.*, 1 Salk. 117.

(*p*) *Marder* v. *Lee*, 3 Burr. 1469: *Metcalfe* v. *Boote*, 6 D. & R. 46.

(*q*) *Anon.*, 7 Mod. 53.

(*r*) *Duncan* v. *Thomas*, 1 Doug. 196: *Fell* v. *Riley*, 1 Cowp. 281; 3 T. R. 616: *Bayley* v. *Taylor*, 8 D. & R. 56: *Martin* v. *Martin*, 3 B. & Ad. 934: *Turner* v. *Shaw*, 2 Dowl. 944.

(*s*) *Anon.*, 2 Ken. 294.

(*t*) *Barrington* v. *Cottle*, 5 Bing. N. C. 339: *Roberts* v. *Goff*, 4 B. & Ald. 92: *Cook* v. *Jones*, 2 Cowp. 727: *Machin* v. *Delaval*, Barnes, 69: *Edmonson* v. *Popkin*, 1 B. & P. 270: *Flight* v. *Chaplin*, 2 B. & Ad. 119: *Murray* v. *Harding*, 3 Wils. 390; 2 W. Bl. 859, *S. C.* See *Hindle* v. *O'Brien*, 1 Taunt. 413. In *Connop* v. *Yeates*, 4 Nev. & M. 302; 2 A. & E. 396, *S. C.*, a warrant of attorney given to secure the amount of an usurious bill at three months, which had been dishonoured at maturity, was holden to be protected by the 3 & 4 W. 4, c. 98, s. 7.

(*u*) See *George* v. *Stanley*, 4 Taunt. 683; 4 M. & Scott, 615, *S. C.* And see *Lane* v. *Chapman*, 11 A. & Ell. 966. The Court would not interfere if the plaintiff were the assignee of the gambling debt, and the defendant represented before he purchased it that it was a valid one. See *Davison* v. *Franklin*, 1 B. & Ad. 142.

(*y*) *Webb* v. *Taylor*, 1 D. & L. 676; 13 Law J., N. S., Q. B., 24. The agreement to compound must be distinctly shewn in the affidavits. (Ib.)

(*z*) *Kerwan* v. *Goodman*, 9 Dowl. 330.

(*a*) Tidd, 547.

(*b*) *Harrod* v. *Benton*, 2 M. & R. 130; 8 B. & C. 217, *S. C.*: *Martin* v. *Martin*, 3 B. & Ad. 934: *Sharpe* v. *Thomas*, 6 Bing. 416: *Dukes* v. *Saunders*, 1 Dowl. 522.

(*c*) *Tabram* v. *Freeman*, 2 Dowl. 375.

(*d*) *Rogers* v. *Kingston*, 10 Moore, 97; 2 Bing. 441, *S. C.*: *Jackson* v. *Davison*, 4 B. & Ald. 691.

(*e*) *Smith* v. *Alexander*, 5 Dowl. 13: *Collins* v. *Benton*, 9 Dowl. 905; 1 Scott. N. R., 183; 2 M. & Gr. 861, *S. C.* And see *Ex p. Hart*, 2 D. & L. 778: *Ashley* v. *Killick*, 5 M. & W. 509: *Dawes* v. *Knott*, 7 M. & W. 144. But it seems the Court will not interfere if the defendant has had an opportunity of pleading his discharge. *Philpot* v. *Aslett*, 1 C., M., & R. 86; 2 Dowl. 689, *S. C.*

(*f*) *Flight* v. *Salter*, 1 B. & Ad. 673: *Kirlew* v. *Butts*, 2 B. & Ad. 736, n.: *Britten* v. *Wait*, 3 B. & Ad. 913: *Colebrooke* v. *Layton*, 1 Nev. & M. 374: *Aberdeen* v. *Newland*, 4 Sim. 221: *Atkin* v. *Hopkins*, 1 Bing. N. C. 99: *Saltmarsh* v. *Hewett*, 1 A. & E. 812: *Skrine* v. *Bunn*, Ib. But the warrant of attorney will not be set aside, unless it does in terms create a charge upon the benefice, contrary to 13 Eliz. c. 20. (See *Moore* v. *Ramsden*, 3 Nev. & P. 180). Nor will it be set aside merely upon the ground that it is given collaterally with another security, which is void by reason of its being a charge upon a benefice. (*Bendry* v. *Price*, 7 Dowl. 753). The Court will not look beyond the warrant of attorney, to ascertain whether it has been given contrary to the

the Annuity Act (*g*), or for securing an attorney payment by his client of costs to which he is disentitled for want of re-admission (*h*), or of future costs (*i*), or the like (*k*), the Court or a judge, having in all cases jurisdiction over the warrant, will, if the fact be clearly made out, order the warrant to be delivered up to be cancelled; or, if judgment have been entered up, they will set it aside, and any proceedings that may have been had upon it; and, if money has been paid under it, they will in general order it to be refunded (*l*). If, however, part of the consideration is good, and severable from the bad, the Court will then only destroy the effect of the bad part (*m*). If the fact of the consideration be doubtful, and be fairly contested, the Court will not at once grant the application, but will direct an issue to try it, and enlarge the rule for cancelling the *cognovit* or setting aside the judgment in the meantime (*n*), or dismiss the application altogether (*o*). The Court have refused to decide the question, whether a joint-stock company was a nuisance within the 6 *G.* 1, *c.* 18, upon a motion to set aside a judgment confessed to them on a warrant of attorney (*p*). And where the defendant has had an opportunity of pleading the illegality or want of consideration, the Court will not, it seems, in general, interfere summarily in this way (*q*).

Where the warrant has been forged or altered.

If it be alleged that the warrant is forged, or the like, the Court will direct an issue to try whether it has been duly executed or not (*r*). But, where a joint warrant of attorney had been altered after its execution in the christian name of one of the parties, who had re-executed the same without the knowledge of the other, the Court refused, on the application of the former, to set aside the judgment which had been signed thereon (*s*).

Where given by an infant.

Also, if a warrant of attorney be given by an infant, the Court will order it to be delivered up to be cancelled, even although there may be circumstances of fraud on the part of the infant, and though the consideration be for necessaries (*t*), on his clearly shewing that he was under age when he gave the warrant (*u*). But, if an infant and another join in a warrant

(S. C.; and *Bishop* v. *Hatch*, 7 Dowl. 208.

(g) *Re p. Chester*, 4 T. R. 694: *Steadman* v. *Purchase*, 6 T. R. 737: *Storton* v. *Tomlins*, 10 Moore, 172: *Nash* v. *Godmond* 1 B. & Ad. 634: *Huggins* v. *Coster*, 1 Dowl., N. S. 897; in which case the Court refused to impose any terms on the defendant. And see *Earle* v. *Broome*, 10 Ad. & E. 526. See *Wade* v. *Simeon*, 13 M. & W. 647; post, 876.

(h) *Wilson* v. *Chambers*, 2 Nev. & P. 392; 7 Ad. & El. 894, S. C.

(i) *Jones* v. *Hunter*, 1 Dowl. 462: *Holdsworth* v. *Whipman*, Id. 592.

(k) See *Jackson* v. *Davidson*, 4 B. & Ald. 225.

(l) *Re p. Hart*, 2 D. & L. 778. And see *Rogers* v. *Williams*, 1 C. & M. 30.

(m) *Holdsworth* v. *Wakeman*, 1 Dowl. 592. And see *Smith* v. *Alexander*, 5 Dowl. P. C. 2; 2 M. & W. 628, S. C.: *Collins* v. *Benton*, 3 Dowl. 260.

(n) *Gale* v. *Jones*, 2 Cowp. 727: *Harrod* v. *Benton*, 8 B. & C. 217; 2 M. & R. 130, S. C.

(o) See *Flight* v. *Chaplin*, 2 B. & Ad. 112: *Ferguson* v. *Sprang*, 3 Nev. & M. 665; 1 A. & E. 576, S. C.: *Re p. Nash*, 4 Moo. & P. 793: *Hembridge* v. *Wildman*, 1 Dowl., N. S., 774: *Downes* v. *Garbutt*, 2 Dowl. 939: *Webb* v. *Taylor*, 1 D. & L. 676; 13 Law J., N. S., Q. B., 94, S. C.

(p) *Brown* v. *Holt*, 4 Taunt. 587. And see other cases in Tidd, 9th ed., 547.

(q) *Bligh* v. *Brewer*, 3 Dowl. 266: *Philpot* v. *Aslett*, 1 C., M., & R. 85; 2 Dowl. 669, S. C. And see *Donne* v. *Knott*, 7 M. & W. 144: *Lane* v. *Chapman*, 11 Ad. & El. 966.

(r) *Gibson* v. *Bond*, Barnes, 239.

(s) *Coke* v. *Brummell*, 2 Moore, 495; 8 Taunt. 439, S. C.

(t) *Saunderson* v. *Marr*, 1 H. Bl. 75: *Wood* v. *Heath*, 1 Chit. Rep. 708: *Oliver* v. *Woodruffe*, 7 Dowl. 165: *Storton* v. *Tomlins*, 10 Moore, 172; 2 Bing. 475, S. C.

(u) *Weaver* v. *Stokes*, 1 M. & W. 203; 1 T. & G. 512; 4 Dowl. 724, S. C. The affidavit of the party as to his infancy was, in that case, held insufficient, though supported by the register of baptism, without the testimony of some person who knew his age.

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of attorney, and judgment be entered up against both, the judgment may be vacated as to the infant, and remain good as to the other (*x*).

By a married woman.

So, if a *feme covert*, unless a sole trader in London, give a warrant of attorney, it is absolutely void; and the Court or a judge will order it to be delivered up to be cancelled, or will set aside the judgment, &c. (*y*); and this although the *feme* was divorced *a mensâ et thoro* (*z*), and though the warrant was given by her in an assumed name, and the plaintiff was wholly ignorant of the marriage (*a*). In a prior case, however, the Court refused to relieve her, where, at the time she executed the warrant, she lived by herself, and acted as a *feme sole*; and they put her to her writ of error (*b*). A warrant to confess a judgment *to* a *feme covert* is, it seems, void (*c*).

By one of several executors.

Where one of several executors gave a warrant of attorney to confess a judgment against all, the Court ordered it to be delivered up to be cancelled (*d*).

By a lunatic.

It is not an objection to signing judgment on a warrant of attorney, that the defendant has, since its execution, become insane (*e*).

Where another security is given.

Nor, that he has since given another security for the same debt; unless there be some agreement that the latter shall be substituted for the former (*f*).

Application, by whom to be made.

The application to have the warrant given up to be cancelled, or to have judgment or execution on it set aside, may, if the objection be a substantial one,—going to the consideration for the warrant,—be made by any person interested in impeaching the warrant, though not a party to it (*g*). Where it has been given for a fraudulent purpose, it would seem that the application can only be made by third parties, and not by the defendant (*h*). But, a mere formal objection, even the want of a formal attestation, under 1 & 2 *Vict. c.* 110, *s.* 9, cannot be made by any but the defendant or his representatives, or those claiming under him (*i*). An objection to the warrant being by an infant or married woman, cannot be made by third parties (*k*). The defendant may make the application, notwithstanding a fiat has issued against him (*l*). It may be made by his assignees (*m*).

Costs on.

The Court in general give the successful party his costs.

Filing of, before judgment.

Filing of.]—By rules of court, which will be noticed hereafter, judgment shall not be signed on a warrant of attorney, without such warrant is delivered to and filed by the clerk of the judgments, who is to file the same in the order in which the warrant is received. The practice as to this, however, will

(*x*) *Mottaux* v. *St. Aubin*, 2 W. Bl. 1133: *Wood* v. *Heath*, 1 Chit. 708, n.: *Ashlin* v. *Langton*, 4 M. & Scott, 719.
(*y*) *Oulds* v. *Sansom*, 3 Taunt. 261.
(*z*) *Fairthorne* v. *Blaquire*, 6 M. & Sel. 73.
(*a*) *Salby* v. *White*, 4 Leg. Obs. 390.
(*b*) *Anon.*, 1 Salk. 400. And see *Wilkins* v. *Wetherill*, 3 B. & P. 220: *Maclean* v. *Douglass*, Id. 128.
(*c*) *Roberts* v. *Pierson*, 2 Wils. 3.
(*d*) *Elwell* v. *Quash*, 1 Str. 20.
(*e*) *Piggott* v. *Killick*, 4 Dowl. 267.
(*f*) *Stowell* v. *Eade*, 4 Bing. 134: *Anon.*, 2 Chit. 423.
(*g*) *Harrod* v. *Benton*, 2 M. & Ry. 130: 8 B. & C. 217, *S. C.*: *Martin* v. *Martin*, 3 B. & Ad. 934.
(*h*) *Ante*, 860. And see *Doe Roberts* v. *Roberts*, 2 B. & Ald. 367.
(*i*) *Dukes* v. *Sanders*, 1 Dowl. 322; *ante*, 849.
(*k*) *Mottaux* v. *St. Aubin*, 2 W. Bl. 1133: *Ashlin* v. *Langton*, 4 M. & Scott, 719.
(*l*) *Pinches* v. *Harvey*, 1 Q. B. 868.
(*m*) See *Bell* v. *Todd*, 9 Dowl. 949.

be more conveniently considered hereafter, while treating of the judgment on the warrant (*n*). CHAP. II.

By stat. 3 *G.* 4, *c.* 39, *s.* 1, to prevent fraud and injustice to creditors by secret warrants of attorney, whereby parties are enabled to keep up false appearances of credit, it is enacted, "that, if the holder thereof shall think fit, every warrant of attorney to confess judgment in any personal action, or a true copy thereof, and of the attestation thereof, and the defeazance and indorsements thereon, in case such warrant of attorney shall be given to confess judgment in his Majesty's Court of King's Bench, at Westminster, or such a true copy thereof as aforesaid, in case such warrant of attorney shall be given to confess judgment in any other court, shall, within twenty-one days after the execution of such warrant of attorney, be filed, together with an affidavit of the time of the execution thereof, with the clerk of the docquets and judgments in the said Court of King's Bench." Warrants of attorney in personal actions to be filed within twenty-one days.

By section 2, "If, at any time after the expiration of twenty-one days next after the execution of such warrant of attorney, a commission of bankrupt shall be issued against the person who shall have given such warrant of attorney, under which he shall be duly found and declared a bankrupt, then and in such case, unless such warrant of attorney, or a copy thereof, shall have been filed as aforesaid within the said space of twenty-one days from the execution thereof, or unless judgment shall have been signed, or execution issued on such warrant of attorney within the same period, such warrant of attorney, and the judgment and execution thereon, shall be deemed fraudulent and void against the assignees under such commission, and such assignees shall be entitled to recover back and receive, for the use of the creditors of such bankrupt at large, all and every the monies levied or effects seized under and by virtue of such judgment and execution." If not filed, &c., void as against assignees in case of bankruptcy.

By section 3, reciting that the object of the above provisions may be defeated by any person giving a *cognovit*, instead of a warrant of attorney, enacts, "that every *cognovit actionem*, given by any defendant in any personal action, in case the action in which such *cognovit actionem* shall be given shall be in the said Court of King's Bench, or a true copy of such *cognovit actionem* in case the action wherein the same is given shall be in any other court, shall, together with an affidavit of the time of the execution thereof, be filed with the said clerk, in like manner as such warrants of attorney, or copies thereof and affidavits, within the space of twenty-one days after such *cognovit actionem* shall have been executed, otherwise such *cognovit actionem*, and any judgment entered up thereon, and any execution taken out on such judgment, shall be deemed fraudulent and void against the assignees of the person giving such *cognovit actionem*, under a commission of bankrupt issued against him, after the expiration of the said space of twenty-one days, in like manner as warrants of attorney, and judgments and executions thereon, are deemed and taken to be fraudulent and void by this act." Same as to cognovits.

(*n*) Post, 974.

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Other provisions as to.

The act provides that the Master's fee for the filing shall be 1*s.* (*o*) If the warrant or *cognovit* be made subject to a defeazance or condition, such defeazance or condition must, in order to make the warrant or *cognovit* effectual against the assignees (*p*), be written on the same paper or parchment on which the warrant or *cognovit* is written before the time when the same or a copy thereof respectively shall be filed (*p*). The same act, section 7, provides, that any person shall be entitled to have an office copy of the warrant or *cognovit*, upon paying for the same at the like rate as for an office copy of a judgment. And by the 5th section the Masters shall keep a book, containing particulars of each warrant or *cognovit* filed, &c. The 6 & 7 *Vict. c.* 66, enacts, that, in addition to this book, another book or index shall be kept, of the names, &c. of persons by whom warrants or *cognovits* are given, and which shall be open to inspection. If the warrant or *cognovit* have been filed, as above mentioned, and the debt be afterwards satisfied or discharged, a judge, upon being satisfied of that fact, may order a memorandum of satisfaction to be written upon it (*q*).

Provisions extended to insolvent debtors.

The 7 *G.* 4, *c.* 57, *s.* 33, and 1 & 2 *Vict. c.* 110, *s.* 60, extend these provisions in favour of the creditors of an insolvent debtor (*r*). It being questionable whether warrants of attorney, executed by insolvent debtors, before adjudication made in the matter of their petition, pursuant to the several acts passed for their relief, were to be deemed secret warrants of attorney within the 3 *G.* 4, *c.* 39, it was enacted by the 1 *W.* 4, *c.* 38, *s.* 3, that such warrants should not be within that act, and that the same should be deemed valid.

Also to insolvent petitioners.

The 7 & 8 *Vict. c.* 96, *s.* 20, extends these provisions to the assignees of insolvent petitioners under that act. Where a defendant had given a warrant of attorney, upon which judgment was signed and execution issued and levied, but the instrument was not duly filed in pursuance of the 3 *G.* 4, and the defendant afterwards became insolvent, and petitioned the Insolvent Court, under the 5 & 6 *Vict. c.* 116, under which petition assignees were appointed, the court refused to set aside the judgment and execution upon the application of the assignees holding, that such instrument was not void as against them by reason of the non-filing thereof, as it did not fall within the provisions of the 3 *G.* 4, the 7 *G.* 4, *c.* 57, nor the 1 & 2 *Vict. c.* 110; and that the 5 & 6 *Vict. c.* 116, *ss.* 1 and 7, contain no words extending the provisions of those enactments to such an instrument (*s*).

The twenty-one days, how reckoned, &c.

The twenty-one days limited by the act for the filing of the warrant or *cognovit*, or signing judgment, or issuing execution are to be reckoned exclusive of the day of execution of the

(*o*) 3 G. 4, c. 30, s. 6.

(*p*) 3 G. 4, c. 39, s. 4: *Bennett* v. *Daniel*, 10 B. & C. 500: *Green* v. *Gray*, 1 Dowl. 350.

(*q*) 3 G. 4, c. 39, s. 8.

(*r*) A warrant was given, while the provision of 7 G. 4, c. 57, s. 33, as continued by later acts, was in force. Between the 16th of August, 1838, when the last of these acts, the 6 & 7 W. 4, c. 44, expired, and the 1st of October, 1838, when the 1 & 2 Vict. c. 110, s. 60, came into effect, there was an interval during which no such provision was in force:—*Held*, that, notwithstanding this interval, a judgment on a warrant of attorney entered up since the & 2 Vict. c. 110, was not valid as against assignees appointed under the act. (C. v. *Stone*, 12 Law J., N. S., Q. B., 244).

(*s*) *Lawrence* v. *Lawrence*, 1 Dowl. & 219; 12 Law J., N. S., Q. B., 346, *S. C.*

warrant or *cognovit*; and a *cognovit*, therefore, executed on the 9th, is duly filed on the 30th of the month (*t*).

Sufficient merely to sign a judgment in that time.

It will suffice to render the warrant or *cognovit* operative under the act as against assignees, that judgment be signed within the twenty-one days after its execution, though execution be not issued until afterwards (*u*).

Affidavit of execution.

The statute, it will be seen, requires an affidavit of the due execution of the warrant or *cognovit* to be filed at the same time, and such affidavit must state the day of the execution. An affidavit made by an attesting witness to the warrant, and filed with it, merely stating its date, and that he saw the party execute the same, without verifying the day on which it was executed, would be insufficient (*x*). The affidavit in the case of a *cognovit* should be intitled in the cause. It may be so intitled in the case of a warrant of attorney, but it need only be intitled in the court (*y*).

There is no necessity for filing an agreement between the parties subsequent to the warrant, altering the terms of it; as, for instance, an agreement to waive the necessity for a *scire facias*, or the like (*z*).

Consequences of not filing, &c.

The 3 *G.* 4, *c.* 39, and 1 & 2 *Vict. c.* 110, *s.* 60, declare the warrant and *cognovit*, and judgment and execution thereon, if the provisions of the former act be not complied with, to be fraudulent and void against the assignees of the defendant, in case he become bankrupt or insolvent, and who shall be entitled to recover back and receive, for the creditors' use, the monies and effects seized under the judgment and execution (*a*). It seems that the warrant, judgment, &c. would be so fraudulent and void at any distance of time (*b*). They would be so, though the petitioning creditor's debt, upon which the fiat is founded, did not exist at the time of the execution of the warrant of attorney, or within the twenty-one days (*c*). A bond, upon the face of it, appeared to be conditioned for the payment of a sum certain; but, by an indenture of the same date, declaring the purposes for which the bond was executed, it was agreed that it should be lawful for the obligees to commence an action upon the bond, and proceed to judgment whenever they should think fit, and, upon judgment being obtained, to issue execution; and that the judgment should be a security for the payment to the obligees, on demand, of all sums of money which them were, or might thereafter, become due to them; a judgment having been entered up by virtue of this deed, the obligees issued execution, without assigning breaches or executing a writ of inquiry; and the Court held, that the indenture, by virtue of which the judgment was entered up, was in

(*t*) *Williams* v. *Burgess*, 12 Ad. & E. 635; 4 P. & D. 443, *S. C.*

(*u*) *Green* v. *Weed*, 14 Law J., N. S., Q. B., 327.

(*x*) *Bilton* v. *Edwards*, 2 M. & P. 560.

(*y*) *Beverley* v. *Woodruffe*, 1 B. & A. 567: *Ex p. Gregory*, 8 B. & Cres. 409: *Davis* v. *Sankey*, 3 Dowl. 440.

(*z*) *Farmer* v. *Johnson*, 3 D. & L. 39.

(*a*) As to the form of remedy, see *Bissin* v. *Yorke*, *infra*: *Brooke* v. *Mitchell*, *infra*.

(*b*) *Everett* v. *Wells*, 2 Scott, N. R., 525; 9 Dowl. 424, *S. C.*: *Godson* v. *Sanctuary*, 4 B. & Ad. 255; 1 N. & M. 52, *S. C.*: *Bissin* v. *Yorke*, 5 M. & G. 429; 6 Scott, N. R., 222, *S. C.*: *Brooke* v. *Mitchell*, 8 Scott, 739: *Wilson* v. *Whittaker*, 1 M. & M. 8.

(*c*) *Everett* v. *Wells*, *supra*.

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legal effect a *cognovit*, within the 3 *G.* 4, *c.* 39; or, if not, that it was a contrivance to defeat the provisions of that statute: and this indenture not having been filed with the proper officer, within twenty-one days after its execution, nor judgment entered up within that period, as required by the statute, the Court, upon application by the assignees of the obligor who had become bankrupt, ordered the execution to be withdrawn (*e*). On the 1st of January, 1841, G. Y. gave a *cognovit* in an action adversely commenced against him by a creditor: the *cognovit* was not filed until the 1st of February: on the 24th of January, 1842, judgment was signed upon this *cognovit* and a *fi. fa.* issued, under which the goods of G. Y. were seized on the 7th of February, and subsequently sold, and the money deducting the expenses, and a sum paid by the sheriff for assessed taxes, handed over to the creditor: G. Y. afterwards suffered judgment by default in an action brought against him by another creditor, at whose suit he was arrested under a *ca. sa.* on the 14th of April, 1842; and, on the 22nd of July, 1842, he obtained his discharge under the 1 & 2 *Vict. c.* 110: it was held, that, the *cognovit* not having been filed, nor judgment signed, nor execution issued thereon within twenty-one days, pursuant to the 3 *G.* 4, *c.* 39, and 1 & 2 *Vict. c.* 110, *s.* 60, the *cognovit* and the judgment and execution thereon were void as against the assignees; and that the latter were consequently entitled to recover, in an action for money had and received, the whole proceeds of the levy, deducting only the sum paid for taxes (*f*). In order to let in the objection that the statute has not been complied with, it must first appear that there is a valid fiat against the party, and it seems that it lies upon him who seeks to impeach the warrant, &c. to shew that it was not filed (*g*).

Though not filed, &c., warrant valid against others than assignees.

Though the warrant or *cognovit* be not filed, or the provisions of the 3 *G.* 4 be not otherwise complied with, still, as those provisions are available only in favour of the assignees of the party under his bankruptcy or insolvency, the warrant or *cognovit* will be valid as against the party giving it and all other persons (*h*), and for this reason the assignees cannot set aside the judgment (*i*).

Judgment on, when to be signed, form of, &c.

Must pursue the warrant.

Judgment on, when to be signed—Form of, &c.]—In entering up the judgment, the authority given by the warrant should be strictly pursued, otherwise the judgment will be irregular. The defeazance to the warrant cannot, it seems, in general, enlarge it, though it may serve to qualify the authority given by it (*k*). In the construction of the terms of the warrant and defeazance, a fair and reasonable, and not a forced, construction must be given (*l*).

(*e*) *Hurst* v. *Jennings*, 5 B. & C. 650; 8 D. & R. 424, *S. C.*

(*f*) *Biffin* v. *Yorke*, 5 Man. & G. 429; 6 Scott, N. R., 222, *S. C.*

(*g*) *Aireton* v. *Davis*, 3 M. & Scott, 138; 9 Bing. 740, *S. C.*

(*h*) *Morris* v. *Mellin*, 6 B. & Cres. 446: *Bennett* v. *Daniel*, 10 B. & C. 500: *Airston* v. *Davis*, 9 Bing. 940.

(*i*) *Green* v. *Day*, 1 Dowl. 350.

(*k*) See *Henshall* v. *Matthews*, 1 D... 217: *Manvill* v. *Manvill*, Id. 544: *P...* v. *Claggett*, 6 Dowl. 594. The Court ... to have allowed the *defeasance* to en... the warrant, in *Chalk* v. *Walton*, 1 D. ... 39; *post*, 869. And see *Shipton* v. ... ton, 1 Dowl. 518: *post*, 869, 876.

(*l*) See *Biddlecombe* v. *Bond*, 5 N. & ... 621: *Duke* v. *Watchorne*, 1 Dowl., N. ... 265; 11 Law J., N. S., Q. B., 53, & *C.*

When to be signed.

The judgment may be entered up at the time allowed by the warrant, and this as of course, without applying to the Court or a judge, if entered up within a year and a day next after the date of the warrant, and if there has not been a change of the parties, or some other event which makes an application to the Court or a judge necessary. If the warrant is given to secure the payment of money, it is not necessary to delay the signing of the judgment until default made in the payment (*m*), unless that be expressly stipulated for in the defeasance (*n*). And if the warrant be given to confess judgment absolutely for a sum certain, but it be understood between the parties that it is given only to indemnify the plaintiff against his suretyship for a smaller sum, the plaintiff need not defer the signing of the judgment or issuing execution until the contingency happen (*o*). If the defeazance state that it is given to secure the payment of a sum on or after demand, an actual demand must be made; and a proposal to settle amicably does not amount to such demand (*p*). Where the plaintiff, for the purpose of dispensing with it, made a formal demand immediately after the execution of the warrant, and at the expiration of the time agreed signed judgment, the Court set it aside (*q*). A demand on a lunatic is insufficient (*r*). A stipulation, that the judgment shall not be entered up before a certain day, unless the party giving it shall, in the meantime, have become bankrupt or insolvent, does not oust the party to whom it is given from the right to enter up judgment before the day specified, if the former be in insolvent circumstances, although he may not have become bankrupt, or taken the benefit of an Insolvent Debtors Act (*s*). If the warrant specify any particular time at which the judgment is to be signed, it cannot be entered up at any other time (*t*). If it be to confess judgment generally "as of" or "in term," it is valid, notwithstanding *R. G., H. T.*, 4 *W.* 4; but the judgment should be signed of a particular day in that term (*u*); and it could not be signed in vacation (*x*). But where a warrant given in July authorized the parties to appear &c. "as of Trinity Term last, Michaelmas Term next, or any subsequent term," judgment having been signed in August as of the preceding Trinity Term, it was held regular, notwithstanding the *R. G., H.*, 4 *W.* 4, *r.* 3 (*y*). Where a warrant was given, dated the 31st of March, 1830, and authorized judg-

Of a particular term.

(*m*) MS., M., 1814. And see *Anon.*, Hardw. 270.

(*n*) See *Nicholl* v. *Bromley*, 2 B. & B. 464; 5 Moore, 307, *S. C.*: *Capper* v. *Dando*, 1 H. & W. 11; 2 A. & E. 458; 4 Nev. & M. 236, *S. C.*

(*o*) *Barber* v. *Barber*, 3 Taunt. 465. And see *Partridge* v. *Fraser*, 7 Taunt. 307; 1 Moore, 54, *S. C.*: *Carr* v. *Roberts*, 5 B. & Ad. 78: *Stein* v. *Brook*, 1 B. & Ad. 124: *Bate* v. *Watchorne*, 1 Dowl., N. S., 265; 11 Law J., N. S., Q. B., 53, *S. C.*: *Kirk* v. *Bent*, 1 Dowl., N. S., 267.

(*p*) *Nicholl* v. *Bromley*, 5 Moore, 307; 2 B. & B. 464, *S. C.* See *Capper* v. *Dando*, 4 Nev. & M. 236; 2 A. & E. 458; 1 H. & W. 11, *S. C.*

(*q*) *Elliott* v. *Greenwood*, 2 Jurist, 989; Q. B.

(*r*) *Capper* v. *Dando*, *ubi supra*.

(*s*) *Biddlecombe* v. *Bond*, 5 Nev. & M. 721; 1 H. & W. 612, *S. C.* See *Partridge* v. *Fraser*, 7 Taunt. 307; 1 Moore, 54, *S. C.*

(*t*) *Mynn's case*, 1 Mod. 1: *Anon.*, 7 Mod. 53.

(*u*) *Todd* v. *Gomperts*, 6 Dowl. 296. And see *Bate* v. *Laurence*, 8 Scott, N. R., 122; 2 D. & L. 88, *S. C.*: *Bird* v. *Manning*, 13 Law J., N. S., Q. B., 123.

(*x*) *Cobbold* v. *Chilver*, 1 Dowl., N. S., 796; 11 Law J., N. S., C. P., 137; 4 M. & Gr. 62, *S. C.* And see *Rayment* v. *Smith*, 1 D. & L. 166; 12 Law J., N. S., B. C., 279, *S. C.*: *Bosanquet* v. *Graham*, 7 Jur. 831.

(*y*) *Jarvis* v. *South*, 2 Dowl. & L. 962; 13 M. & W. 152; 13 Law J., N. S., Exch., 319, *S. C.*

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ment to be signed "as of Michaelmas Term last, Hilary Term next, or of any subsequent term," with a defeazance to secure 1000*l.* "on the 16th of December next," and judgment was signed on the 21st of April, 1830, on motion to set aside the judgment, it was held, that it was not clear that the judgment was not authorized by the terms of the instrument; and that, at all events, the application could not be granted, when it was sworn that it was agreed by all parties that the judgment should be entered up immediately, and the defendant did not take the objection till eleven years after the judgment had been signed (*z*). And it seems that an application to set aside a judgment, on the ground that it was signed at a time not authorized by the warrant, should be made within a reasonable time, or the irregularity will be cured (*a*).

In what court.

The warrant, in general, points out the court in which the judgment is to be signed. Where a warrant omitted to do so in express terms, but was directed to two attornies of the Queen's Bench, and no other court was mentioned, it was held that that was the proper court in which to enter up the judgment (*b*).

In whose name and against whom.

The judgment must be entered up in the name of the party as authorized by the warrant. Where a warrant in ejectment authorizes the lessor of the plaintiff to enter up judgment, it must be entered up in the name of the nominal plaintiff (*c*). If the warrant authorizes a judgment at the suit of A., this does not authorize one at the suit of his executors (*d*). So, upon a *joint* warrant given by two, without words of severalty, judgment cannot, in general, be entered up against one, even after the death of the other (*e*). So, a warrant given by one of two executors will not authorize the plaintiff in entering up judgment against both (*f*). Where a judgment-creditor applied to set aside a judgment and execution, upon the ground that the judgment was entered up against the defendant by a different christian name from that signed to the warrant of attorney, the Court refused even a rule *nisi* (*g*); but this was, probably, on the ground that a mere formal objection cannot be taken advantage of by third parties (*h*).

For what amount of debt and costs.

The warrant in general authorizes a judgment for more than the amount of the debt really due, usually double the amount. Where the defeazance shewed that the debt secured by the warrant was to carry interest, but the penalty of the instrument itself was the amount of the actual debt only, the Court, on special application, referred it to the Master to find what was due for interest, and authorized judgment to be taken for

(*z*) *Fernell* v. *Adams*, 12 Law J., N. S., Q. B., 81.

(*a*) See *Bate* v. *Lawrence*, 2 D. & L. 83; 8 Scott, N. R., 122; 13 Law J., N. S., C. P., 147, *S. C.*: *Anderson* v. *Harrison*, 2 D. & L. 91; 13 Law J., N. S., Q. B., 293, *S. C.*

(*b*) *Harrison* v. *Peck*, 2 D. & L. 106; 13 Law J., N. S., Q. B., 295, *S. C.*

(*c*) *Doe* v. *Stewart*, 1 Dowl., N. S., 813. A cognovit having been given in an action brought by the public officer of a banking company, under the 7 G. 4, c. 46, by which it was provided, that, upon default in payment of a sum of money, the plaintiff should be at liberty to enter up judgment and issue execution, it was held to be sufficient to authorize signing judgment in the name of another public officer, upon a suggestion being entered of the removal of the original plaintiff. (*Webb* v. *Taylor*, 1 D. & L. 676; 13 Law J., N. S., Q. B., 24, *S. C.*) But this would not, it is apprehended, apply to the case of a warrant of attorney.

(*d*) *Short* v. *Coytlie*, 1 Anstr. 225. See *ante*, 858.

(*e*) *Goe* v. *Lane*, 15 East, 592: *Jordan* v. *Farr*, 2 A. & E. 437: *ante*, 858.

(*f*) *Elwell* v. *Quash*, 1 Str. 20.

(*g*) MS., M., 1815.

(*h*) See *ante*, 862.

the penalty, and such interest (*i*). Where the warrant empowered the plaintiff to sign judgment and issue execution for the debt, but omitted the words "together with costs of suit," it was held, that judgment could not be signed for those costs (*j*). But the costs of the judgment and execution might, it seems, be levied, if the warrant authorize a judgment for a sum sufficient to cover the debt and costs (*k*). For what amount judgment may be signed and execution issued, where the debt is payable by instalments, see *post*, 875, 876. As to the taxation of the costs, see *post*, 873.

The matter of the judgment.

If, on a warrant to enter up judgment in debt on bond, judgment be entered up in debt on a *mutuatus*, the Court will set it aside as irregular (*l*). So, a general warrant, given by a person who afterward became insolvent, was held not to authorize the plaintiff to enter up a special judgment against his future effects (*m*). The words "or otherwise," in the warrant, mean otherwise "by default" (*n*).

Suggestion of breaches.

It is not necessary to suggest breaches in the same cases in which breaches must be assigned or suggested in an action on a bond, even though a bond has been given as well as the warrant (*o*).

Setting aside at plaintiff's instance.

Where a judgment has been irregularly signed at a time not authorized by the warrant or otherwise, the Court or a judge, at the plaintiff's instance, will set it aside, so as to give him an opportunity of signing a new judgment rightly (*p*). It seems that the rule for this purpose is *nisi* only, and not absolute in the first instance (*q*).

When leave necessary before signing judgment.

When Leave of the Court or a Judge necessary before signing Judgment.]—Within a year and a day from the date (*r*) of the warrant, judgment may be entered up as of course (*s*). But not after that time without leave of the Court in term time, or of a judge in vacation (*t*), unless the warrant or defeazance, in express terms, dispenses with the necessity for such leave (*u*).

Application, how made.

By a general rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 1, *s.* 3, "*leave to enter up judgment on a warrant of attorney above one, and under ten years old, must be obtained by a motion in term, or by order of a judge in vacation; and if ten years old or more, upon a rule to shew cause.*" In the case of a warrant to secure the payment of a *post-obit* bond, the Court have refused to grant more than a rule *nisi* in the first instance, though the warrant was under ten years old (*x*). And in another case, where the circumstances were peculiar, the Court would only grant a rule *nisi* in the first instance (*y*). But they granted a

(*i*) *Chalk* v. *Walton*, 1 D. & L. 39; 5 M. & G. 573; 6 Scott, N. R., 693, S. C. And see *Bladon* v. *Shipton*, 1 Dowl. 518.

(*j*) *Page* v. *South*, 2 D. & L. 106; 13 Law J., N. S., Q. B., 291, *S. C.*

(*k*) See *Thornton* v. *Merridew*, 3 B. & P. 362.

(*l*) *Paris* v. *Wilkinson*, 8 T. R. 153.

(*m*) *Beaton* v. *Marsden*, 1 T. R. 80; decided before the 7 G. 4, c. 57.

(*n*) *Reardon* v. *Wentworth*, 10 M. & W. 36.

(*o*) See the cases, *post*, 876.

(*p*) *Coulson* v. *Chatterbuck*, 2 Dowl., N. S., 281.

(*q*) *Bennet* v. *Simons*, 13 Law J., N. S., Q. B., 306; 2 D. & L. 98.

(*r*) There may be ground for contending that the year and day should be calculated from the time allowed for the payment of the money: see Lush, Pr. 727. It seems, however, the date of the warrant is the proper time from whence it is to be calculated.

(*s*) *Calvert* v. *Tomlin*, 5 Bing. 1; 2 Moo. & P. 1, *S. C.*

(*t*) *Anon.*, 6 Mod. 212: *Lushington* v. *Waller*, 1 H. Bl. 94.

(*u*) *Sherran* v. *Marshall*, 1 D. & L. 669; 13 Law J., N. S., Q. B., 66, *S. C.*

(*x*) *Lushington* v. *Waller*, 1 H. Bl. 94. See form of the rule, Chit. Forms, 316.

(*y*) *Edwards* v. *Holliday*, 9 Dowl. 1023.

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rule absolute in the first instance in another case, notwithstanding it appeared that the defendant was insane, and had been so for a considerable period, and there did not appear to be any chance of his recovery (*z*). Since the rule, the Court will not grant a rule absolute in the first instance, for judgment on a warrant *more* than ten years old, although the defendant, shortly before the application, had acknowledged the sum secured by the warrant to be due (*a*), or though the warrant be to confess a judgment on a bond, and the defendant is resident abroad (*b*). Personal service of the rule *nisi* on the defendant will be dispensed with, if it appear that he is keeping out of the way (*c*). In one case, under special circumstances, *Coleridge*, J., allowed the rule *nisi* to be made absolute, where its service had only been effected by leaving it with the landlady of the house in which the defendant lodged (*d*).

The original warrant must be forthcoming.

Leave has been refused to sign judgment on a copy of the warrant, although the original was in defendant's possession, and the copy in his handwriting (*e*). The proper course, in such a case, appears to be, to apply for a rule calling on the defendant to shew cause why he should not produce the original in court for the purpose of having judgment entered on it (*f*). Where a copy of an old warrant had been filed instead of the original, and search for the instrument itself proved ineffectual, the Court of Queen's Bench, upon an affidavit of the due execution of the instrument by the attesting witness since dead, granted a rule for judgment (*g*).

Consequences of signing judgment without leave.

Although judgment happen to be entered up without the leave of the Court or a judge when necessary, yet it seems that none but the defendant himself (*h*), or his personal representatives in case of his death, or his assignees in case of his bankruptcy or insolvency (*i*), can object to the irregularity. The irregularity is one that may be waived.

Affidavit in support of application for leave.

The application for leave to sign judgment is founded upon an affidavit, stating the execution of the warrant—the consideration for it—the amount remaining due to the plaintiff, and that the defendant is alive (*k*). The affidavit may or may not, it seems, be intitled in the cause in which the judgment is entered up (*l*).

Must state execution of warrant.

1. The execution of the warrant must be sworn to, and in general by the attesting witness (*m*), and the Court is so strict in requiring this, that, even though the witness refuses from malice to make the necessary affidavit, they will not grant the application (*n*). Nor will the circumstance of the commissioner, before whom the affidavit that the party is alive is

(*z*) *Piggott* v. *Killick*, 4 Dowl. 287; 1 H. & W. 518, *S. C.* In the report of this case in Dowling, the warrant is stated to have been more than eleven years old; *sed quære.*

(*a*) *Nicholas* v. *Merit*, 9 Dowl. 101.

(*b*) *Fletcher* v. *Everard*, 13 Law J., N. S., 44, Q. B.

(*c*) *Croft* v. *Lord Egmont*, 8 Dowl. 95. See *post*, 912.

(*d*) *Wortham* v. *Turk*, 9 Dowl. 335.

(*e*) *Anon.*, M., 1838, B. C.: *Littledale*, J., 2 Jurist, 944: *Jacob* v. *Neville*, 8 Dowl. 125.

(*f*) *Anon.*, M., 1838, B. C.: *Littledale*, J., 2 Jurist, 1057.

(*g*) *Doe* d. *Bramont* v. *Bramont*, 2 Dowl. N. S., 972.

(*h*) *Jones* v. *Jones*, 1 D. & R. 538. And see *ante*, 857, 858.

(*i*) See *Cocks* v. *Edwards*, 2 Dowl., N. S., 55.

(*k*) See the form of the affidavit, Chit. Forms, 315.

(*l*) *Davis* v. *Stanbury*, 3 Dowl. 440: *Sowerby* v. *Woodruffe*, 1 B. & Ald. 567: 1 Chit. 315, *S. C.*: *Poole* v. *Robbards*, Id. 568, n.: *Ex p. Gregory*, 8 B. & C. 469.

(*m*) See *Field* v. *Beaucroft*, 1 Dowl. 388: 2 Tyr. 263; 2 C. & J. 217, *S. C.*: *Jones* v. *Knight*, 1 Chit. 743.

(*n*) *Mills* v. *M'Donoughoe*, 1 H. & W. 184.

sworn, being the witness, dispense with the necessity of an affidavit by him of its execution (*o*). It must be observed, however, that, as this is a mere matter of practice, if a judge allows judgment to be signed on other evidence, without the affidavit of the witness, such judgment will not afterwards be liable to be set aside merely on account of that deficiency (*p*).

An affidavit that the defendant had recently acknowledged the execution, expressly for the purpose of enabling the plaintiff to enter up judgment without being at the trouble of sending for the subscribing witness, has been held sufficient by the Court of Common Pleas (*q*); though, indeed, the Court of Queen's Bench have decided otherwise (*r*). If, indeed, the attesting witness be dead (*s*) or abroad, or out of the jurisdiction of the court (*t*), or transported (*u*), and that fact be substantiated by affidavit, or if he cannot be found after due search, and the affidavit state the endeavours which have been made to find him (*v*), then the Court will receive secondary evidence of the execution, and an affidavit verifying his handwriting (*x*), or an affidavit by another party who saw the execution (*y*), or an affidavit that defendant has acknowledged the debt and the handwriting of the witness (*z*) will in general suffice. Where the attesting witness was the clerk of the attorney who prepared the warrant, the want of his affidavit was considered sufficiently supplied by that of his master, verifying the handwriting of his clerk and that of the defendant, and stating that the former had absconded and could not be found (*a*). The illness of the witness will be no excuse for his not making the affidavit, because a commissioner might attend him and take it (*b*). The production of an office copy of the affidavit of the due execution of the warrant at the time it was filed, if it was so, will be sufficient (*c*). If the defendant be a marksman, it seems that the affidavit should state that the warrant was read over to him before execution (*d*). The Court will, by rule, compel the attesting witness to swear to the execution if he refuse to swear to it (*e*); and if he has misconducted himself, they will make him pay the costs of the rule (*f*).

2. The consideration and the sum remaining due must be stated in the affidavit (*g*): these are usually sworn to by the

Must shew that a debt exists.

(*o*) *Field* v. *Bascroft*, *ante*, 870, n. (*m*).

(*p*) *Weller* v. *Crampton*, at Chambers, 27th September, 1839, coram *Maule*, B.

(*q*) *Laing* v. *Keane*, 2 B. & P. 85.

(*r*) *Jones* v. *Knight*, 1 Chit. Rep. 743: *Halsey* v. *Lord Oxford*, 10 Leg. Obs. 430. See Bagley's Pract. 322.

(*s*) *Constable* v. *Wren*, 3 M. & Scott, 710, a. And see *Taylor* v. *Leighton*, Id. 450; 2 Dowl. 746.

(*t*) *Taylor* v. *Leighton*, 3 M. & Scott, 422: 2 Dowl. 746, S. C.: *Appleton* v. *Bond*, 1 Chit. 744.

(*u*) *Edwards* v. *Penney*, 2 Dowl., N. S., 625. The affidavit also stated that no information respecting the witness could be obtained.

(*v*) *Young* v. *Shoveler*, 2 Dowl. 556: *Waring* v. *Bowles*, 4 Taunt. 132: *Jones* v. *Knight*, 1 Chit. Rep. 743. And see *Cope* v. *Lee*, 9 Dowl. 162: *Reid* v. *Ford*, 1 Dowl., N. S., 127: 3 M. & G. 546, S. C.

(*x*) *Jones* v. *Knight*, *Young* v. *Shoveler*, *supra*.

(*y*) *Huthwaite* v. *Hood*, 5 M. & P. 321: *Taylor* v. *Leighton*, 3 M. & Scott, 423.

(*z*) *Reid* v. *Ford*, 3 M. & G. 546; 1 Dowl., N. S., 127, *S. C.*

(*a*) *Young* v. *Shoveler*, 2 Dowl. 556.

(*b*) *Owen* v. *Holles*, 4 Dowl. 572.

(*c*) *Webb* v. *Webb*, 4 Dowl. 399: *Bland* v. *Wilson*, 1 Dowl., N. S., 260.

(*d*) *James* v. *Harris*, 6 Dowl. 184.

(*e*) *Clark* v. *Rhwick*, 1 Str. 1: *Coffin* v. *Idle*, M., 3 G. 4, K. B.; Tidd, 9th ed., 554: *Mills* v. *M'Donoughoo*, 1 H. & W. 184. See *Doe Avery* v. *Roe*, 6 Dowl. 518, per *Williams*, J.

(*f*) *Ex p. Morrison*, 8 Dowl. 94, in *Croft* v. *Lord Percival*.

(*g*) *Barton* v. *Turner*, 8 Dowl. 122. See *Hulke* v. *Pickering*, 2 B. & Cres. 555; 4 D. & Ry. *b*, *S. C.* But where the warrant was given to secure a guarantee, it was deemed sufficient to swear that the guarantee was still in force, without stating that any sum was owing on it. (*Pickering* v. *Carnell*, 8 Dowl. 309).

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Plaintiff insane.

plaintiff himself; and, if not sworn to by the plaintiff himself, the affidavit must shew why not (*h*). Where the plaintiff was a lunatic, an affidavit of the debt being unpaid, made by a person who had received the interest due upon it for the last three years, was deemed sufficient (*i*); and an affidavit by the plaintiff's attorney, swearing to the consideration and the money remaining unpaid, and that he has been employed in managing the money and paying over the interest, has been admitted as sufficient, without any affidavit by the plaintiff himself (*k*). And so has an affidavit by the plaintiff's attorney's clerk, stating that the money remained unpaid, that he had received money on several occasions in respect of the sum secured by the warrant, and that he had lately seen the defendant, when he promised to pay a further instalment upon it (*l*). Where the warrant was given to secure the re-transfer of stock on demand, the Court refused leave to enter up judgment on proof of a demand made while defendant was insane (*m*).

Defendant insane.

3. That defendant is alive.

3. It must appear from the affidavit that the defendant is alive, either from the deponent having seen him alive, or otherwise. If the affidavit shew that the defendant was alive within a *reasonable* time before the day on which the motion or application is made (*n*), and state the deponent's belief that the defendant is still alive, it will suffice (*o*). As to what is a reasonable time must depend upon the circumstances of each particular case. In one case the Court granted a rule moved for on the *third* day of term, upon an affidavit stating that the defendant was alive on a day six days before the commencement of the term (*p*), and, in another case, a rule was granted where the defendant had last been seen alive above three weeks (*q*), and in another (*r*) five weeks, before the application. If the defendant be abroad, a longer time is of course allowed, according to the distance of the place and the circumstances. Judgment has been allowed to be entered up against a defendant residing in Jamaica, upon an affidavit that he was alive four months before (*s*); and against a defendant at Nice, on production and verification of a letter from him, dated thirteen days before (*t*); and against a defendant residing in France, upon an affidavit that he was alive on the 20th February next preceding the application, the application being made in the Easter Term following (*u*); and against a defendant in New South Wales, upon an affidavit stating the receipt of a letter from him dated from that place in the August preceding, the application being made in November (*x*); and against a defendant in Newfoundland, upon an affidavit

(*h*) *Barton* v. *Turner*, 8 Dowl. 122, per *Littledale*, J.
(*i*) *Coppendale* v. *Sunderland*, Barnes, 42.
(*k*) *Ashman* v. *Bowdler*, 2 C. & M. 212; 4 Tyr. 84, *S. C.* And see *Hill* v. *Knox*, 13, Law J., N. S., Q. B., 65.
(*l*) *Middleton* v. *Stockdale*, 1 Dowl., N.S., 776.
(*m*) *Capper* v. *Dando*, 2 A. & E. 450; 4 Nev. & M. 335; 1 H. & W. 11, *S. C.*
(*n*) *Jordan* v. *Farr*, 4 Nev. & M. 407; 2 A. & E. 437, *S. C.*
(*o*) *Richardson* v. *Scholefield*, 2 Dowl., N. S., 36: *Reader* v. *Whip*, 5 Dowl. 576.
(*p*) *Jordan* v. *Farr*, 4 Nev. & M. 367; 2 A. & E. 437, *S. C.*
(*q*) *Watts* v. *Bury*, 4 Dowl. 44.
(*r*) *Stockes* v. *Wilks*, 13 Leg. Obs. 29; 5 Dowl. 221, *S. C.* And see *O'Neill* v. *Coghlan*, 2 D. & L. 5; 13 Law J., N. S., Q. B., 204, *S. C.*; *Knell* v. *Jay*, 4 Dowl. 600; 1 H. & W. 670, *S. C.*
(*s*) *Rowndell* v. *Powell*, Willes, 66: *Furey* v. *Pilkington*, 2 Dowl. 452.
(*t*) *Grantley* v. *Summers*, 6 Dowl. 478.
(*u*) *Bayley* v. *Western*, 7 Dowl. 601.
(*x*) *Hopley* v. *Thornton*, 2 D. & R. 12.

shewing he was alive eight months before (*y*). An affidavit merely stating that deponent *saw* the defendant is not enough, unless it state that he saw him *alive* (*z*), nor would it suffice though deponent swore that he believed he was living (*a*). And where the affidavit stated merely that the deponent was told by the defendant's wife that her husband was living, the Court held it to be insufficient (*b*). An affidavit that the deponent believes the defendant to be alive, having heard from him, and one of his neighbours having told deponent that he was in good health on Friday last, was held insufficient, the latter being mere hearsay, and no time being stated as to when deponent heard from defendant (*c*). It is insufficient, also, for the deponent to swear that he believes the defendant to be alive from information which he has received, unless he also swears that he believes the information to be true (*d*). An affidavit stating the receipt of a letter from the defendant, in his handwriting, is sufficient evidence of his being alive at the time it bears date (*e*). So is an affidavit shewing that a cheque of the defendant dated thirteen days before the application had been paid in the interim (*f*); but not so an affidavit merely shewing that defendant's attorney had lately moved to set aside a judgment of outlawry against him (*g*). If the warrant be a joint one by several parties, it must be sworn that they are all alive (*h*), unless the warrant be joint and several, and the application be for the purpose of signing judgment against the survivors only (*i*).

Judgment, how signed.

Judgment, how signed.]—The judgment being in debt is always final, and signed in like manner as a final judgment by confession or default in an adverse suit (*k*), excepting, however, that it is not necessary to *enter an appearance for the defendant* (*l*). *Make an incipitur of the declaration on plain paper, and an incipitur on a roll. Take these, and the warrant of attorney, to one of the Masters, who will sign the judgment, and file the warrant* (*m*). *If judgment be signed by leave of the Court or a judge, annex the rule or order to the incipitur on plain paper, when you take it to the Master to sign judgment.*

Taxing of costs.

There is no occasion to tax the costs of signing judgment, because they are a fixed sum, which cannot be reduced (*n*). As to the taxing of costs on a judgment by *cognovit*, see *ante*, 849.

(*y*) *Pemberton* v. *Browning*, 2 Bing. 204; 9 Moore, 389, *S. C.* And see *Johnson* v. *Fry*, 5 Dowl. 215: *Grantley* v. *Summers*, 6 Dowl. 478: *Hawke* v. *Harris*, 1 Dowl., N. S., 261.

(*z*) *Chell* v. *Oldfield*, 4 Dowl. 629.

(*a*) *Watson* v. *Matthews and Others*, 12 Law J., N. S., Q. B., 139; 2 Dowl., N. S., 670, *S. C.*

(*b*) MS., M., 1834:—— v. *Hobson*, 1 Chit. Rep. 314.

(*c*) *Kay* v. *Montague*, 1 Dowl., N. S., 853. And see *Levi* v. *Cohen*, 2 Dowl., N. S., 667; 12 Law J., N. S., Q. B., 137, *S. C.*

(*d*) *Reader* v. *Whip*, 5 Dowl. 576.

(*e*) *Bullocke* v. *Carter*, MS., E. T., 1824: *Sanders* v. *Jones*, 1 Dowl. 367: *Gray* v. *Withers*, 4 Dowl. 636; 1 H. & W. 659, *S. C.* See *Goodman* v. *Trevannion*, 9 Dowl. 328.

(*f*) *Jacobs* v. *Griffiths*, 5 Dowl. 577.

(*g*) *Croft* v. *Lord Egmont*, 8 Dowl. 95.

(*h*) —— v. *Hobson*, 1 Chit. 314: *Lot* v. *Anderson*, 1 Dowl., N. S., 305.

(*i*) See *Jordan* v. *Farr*, 2 A. & E. 437; 4 Nev. & M. 347, *S C.*: —— v. *Hobson*, 1 Chit. 314; Barnes, 53.

(*k*) Tidd, 9th ed., 556.

(*l*) *Bircham* v. *Tucker*, 8 Scott, 469: *Kemp* v. *Matthew*, 1d. 399, recognised in *Charlesworth* v. *Ellis*, 14 Law J., N. S., Q. B., 331. And see Vol. 1, p. 165.

(*m*) See the form of the entry, Chit. Forms, 326.

(*n*) See per *Patteson*, J., *Griffiths* v. *Liversedge*, 2 Dowl. 143.

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Filing of warrant.

By rule of all the courts, "no judgment shall be signed upon any warrant authorizing any attorney to confess judgment, without such warrant being delivered to and filed by the clerk of the dockets, or Master in the Exchequer, (now in each of the courts one of the Masters), who is to file the same in the order in which they are received (*o*)." A non-compliance with this rule will render the judgment irregular. The original must be filed. The mere fact, however, of a copy having been filed instead of the original, will not be sufficient to support an application to set aside a judgment signed eight years before. It is necessary for those who seek to set it aside to shew further some omission or default, as regards the filing, in the party to whom it was given, or his attorney (*p*). And it seems that if the original was omitted to be filed through a mistake of the officer, the judgment would not be avoided. As to the obtaining leave to sign judgment on a copy of the warrant, see *ante*, 870.

Effect of release of errors.

Writ of Error.]—The warrant, as already mentioned, (*ante*, 852), authorizes the attorney to execute a *release of errors;* and if the defendant, notwithstanding, bring a writ of error upon the judgment, or upon a judgment in *scire facias* to revive that judgment (*q*), the Court, upon application, would probably quash the writ.

Execution on, &c.

Execution, &c.]—The observations already made as to executions in ordinary cases will be, for the most part, applicable to execution on warrant of attorney, (*ante, Vol.* 1, *p.* 526).

When it may be issued.

In considering the practice as to when the judgment may be signed, we have already mentioned several points as to the execution thereon (*r*). In general, as soon as judgment is signed, the plaintiff may immediately sue out execution as in ordinary cases, unless prevented doing so by the terms of the defeasance. In some cases, where the warrant is given to indemnify the plaintiff against the payment of a debt, judgment may be signed, and execution issued for the whole amount, before he has paid it (*s*). Where a warrant was given by two persons, and the party to whom it was given stipulated that he should not proceed hostilely against them, unless he should conceive that there was danger of their failure, it was held, that he might sue out execution immediately upon the failure of one of them (*t*). If the defeazance state that a demand must be made before execution issued, such demand must be made accordingly (*u*).

After a year and a day.

If a year and a day have elapsed from the time of signing the judgment, a *scire facias* is necessary to revive it, as in ordinary cases, before execution can be issued, unless a *scire facias* be expressly dispensed with by the terms of the warrant or defeazance, and which is generally the case. Where a defeazance to a warrant, dated the 5th of June, 1824, stated that the warrant was given to secure the payment of 420*l.*, together with costs of

(*o*) R. M., 42 Geo. 3, Q. B., 2 East, 136; R. M., 43 Geo. 3, C. P., 3 B. & B. 310: R. M., 43 Geo. 3, Exch., 8 Price, 505.
(*p*) *James* v. *Hovard*. 12 Law J., N. S., Q. B., 58; 3 Q. B. 948; 3 Gale & D. 264, *S. C.*
(*q*) *Baddeley* v. *Shafto*, 8 Taunt. 484. And see Vol. 1, p. 483.
(*r*) *Ante*, 866.
(*s*) *Barber* v. *Barber*, 3 Taunt, 465 *Duke* v. *Watchorn*, 1 Dowl., N. S., 265; 11 Law J., N. S., 53, Q. B., *S. C.*: *Kirk* v. *Scott*, 1 Dowl., N. S., 267. And see *ante*, 867.
(*t*) *Partridge* v. *Fraser*, 7 Taunt. 307.
(*u*) *Ante*, 867.

judgment if signed, on the 5th December, 1826; that the plaintiffs might enter up judgment at their pleasure; and that, in case of default in payment as aforesaid, they might issue execution and levy for the said sum, or so much thereof as should remain unpaid; and judgment was signed on the 27th of May, 1825; the Court held that an execution issued in February, 1827, without first suing out a *sci. fa.*, was regular, as the plaintiffs were restrained by the defeazance from issuing execution before the 5th December, 1826 (*x*).

In what amount.

The execution, of course, must not be indorsed to levy a greater amount than that authorized by the warrant and defeazance; otherwise the Court or a judge will set aside the execution (*y*), or, in case of a mistake, order the execution to stand only for the real amount due (*z*), or, in case of a dispute, may refer it to one of the Masters, or to a jury, to ascertain the amount. And an action might, perhaps, be supported against the plaintiff (*a*). Where the defeazance stated that the warrant was given for the purpose of securing a specific sum, and the plaintiff, nevertheless, issued execution for a further sum, the Court, at the instance of the assignees of the defendant, who became bankrupt after the execution was executed, ordered the plaintiff to refund such last-mentioned sum, although the plaintiff swore that it was understood between him and the defendant, at the time of the execution of the warrant, that the warrant was given as a security for it (*b*). The Court will stay proceedings in a *sci. fa.* on a judgment on a warrant of attorney, on a suggestion that matters occurred before the signing of the judgment from which it would appear that nothing was due to the plaintiff, and refer the case to the Master to report (*c*). Where a warrant was given for securing the payment of an annuity, and upon default made in the payment of the annuity the plaintiff sued out execution and arrested the defendant for the amount of the penalty, the Court set aside the execution, and ordered the defendant to be discharged, as the defeazance authorized the plaintiff to take out execution merely for the arrears (*d*). But, where a warrant was given to a surety, and the defeazance, after reciting that the warrant was given to secure the plaintiff from all responsibility, and to give him the means of providing for the payment of the bills for which he was surety, empowered him "at any time, or from time to time, to take out execution for the whole or any part of the amount," the Court held that he might at any time take out execution for the whole of the amount of the bills, and that he was not confined to the sum which had then become due in respect of them (*e*). Where a warrant was given for the payment of money by instalments, and by the terms of the defeazance the plaintiff was to be at liberty to enter up judgment immediately, "but no execution to be issued until default made

(*x*) *Hiscocks* v. *Kemp*, 3 Ad. & Ell. 676.

(*y*) See *Tilby* v. *Best*, 16 East, 165: *Amery* v. *Smallridge*, 2 W. Bla. 760. See *ante*, 542.

(*z*) See Vol. 1, p. 543.

(*a*) *Wentworth* v. *Bullen*, 9 B. & C. 840.

(*b*) *Bell* v. *Thid.* 9 Dowl. 949.

(*c*) *Greenslade* v. *Vaughan*, 8 Dowl. 687.

(*d*) *Tilby* v. *Best*, 16 East, 163. The plaintiff, in such a case, should sue out execution for the amount of the penalty, because the writ of execution must strictly pursue the judgment, but should indorse it to levy the amount of arrears only. (Vol. 1, p. 534).

(*e*) *Duke* v. *Watchorn*, 11 Law J., N. S., Q. B., 53; 1 Dowl., N. S., 265, *S. C.* And see *Kirk* v. *Scott*, 1 Dowl., N. S., 267.

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in payment of the said sum of 1402*l.* 18*s.* 8*d.*, with interest as aforesaid, by the instalments and in the manner hereinbefore mentioned," the Court held, that the plaintiff, upon a fair construction of the above terms of the defeazance, was at liberty to sue out and execute a writ of execution for the entire sum, upon default in payment of any one of the instalments (*f*). In such or similar cases, where the sum secured by the warrant is payable by instalments, and default is made, the defendant, if already in custody, may be charged in execution for each of those defaults as they are made, without any leave of the Court or a judge (*g*). The plaintiff may also, on each default made, have and execute a fresh execution, if the terms of the warrant expressly authorize it, otherwise not; and in that case, if he have been once taken in execution and discharged, the judgment is satisfied, and the only remedy would be in equity (*h*). Where the warrant was given with a defeazance stating it to be given as a security for a certain sum, and interest thereon, the Court held that it was to be construed as a continuing security, and not merely as a security for money then due (*i*). Where a warrant made no mention of interest on the principal, but the defeazance did, the Court allowed execution to be issued for the principal and interest (*k*).

After a change of parties by death, &c.

If there has been a change of the parties to the judgment, a *scire facias* is necessary to make the fresh parties parties to the proceedings, before execution can be issued, the same as in ordinary cases.

Suggestions of breaches, and *sci. fa.* under 8 & 9 W. 3, c. 11, unnecessary.

Although a warrant of attorney be given to secure the payment of an annuity, or of a sum of money by instalments, or the like, it seems a *scire facias* is not necessary, previous to suing out execution for every periodical payment or instalment, as would be the case if a bond only had been given; for the stat. 8 & 9 *W.* 3, *c.* 11, *s.* 8, which requires suggestions of breaches and the *scire facias* in such cases (*l*), does not extend to warrants to confess judgment on a *mutuatus*, even when given merely as a collateral security with a bond (*m*).

Execution in case of bankruptcy, &c.

As to how far an execution under a warrant of attorney is or is not available in case of the bankruptcy or insolvency of the defendant, see *Vol.* 1, *p.* 585.

Setting aside execution for breach of faith, &c.

If the execution be issued against good faith, the same may be set aside. But where a party gives a warrant of attorney to another without consideration, in order that the latter may protect the goods of the former from execution, and judgment is signed and execution issued against good faith, the Court will not, it seems, interfere (*n*). The observations already made, (*Vol.* 1, *p.* 566), as to setting aside executions in general for irregularity, will be here applicable.

(*f*) *Leveridge* v. *Forty*, 1 M. & Sel. 706. And see *Rose* v. *Tomblinson*, 3 Dowl. 49; *ante*, 847: *Gowlett* v. *Hanforth*, 2 W. Bla. 957.

(*g*) *Davis* v. *Gompertz*, 2 Dowl. 407.

(*h*) See *Atkinson* v. *Bagster*, 1 Bing., N. S., 444; 1 Hodges, 7, *S. C.*

(*i*) *Woolley* v. *Jennings*, 5 B. & C. 165; 7 D. & R. 824, *S. C.* And see *Stoveld* v. *Hoole*, 12 Moore, 370; 4 Bing. 154, *S. C.*

(*k*) *Chalk* v. *Watton*, 1 D. & L. 39: *Shipton* v. *Shipton*, 1 Dowl. 518.

(*l*) See *post*, Chap. V. of this Part.

(*m*) *Austerbury* v. *Morgan*, 2 Taunt. 195. See per *Littledale*, J., in *James* v. *Thomas*, 5 B. & Ad. 41.

(*n*) *Ante*, 860.

CHAPTER III.

JUDGMENT BY JUDGE'S ORDER.

The order for judgment.

It has become the practice of late in actions for a debt, where the defendant has no defence to the action, instead of suffering at once a judgment by default, with the consent of both parties to obtain a judge's order for the staying of proceedings, with a condition that final judgment shall be signed, and execution issued, in the event of the debt and costs not being paid within a certain time. There can be no doubt of a judge's power to make such an order (*a*), provided both parties consent to it, otherwise not (*b*). Such consent on the plaintiff's part is expressed by his or his attorney's attendance before the judge. As to the consent on the defendant's part, the judges of all the courts, on the 12th June, 1845, promulgated as a recommendation the following precautionary steps to be taken as the means best calculated to prevent parties from fraudulently obtaining these orders; viz.—"That all written consents, upon which such orders are obtained, shall be preserved in the chambers of the respective courts. That, in actions where the defendant has appeared by attorney, no such order be made unless the consent of the defendant be given by his attorney or agent. That, where the defendant has not appeared, or has appeared in person, no such order be made unless the defendant attends the judge and gives his consent in person, or unless his written consent be attested by an attorney acting on his behalf; but we think that these precautions are unnecessary where the defendant is a barrister, conveyancer, special pleader, or attorney." This consent on the defendant's part much resembles a *cognovit*, but it is not one; and it does not require to be attested by an attorney, nor need an attorney be present, according to the provisions of the 1 & 2 *Vict. c* 110, *s.* 9 (*c*)), nor does it require a stamp (*d*).

Stay of proceedings.

The order does not operate as a stay of proceedings during the time given by it for the payment of the debt and costs, unless it expressly orders it (*e*).

Judgment and execution.

If the debt and costs be not paid according to the terms of the order, judgment may be signed and execution issued. The judgment, as expressed in the order, is a final one. As on a judgment by *cognovit*, "an appearance must be entered before signing it, or it may be set aside for irregularity, on an application made in due time (*f*). The costs are frequently agreed

(*a*) See per *Parke*, B., in *Baker* v. *Flower*, 8 M. & W. 671.

(*b*) *Kirby* v. *Ellison*, 2 Dowl. 219; 2 C. & M. 315; 4 Tyr. 239, *S. C.*: *Reynolds* v. *Sherwood*, 3 Dowl. 183.

(*c*) *Ante*, 847: *Brooks* v. *Hodgson*, 3 Scott, N. R., 223: *Baker* v. *Flower*, *supra*: *Bray* v. *Manson*, 6 M. & W. 668: 9 Dowl. 748, & C.: *Thorne* v. *Neale*, 2 G. & D. 48; 2 Q. B. 726, *S. C.*: *Stevens* v. *Miller*, 3 M. & G. 223.

(*d*) *Bray* v. *Manson*, *supra*.

(*e*) *Michael* v. *Myers*, 13 Law J., N. S., C. P., 15; 6 M. & Gr. 702, *S. C.*

(*f*) See *Hackin* v. *Hassells*, 1 D. & L. 1006; 12 M. & W. 776, *S. C.*; and *ante*, Vol. 1, p. 169.

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on; if not so, they must be taxed in the usual manner, the same as on a *cognovit;* as to which, see *ante*, 849. As to the mode of signing the judgment, this is much the same as on a *cognovit. Make an incipitur of the declaration on plain paper, (then termed the judgment paper); take it and the order to one of the Masters, who will sign judgment* (*g*). The execution is the same as in ordinary cases.

Setting aside order, &c.

If there be any fraud practised on the defendant in obtaining the order, the order, and any proceedings had under it, may be set aside (*h*). Even without such fraud, the Court may, it seems, under very special circumstances, set aside the order, and, upon terms, let the defendant in to defend the action (*i*).

Not revoked by marriage.

If the order was given by a woman *dum sola*, it will not be revoked by her marriage (*k*).

(*g*) See a form of judgment stating the order and defendant's default, Chit. Forms, 318.

(*h*) See *Thorne* v. *Neale*, 2 A. & E., N. S., 726.

(*i*) *Wade* v. *Simeon*, 13 M. & W. 647; 2 D. & L. 658, S. C.

(*k*) *Thorpe* v. *Argles*, 5 Jur. 602, B. C.

CHAPTER IV.

JUDGMENT BY DEFAULT.

What, and in what Cases, 879.
When signed, 880.
How signed, 880.
Costs of, 881.
Execution on, 881.
Setting aside or waiving irregular Judgment, 881.
Setting aside regular Judgment on Terms, 883.

What, and in what cases.

What, and in what Cases.]—WHEN a defendant hath a day certain given him in court, and is then demandable, and being demanded doth not appear, the Court thereupon give judgment against him by default (*a*).

The defendant allows judgment to go by default to the whole or part of the cause of action, either intentionally, or through mistake or neglect: intentionally, where he has no merits, or when he does so according to a previous agreement with the plaintiff; through mistake, when he puts in a plea, or rejoinder, &c., so informal or defective, that it is treated as a nullity; and through neglect, when perhaps he has merits, but he neglects to plead, rejoin, &c. within the time limited by the rules of court for that purpose. This is also an implied confession of the action.

Nil dicit.

Non sum informatus.

Judgment by default is either by *nil dicit*, that is, where the defendant is stated to have appeared, but to have said nothing in bar or preclusion of the action; or by *non sum informatus*, where he is said to appear by attorney, but the attorney says that he is not informed by the defendant of any answer to be given. The latter is used only in cases where judgment is entered in pursuance of a previous agreement between the parties; the former, where the defendant has not pleaded within the time limited by the rules of the court, or in a proper manner (*b*). As to judgment for want of a plea, see *ante*, 262, &c. As to judgment for want of a rejoinder, rebutter, &c., see *ante*, 279.

Default at trial.

If the defendant make default at the trial, this is not such a default as will entitle the plaintiff to sign judgment; but he must proceed regularly to verdict and judgment, in the same manner as if the action were defended.

Venire, where default as to part.

Where judgment by default is signed as to *part*, and issue is joined as to the residue, a special *venire* is always awarded, *tam ad triandum quam ad inquirendum*, as well to try the issue as to inquire of the damages; and the jury who try the issue in that case assess the damages for the whole (*c*).

(*a*) Mervice v. Green, 3 Salk. 213.
(*b*) See forms of judgment by *non sum informatus*, Chit. Forms, 325.
(*c*) 11 Co. 5. See the form of the award of the *venire*, Chit. Forms, 49.

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As to some of several defendants.

So, where there are several defendants, if some let judgment go by default, and others plead to issue, a similar special *venire* should be awarded, and the jury who try the issue should assess the damages against all the defendants (*d*). But in actions where the plea of one defendant enures to the benefit of all, as in actions *ex contractu* (*e*), if the plaintiff fail of obtaining a verdict against those who have pleaded, he cannot have damages assessed against the others who let judgment go by default; for, the contract being entire, the plaintiff must succeed against all the defendants or none (*f*). In actions *ex delicto*, on the contrary, if the plaintiff do not succeed against the defendants who plead, he may still have his damages assessed against those who allowed judgment to go by default (*g*), (unless the plea of those who pleaded prove that the plaintiff could have no cause of action against any of them (*h*)), for the tort is several as well as joint (*i*).

The judgment, when interlocutory or final.

Judgment by default is *interlocutory* in *assumpsit*, covenant, trespass, case, and replevin, where the sole object of the action is damages; but in debt and ejectment, damages not being the principal object of the action, and those usually recoverable not being of sufficient consequence to warrant the expense of executing a writ of inquiry, the plaintiff usually signs *final* judgment in the first instance. But even in debt the plaintiff must, as we shall hereafter see, in some instances in actions on bonds, execute an inquiry; and sometimes, though not necessary, it may be advisable for him to execute it (*k*).

When signed.

When signed.]—Judgment for want of a plea cannot be signed until the defendant is fully before the court. And if it be signed without an appearance entered, it may be set aside for irregularity (*l*). As to the time when judgment may be signed for want of a plea, (see *ante*, 262, 263). The judgment may be signed in vacation (*m*), but not on a *dies non* (*n*).

How signed.

How signed.]—*An appearance for the defendant must be entered in all cases before judgment can be regularly signed* (*o*). If the judgment is to be interlocutory merely (*p*), *make an incipitur of the declaration on plain paper, and an incipitur on a roll, which you may get at a stationer's; take them to the Master's Office, and one of the Masters will sign the judgment* (*q*). *Having signed interlocutory judgment, you may proceed to sue out and execute a writ of inquiry or obtain a rule to compute, (as the case may be), as directed in the next two chapters.* If the judgment is to be final, *make an incipitur of the declaration on*

(*d*) 11 Co. 51 *Dicker* v. *Adams*, 2 B. & P. 163. See the form of the award of the *venire*, Chit. Forms, 46.

(*e*) *Morgan* v. *Edwards*, 6 Taunt. 396: *Porter* v. *Harris*, 1 Lev. 63: *Bouter* v. *Ford*, 1 Sid. 76: Ca. Pr. C. B. 107: Pr. Reg. 102: *Hannay* v. *Smith*, 3 T. R. 662.

(*f*) *Alitter* in some cases, as in another action after plea in abatement for non-joinder, (*ante*, 807), or in actions against executors or administrators (*post*). See a form of judgment in such a case, Chit. Forms, 323, 324.

(*g*) *Jones* v. *Harris*, 2 Str. 1101: *Cressey* v. *Webb*, Id. 1222.

(*h*) *Biggs* v. *Benger*, 2 Ld. Raym. 1372; 1 Str. 610, S. C.; 8 Mod. 217.

(*i*) See form of judgment in such a case, Chit. Forms, 324.

(*k*) See *post*, 886.

(*l*) See Vol. 1, p. 165.

(*m*) R. T., 29 Car. 2, r. 5.

(*n*) *Harrison* v. *Smith*, 9 B. & Cres. 543.

(*o*) See *ante*, 165.

(*p*) *Supra*.

(*q*) See the various forms of the entries of judgment by default, Chit. Forms, 320 to 326. And see the form of the jury process in these latter cases, where judgment by default is only as to part or by one defendant. (Chit. Forms, 73).

plain paper, and an incipitur on a roll; take the judgment paper and roll to the Master's Office, and one of the Masters will sign judgment, and tax the costs, and mark them on the judgment paper (*r*). *The costs are taxed as in other cases.* No rule for judgment is necessary. If judgment is to be signed for want of a rejoinder or rebutter, &c., see the course to be adopted as to striking out the previous pleadings, &c., *ante*, *Vol.* 1, *p.* 279, 280. If the nature of the case requires that the pleadings down to this default should continue on the record, they ought to be retained (*s*). See further as to judgments, *ante*, *Vol.* 1, *p.* 457, &c.

Costs.

Costs.]—The plaintiff is entitled to his full costs, upon judgment by default, in all cases where he would be entitled to damages if he obtained a verdict, by the *stat. Gloucester;* and this, although the damages given by the inquest upon the writ of inquiry be less than 40*s.*, unless in actions of trespass and trespass on the case; for the statutes upon that subject, excepting the 3 & 4 *Vict. c.* 24, extend to damages given by a jury only, and not to those given by an inquest (*t*). See further as to costs, *post*, *Part* 5, *ch.* 31.

Execution.

Execution.]—The execution on a judgment by default is, in general, the same as in ordinary cases (*u*). In actions of debt, within the statute 8 & 9 *W.* 3, *c.* 11, *s.* 8, such as on a bond for the performance of covenants, for the payment of money by instalments, or of an annuity, or the like (*x*), if the defendant suffer judgment to go by default, although in strictness this is a *final* judgment, and entered up for the entire penalty of the bond, yet the plaintiff cannot sue out execution for the sum recovered by the judgment, but he must *suggest breaches* upon the roll, from time to time, as they occur, and execute a *writ of inquiry*, in order to assess damages on them (*y*).

Setting aside or waiving irregular judgment.

Setting aside or waiving irregular Judgment.]—If the judgment itself be *irregularly* signed, or if any of the previous proceedings upon the part of the plaintiff be irregular, and the irregularity be not waived by any act of the defendant, or if judgment be signed when, in fact, the defendant has not been guilty of any default, or if it be signed against good faith (*z*), the Court on motion, or a judge on summons, will set it aside, or stay the proceedings, so as to give the defendant an opportunity to move the Court for that purpose.

Time for making application.

The application, like other applications to set aside proceedings for irregularity, should be made within a reasonable time, and, at all events, not after the defendant has taken any fresh step after the knowledge of the irregularity (*a*). In general, the time for making the application begins to run from the time that defendant became acquainted of the judgment being signed, and he cannot as of course delay the application until a

(*r*) See the form of the entry of judgment in debt, &c., Chit. Forms, 320.
(*s*) *Lawes* v. *Shuter*, 5 Q. B. 322.
(*t*) *Petre* v. *Petersy*, 5 T. R. 152.
(*u*) See *ante*, 598, 622.
(*x*) See *post*, Ch. 5.
(*y*) See Ibid.
(*z*) See *Gould* v. *Whitehead*, 8 Scott, 340: *Cash* v. *Wells*, 1 B. & Ad. 375; and 13 Price, 489.
(*a*) R. H., 2 W. 4, r. 33. See *post*, Part 5, Ch. 16.

PART II.

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So, where there are several defendants, if some let judgment go by default, and others plead to issue, a similar special *venire* should be awarded, and the jury who try the issue should assess the damages against all the defendants (*d*). But in actions where the plea of one defendant enures to the benefit of all, as in actions *ex contractu* (*e*), if the plaintiff fail of obtaining a verdict against those who have pleaded, he cannot have damages assessed against the others who let judgment go by default; for, the contract being entire, the plaintiff must succeed against all the defendants or none (*f*). In actions *ex delicto*, on the contrary, if the plaintiff do not succeed against the defendants who plead, he may still have his damages assessed against those who allowed judgment to go by default (*g*), (unless the plea of those who pleaded prove that the plaintiff could have no cause of action against any of them (*h*)), for the tort is several as well as joint (*i*).

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When signed.

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How signed.

How signed.]—*An appearance for the defendant must be entered in all cases before judgment can be regularly signed* (*o*). If the judgment is to be interlocutory merely (*p*), *make an incipitur of the declaration on plain paper, and an incipitur on a roll, which you may get at a stationer's; take them to the Master's Office, and one of the Masters will sign the judgment* (*q*). *Having signed interlocutory judgment, you may proceed to sue out and execute a writ of inquiry or obtain a rule to compute, (as the case may be), as directed in the next two chapters.* If the judgment is to be final, *make an incipitur of the declaration on*

(*d*) 11 Co. 5: *Dicker* v. *Adams*, 2 B. & P. 163. See the form of the award of the *venire*, Chit. Forms, 46.

(*e*) *Morgan* v. *Edwards*, 6 Taunt. 398: *Porter* v. *Harris*, 1 Lev. 63: *Bouter* v. *Ford*, 1 Sid. 76: Ca. Pr. C. B. 107: Pr. Reg. 102: *Hannay* v. *Smith*, 3 T. R. 662.

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(*g*) *Jones* v. *Harris*, 2 Str. 1101: *Cressey* v. *Webb*, 1d. 1222.

(*h*) *Biggs* v. *Benger*, 2 Ld. Raym. 1372; 1 Str. 610, *S. C.*; 8 Mod. 217.

(*i*) See form of judgment in such a case, Chit. Forms, 324.

(*k*) See *post*, 866.

(*l*) See Vol. 1, p. 165.

(*m*) R. T., 29 Car. 2, r. 5.

(*n*) *Harrison* v. *Smith*, 9 B. & Cres. 243.

(*o*) See *ante*, 165.

(*p*) *Supra.*

(*q*) See the various forms of the entries of judgment by default, Chit. Forms, 320 to 326. And see the form of the jury process in these latter cases, where judgment by default is only as to part or by one defendant. (Chit. Forms, 73).

plain paper, and an incipitur on a roll; take the judgment paper and roll to the Master's Office, and one of the Masters will sign judgment, and tax the costs, and mark them on the judgment paper (*r*). *The costs are taxed as in other cases.* No rule for judgment is necessary. If judgment is to be signed for want of a rejoinder or rebutter, &c., see the course to be adopted as to striking out the previous pleadings, &c., *ante, Vol.* 1, *p.* 279, 280. If the nature of the case requires that the pleadings down to this default should continue on the record, they ought to be retained (*s*). See further as to judgments, *ante, Vol.* 1, *p.* 457, &c.

Costs. Costs.]—The plaintiff is entitled to his full costs, upon judgment by default, in all cases where he would be entitled to damages if he obtained a verdict, by the *stat. Gloucester;* and this, although the damages given by the inquest upon the writ of inquiry be less than 40*s.*, unless in actions of trespass and trespass on the case; for the statutes upon that subject, excepting the 3 & 4 *Vict. c.* 24, extend to damages given by a jury only, and not to those given by an inquest (*t*). See further as to costs, *post, Part* 5, *ch.* 31.

Execution. Execution.]—The execution on a judgment by default is, in general, the same as in ordinary cases (*u*). In actions of debt, within the statute 8 & 9 *W.* 3, *c.* 11, *s.* 8, such as on a bond for the performance of covenants, for the payment of money by instalments, or of an annuity, or the like (*x*), if the defendant suffer judgment to go by default, although in strictness this is a *final* judgment, and entered up for the entire penalty of the bond, yet the plaintiff cannot sue out execution for the sum recovered by the judgment, but he must *suggest breaches* upon the roll, from time to time, as they occur, and execute a *writ of inquiry*, in order to assess damages on them (*y*).

Setting aside or waiving irregular judgment. Setting aside or waiving irregular judgment.]—If the judgment itself be *irregularly* signed, or if any of the previous proceedings upon the part of the plaintiff be irregular, and the irregularity be not waived by any act of the defendant, or if judgment be signed when, in fact, the defendant has not been guilty of any default, or if it be signed against good faith (*z*), the Court on motion, or a judge on summons, will set it aside, or stay the proceedings, so as to give the defendant an opportunity to move the Court for that purpose.

Time for making application. The application, like other applications to set aside proceedings for irregularity, should be made within a reasonable time, and, at all events, not after the defendant has taken any fresh step after the knowledge of the irregularity (*a*). In general, the time for making the application begins to run from the time that defendant became acquainted of the judgment being signed, and he cannot as of course delay the application until a

(*r*) See the form of the entry of judgment in debt, &c., Chit. Forms, 320.
(*s*) *Lawes* v. *Shaw*, 5 Q. B. 322.
(*t*) *Petre* v. *Petrey*, 5 T. R. 132.
(*u*) See *ante*, 526, 622.
(*x*) See *post*, Ch. 5.
(*y*) See Ibid.
(*z*) See *Gould* v. *Whitehead*, 8 Scott, 340: *Cash* v. *Wells*, 1 B. & Ad. 375; and 13 Price, 489.
(*a*) R. H., 2 W. 4, r. 33. See *post*, Part 5, Ch. 16.

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rule to compute is served (*b*); nor can he make the application after inquiry executed, unless, indeed, he had no notice of such inquiry (*c*). Nor can he make it after execution executed, unless, indeed, until then he had no notice of the judgment, which may often be the case where it is signed in an action of debt for want of a plea. Where notice of inquiry was given on the 4th for the 12th, and the application to set aside the judgment for irregularity was not made until the 12th, the day on which the inquiry was to be executed, the Court held it was too late (*d*). And where judgment for want of a plea was signed on the 4th April, and a summons taken out for setting it aside was discharged on Friday the 23rd, execution was issued on the 27th, and on the 28th the defendant moved the court to set aside the judgment for irregularity, it was held that the application was too late; that it ought to have been made on the 24th, or, at latest, on Monday the 26th (*e*). Where the irregularity was in the entering of the rule to plead, it was held, that the application might be made on the day after that on which the notice of executing the writ of inquiry was served (*f*).

As to the time for applying to set aside the judgment where the irregularity was in there being no service of the writ of summons, see *ante*, 161; in the appearance, *ante*, 169; in the declaration, *ante*, 202. For other points as to the time within which the application should be made, and which affect applications to set aside proceedings in general for irregularity, see *post*, *Pt. 5, ch.* 16.

Waiver of irregularity.

An irregularity in signing the judgment may be waived, as in other cases. Taxing costs and signing final judgment are considered as contemporaneous acts; and, therefore, the attendance of the defendant or his attorney before the Master on taxing costs is, in general, an admission that the judgment was properly signed, and it cannot afterwards be objected to as having been signed too soon (*g*). Attending the execution of a writ of inquiry will be a waiver of any irregularity in the judgment (*h*). See further as to waiving an irregularity, *post*, *Pt. 5, ch.* 16.

Form of summons, &c

The rule *nisi* or summons should specify the irregularity complained of, and the defendant will not be allowed to go into any matter not so specified (*i*).

Affidavit.

The affidavit in support of the application must distinctly state that judgment has been signed; it is not sufficient to state that a rule to compute has been served on the defendant (*k*). For other points as to the form of an affidavit to set aside proceedings in general for irregularity, see *post*, *Pt. 5, ch.* 16.

Costs and

The application, if granted, will, in general, be so *with costs*,

(*b*) *Grant* v. *Flower*, 5 Dowl. 419: *Mann* v. *Duncombe*, 8 Jur. 539, C. P.: *Anderson* v. *Harrison*, 8 Jur. 603, B. C.

(*c*) *Fraas* v. *Paravicini*, 4 Taunt. 545: *Gillingham* v. *Waskett*, M'Clel. 568: *Doe Antrobus* v. *Jepson*, 3 B. & Adol. 402.

(*d*) *Scott* v. *Cogger*, 3 Dowl. 212. And see *Smith* v. *Clarke*, 2 Dowl. 218: *Finley* v. *Hallett*, Id. 708: *Cox* v. *Tullock*, Id. 478. *Sed vide Hill* v. *Mills*, Id. 696: *semb. contrà.*

(*e*) *Shield* v. *Quick*, 8 M. & W. 289. And see *Weedon* v. *Garcia*, 2 Dowl., N. S., 64, where the defendant became a bankrupt, and the application was by his assignees.

(*f*) *Amory* v. *Smith*, 7 Dowl. 666.

(*g*) Tidd, 9th ed., 930; *Blackburn* v. *Kymer*, 5 Taunt. 672, 1 Marsh. 278, *S. C.*: *Butler* v. *Bulkeley*, 1 Bing. 233; 8 Moore, 104, *S. C.*

(*h*) *Fraas* v. *Paravicini*, 4 Taunt. 545.

(*i*) See *post*, Pt. 5, ch. 16.

(*k*) *Chaney* v. *Drayton*, 6 M. & W. 17; 8 Dowl. 184, *S. C.*

terms imposed on application.

provided the defendant consents to the terms of bringing no action; but if the defendant will not consent to those terms, costs will not be given, unless a strong case for damages be shewn (*l*), or the judgment and execution were against good faith (*m*). If the terms of bringing no action be not imposed at the time of disposing of the rule, the defendant cannot afterwards be restrained from bringing an action (*n*). If costs be granted, the Court or judge may order a stay of proceedings until they are paid (*o*). If the application be by one of several defendants, the costs must be paid to him, and not to any other party (*p*). If costs are refused, the defendant cannot recover such costs as damages in an action of trespass for taking his goods under colour of the judgment (*q*). If the application be asked with costs and dismissed, the practice, in general, is to dismiss it with costs.

Plaintiff may waive the judgment.

The plaintiff, also, if he finds that he has signed the judgment irregularly, may *waive* it, by getting the Master to strike it out (*r*); and he may give notice thereof to the defendant's attorney, in order to prevent the expense of an application to the Court (*s*); and he may, it seems, do this, even after application made to set aside the judgment, provided he pay the costs incurred by the defendant in consequence of the irregularity (*t*). Where the plaintiff gives notice to the defendant of abandoning a judgment by default irregularly signed, but does not actually strike it out, the defendant need not, it seems, apply to the Court to set it aside; and, where it appeared that the defendant had not asked the plaintiff to strike out the judgment, *Littledale*, J., discharged a rule for that purpose, but without costs (*u*). If the Master refuses to strike out the judgment, a rule of court or judge's order must be obtained, authorizing him to do so. The rule for this purpose and to sign judgment anew is a rule *nisi* only (*x*).

Setting aside regular judgment on terms.

Setting aside regular Judgment on Terms.]—Even a *regular* judgment may be set aside upon an affidavit of merits, and in ordinary cases it is almost a matter of course to grant the application for this purpose (*y*). As it is wholly discretionary, however, in the Court or judge to grant it, they will not grant it in order to give the defendant an advantage of any nicety of pleading (*z*), or of any matter which does not go to the merits of the cause (*a*): for instance, in an action on an attorney's bill, that no signed bill was delivered (*b*), or a special plea of questionable matter designed to draw the plaintiff to demur (*c*).

(*l*) *Larimer* v. *Lule*, 1 Chit. Rep. 134, 238: *Wentworth* v. *Bullen*, 9 B. & C. 840, 849.

(*m*) *Cash* v. *Wells*, 1 B. & Adol. 375: *Abbott* v. *Greenwood*, 7 Dowl. 534, per Patteson, J.

(*n*) *Abbott* v. *Greenwood*, 7 Dowl. 534.

(*o*) *Wenham* v. *Darmes*, 3 Ad. & E. 450.

(*p*) *Shawler* v. *Stokes*, 2 D. & L. 2.

(*q*) *Luton* v. *Devereux*, 3 B & Adol. 343. In the case of a discharge of a defendant from arrest, the judge refused to give him costs, unless he would forego the action. (*Elliott* v. *Bevan*, 1 C. & M. 755).

(*r*) See Tidd, 9th ed., 667; R. T., 23 Car. 1, K. B., Barnes, 251.

(*s*) Imp. B. R. 494, n.

(*t*) See *post*, Pt. 5, ch. 16. And see *Beeston* v. *Beckett*, 4 M. & R. 100; Ca. Prac. C. B. 124.

(*u*) *Robinson* v. *Studdart*, 5 Dowl. 266.

(*x*) *Bennet* v. *Simons*, 2 D. & L. 96.

(*y*) *Wood* v. *Cleveland*, 2 Salk. 518: *Sided* v. *Lee*, 1 Salk. 402.

(*z*) *Forbes* v. *Middleton*, 2 Str. 1242.

(*a*) *Willet* v. *Atterton*, 1 W. Bla. 35. But see, as to Statute of Limitations, *Maddocks* v. *Holmes*, *post*, 884.

(*b*) *Beck* v. *Mordaunt*, 2 Bing. N. C. 140; 4 Dowl. 112, *S. C.*

(*c*) *Wood* v. *Cleveland*, 2 Salk. 518.

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And the Court of Common Pleas have refused to set aside a regular judgment, where it appeared that the defendant had refused to accede to equitable terms of compromise (*d*). But a plea of the Statute of Limitations is now considered a plea to the merits; and, therefore, in the Common Pleas, an interlocutory judgment was allowed to be set aside without restraining the defendant from pleading it (*e*). So, the defendant may plead bankruptcy (*f*), or infancy (*g*).

On what terms.

When a regular judgment is set aside, it is usually upon such terms as will place the plaintiff as nearly as possible in the same situation as though the action had proceeded in its regular course (*h*). The terms generally imposed are, of the defendant paying the costs of the application (*i*), pleading issuably *instanter*, (which means on the same day at all events) (*k*), taking short notice of trial (*l*); and, in some cases, especially where plaintiff has lost a trial, the defendant will be ordered to bring the money sought to be recovered, or part of it, into court (*m*); and, in all cases of regular judgment and execution, the defendant will be restrained from bringing an action.

"Merits" must be sworn to.

The affidavit of merits must, in express terms, state that the defendant has "a good defence to this action upon the merits" (*n*). It may be made either by the defendant himself or his attorney or agent, or the clerk of the attorney who has the sole management of the cause, or some person who has had such a connexion with the cause as acquaints him with its merits, and this must appear on the face of the affidavit (*o*). Where it is made by the party himself, the words "as he is *advised* and believes" are added. Where it is made by the attorney or managing clerk to the attorney, the form is, "as he is *informed* and verily believes" (*p*), or, "as he is instructed and verily believes" (*q*). An affidavit merely that the defendant is advised and believes he has "a good and meritorious defence" (*r*); or, that the defendant "hath merits and good cause of defence to this action" (*s*); or, that he "is informed and believes that he has a good, substantial, and available defence to this action" (*t*); or, that he has "merits to defend," or a good defence to the action" (*u*); or, that he has "a good and sufficient defence on the merits," not saying "to this action" (*x*), or the like, will not suffice. An affidavit by an agent, that, from the instructions he had received from the

(*d*) *Anon.*, 4 Taunt. 885.
(*e*) *Maddocks* v. *Holmes*, 1 B. & P. 228. See the prior cases of *Forbes* v. *Middleton*, 2 Stra. 1242; *Willett* v. *Atterton*, 1 W. Bla. 35.
(*f*) *Evans* v. *Gill*, 1 B. & P. 52; Tidd, 9th ed., 568.
(*g*) *Delafield* v. *Tanner*, 5 Taunt. 856; 1 Marsh. 391, *S. C.*
(*h*) See *Anon.*, 3 Doug. 431: *Smith* v. *Blundell*, 1 Chit. Rep. 228. And see *Picker* v. *Webster*, Id. 232.
(*i*) *Sisted* v. *Lee*, 1 Salk. 402. See *Prudhoe* v. *Armstrong*, Barnes, 256.
(*k*) Tidd, 9th ed., 567.
(*l*) *Matthews* v. *Stone*, Barnes, 242.
(*m*) *Welland* v. *Rock*, Barnes, 243. See *Wade* v. *Simeon*, 13 M. & W. 847.
(*n*) *Lane* v. *Isaacs*, 3 Dowl. 652, and the cases *infra*. See Chit. Forms, 243.
(*o*) *Rowbotham* v. *Dupree*, 5 Dowl. 557: *Morris* v. *Hunt*, 1 Chit. Rep. 97.
(*p*) *Per Cur.*, *Bromley* v. *Gerish*, 6 M. & G. 750; 1 D. & L. 768. And see *Crossby* v. *Innes*, 5 Dowl. 566.
(*q*) *Schoffield* v. *Huggins*, 3 Dowl. 427: *Worthington* v. ——, 2 C., M., & R. 315. "Apprised and believed" will not do, *Bromley* v. *Gerish*, *supra*.
(*r*) *Bower* v. *Kemp*, 1 Dowl. 282; 8 C. & J. 287, *S. C.*
(*s*) *Lane* v. *Isaacs*, 3 Dowl. 652.
(*t*) *Page* v. *South*, 7 Dowl. 412.
(*u*) *Pringle* v. *Maraack*, 1 D. & R. 156.
(*x*) *Crossby* v. *Innes*, 5 Dowl. 566.

country, he believed that the defendant had a good defence to the action on the merits, has been held sufficient (*y*). The plaintiff cannot, in general, in answer to the affidavit of merits, be let in to make an affidavit to shew that the defendant has no merits; and if he does, and makes a long statement of it, the Court will order the Master not to allow the costs of that part of the affidavit (*z*).

(*y*) *Aringfield* v. *Huggins*, 3 Dowl. 427. per *Gurney*, B. And see per *Coleridge*, J., in 1 Dowl., N. S., 220.
(*z*) *Hume* v. *Butterworth*, 3 Dowl. 213.

CHAPTER V.

WRIT OF INQUIRY.

SECT. 1. *Writ of Inquiry in ordinary Cases*—886 *to* 900.
2. *Writ of Inquiry in Debt on Bond*—901 *to* 909.

SECT. 1.

Writ of Inquiry in ordinary Cases.

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CHAP. V.

In what cases necessary.

In what Cases necessary, &c.]—When the judgment is interlocutory merely, (which is always the case in *assumpsit*, covenant, case, trespass, and replevin, the sole object of those actions being *damages* (*a*)), the plaintiff's title to damages is thereby established; but the amount of the damages yet remains to be ascertained. This is usually done by a writ of inquiry. As the inquest, however, is merely for the purpose of informing the conscience of the Court, the Court themselves may, in all cases, if they please, assess the damages, and thereupon give final judgment (*b*); and it is accordingly the practice, in actions upon bills of exchange and promissory notes (*c*), or bankers' cheques (*d*), to refer it to one of the Masters to compute the amount of principal and interest due on the instrument, without a writ of inquiry; and the same in an

(*a*) See *ante*, 880.

(*b*) *Bruce* v. *Rawlins*, 3 Wils. 61: *Thelluson* v. *Fletcher*, 1 Doug. 316, n.; 1 Esp. 13, *S. C.*: *Gould* v. *Hammersley*, 4 Taunt. 148.

(*c*) *Shepherd* v. *Charter*, 4 T. R. 275; 2 Saund. 107, n. (2): *Eyre* v. *Bank of England*, 1 Bligh, 582. And in *Goldsmid* v. *Tuite*, 2 B. & P. 55, the Court referred it to the prothonotary to compute principal, interest, *exchange*, *re-exchange*, and costs, but not charges and expenses. But in *Napier* v. *Schneider*, (12 East, 419), the court refused to direct the Master to allow *re-exchange* on a bill drawn in Scotland upon and accepted by the defendant in England. And see *Kendrick* v. *Lomax*, 2 Tyrw. 447; 2 Dowl. 240.

(*d*) *Rosekrtt* v. *Webb*, H. T., 1839, Exch.: *Bentham* v. *Chesterfield*, 5 Scott, 417.

action on an award (*e*), and in an action of covenant for non-payment of a sum certain (*f*) as for non-payment of money lent upon mortgage (*g*), or for non-payment of rent upon a lease (*h*), or for the arrears of an annuity (*i*), or the like. But when the computation of damages is not a mere *matter of calculation* of figures, the Court will not refer it to one of the Masters, but will put the plaintiff to sue out his writ of inquiry: thus, in an action on a bill of exchange for foreign money (*k*), or on a foreign judgment (*l*), or on a bond to save harmless (*m*), or on a covenant to indemnify (*n*), or on a bottomry bond (*o*), or for calls due on railway shares (*p*), and even in an action upon a judgment recovered on a bill of exchange where interest is sought for (*q*), or in *assumpsit* for a sum certain due upon an agreement (*r*), the Court have refused to refer it to the Master. In cases where the Court will refer it, as when the action is on a bill of exchange or other matter where the damages are merely the subject of calculation, it is necessary that this appear upon the face of the declaration, and not be mere matter of evidence (*s*). And if one of several counts contain matters of this kind, you can, after a judgment by default, have it referred to the Master to compute the damages upon that count, upon your entering a *remittitur damna* as to the others (*t*); but not after payment has been made generally on account (*u*).

In case of judgment by default as to part.

But if there be judgment by default as to part, and issue joined as to the residue, or if some of several defendants suffer judgment by default, and others plead to issue, a writ of inquiry is never executed; but a special *venire*, as well to try the issues as to inquire of the damages, is awarded, and the jury who try the issues will assess the damages for the whole (*x*). So, if there be a demurrer to one count, and issue in fact joined on the other, a special *venire* may issue as above mentioned (*y*); or the plaintiff, after he has obtained judgment on the demurrer, may execute an inquiry as to that count, and enter a *nolle prosequi* as to the other (*z*); and he may enter the *nolle prosequi* after the damages have been assessed, provided he do so before final judgment (*a*). Or if there be a demurrer as to part, and judgment by default as to the residue,

(*e*) Higgins v. ———, Tidd, 9th ed., 571.

(*f*) Thelluson v. *Fletcher*, 1 Doug. 316; 1 Esp. 70, S. C.; *Wingfield* v. *Cleverley*, 13 Price, 28.

(*g*) *Bertlon* v. *Strust*, 8 T. R. 326.

(*h*) *Brown* v. *Johnson*, 8 T. R. 410: *Compton* v. *Cruxshay*, 6 Taunt. 356; 2 Marsh. 58, S. C.

(*i*) *Mowry* v. *Hill*, 2 Chit. Rep. 32.

(*k*) *Mennell* v. *Maccarcone*, 5 T. R. 87.

(*l*) *Nonin* v. *Maccarcone*, 4 T. R. 493. See *Brown* v. *O'Reilly*, 5 Dowl. 233.

(*m*) *Coats* v. *Pettit*, 2 Wils. 5.

(*n*) *Bennison* v. *Mosley*, 14 East, 622.

(*o*) Tidd, 9th ed., 571.

(*p*) *Cheltenham Railway Co.* v. *Fry*, 7 Dowl. 564.

(*q*) *Mahon* v. *Sheridan*, 8 T. R. 395: *Bishop* v. *Best*, 2 Chit. Rep. 233; 3 B. & Ald. 225, S. C. See *Blenkinsop* v. *Fiennes*, 7 T. R. 446: *Taylor* v. *Capper*, 14 East, 442: *M'Clure* v. *Duncan*, 1 East, 436: but since the 1 & 2 Vict. c. 110, this would probably be held otherwise, where the plaintiff seeks only 4*l.* per cent.

(*r*) Tidd, 9th ed., 571.

(*s*) *Osborne* v. *Noad*, 8 T. R. 648.

(*t*) *Duperoy* v. *Johnson*, 7 T. R. 473: *Heald* v. *Johnson*, 2 Smith, 46, 47, n.: *Hoard* v. *Hunt*, C. P., M., 1838: 2 Jurist, 24: *Bowden* v. *Horne*, 7 Bing. 716; 5 Moo. & P. 756, S. C.

(*u*) *Jones* v. *Shell*, 6 Dowl. 579.

(*x*) *Ante*, 879.

(*y*) See *Codrington* v. *Lloyd*, 1 Per. & D. 157; 8 Ad. & Ell. 449, S. C. And see *Wood* v. *Peyton*, 2 Dowl. & L. 441.

(*z*) *Fleming* v. *Langton*, 1 Str. 532.

(*a*) *Duperoy* v. *Johnson*, 7 T. R. 473. See *Bowden* v. *Horne*, 7 Bing. 716; 5 Moo. & P. 756, S. C.

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the plaintiff may sue out a writ of inquiry on the judgment by default, and assess contingent damages as to the demurrer; or he may proceed to obtain judgment on the demurrer in the first instance, and then execute a writ of inquiry on both judgments (*b*).

In debt generally.

In *debt*, the judgment is always *final quoad* the debt; and the damages usually sought for being very trifling, it is not, in general, proper to execute a writ of inquiry for them, but the plaintiff may at once enter up a final judgment, and sue out execution, taking under it the amount due to him. And in a recent case, where, in debt for use and occupation, the plaintiff signed final judgment for want of a plea, and issued execution without a writ of inquiry, the Court of Exchequer refused a rule to set aside the judgment, although it was moved on an affidavit that there was no rent agreed on, and that the claim was unliquidated (*c*). So, in debt for foreign money, the declaration attesting its value in English money, no writ of inquiry is necessary (*d*). So, the plaintiff may at once sign final judgment and sue out execution in debt on a bail-bond (*e*). So, in debt on a replevin bond, where the not making a return of goods distrained for rent was assigned for breach, it was holden, that the plaintiff, after signing judgment by default, might sue out execution for the amount of the goods as indorsed on the replevin bond, and of the taxed costs, without executing a writ of inquiry (*f*). But if the damages be of sufficient consequence to warrant the expense of proceeding for them, the plaintiff may either execute a writ of inquiry for them, or, where they are mere matter of calculation, may apply to have it referred to one of the Masters. Thus, in debt on a judgment of many years' standing, where the defendant allowed judgment to go by default, it was held, that the plaintiff was justified in executing a writ of inquiry, to obtain interest on his judgment by way of damages (*g*). And it seems, that in any case where the plaintiff is uncertain as to the amount of his demand, there is no objection to his signing interlocutory judgment, and executing a writ of inquiry, instead of signing final judgment in the first instance (*h*).

In debt on bond, within 8 & 9 W. 3, c. 11.

In *debt on bond*, conditioned for the payment of an annuity, or of money by instalments, or for the performance of covenants, or of an award, or of any other specific act, although judgment by default be entered up for the amount of the penalty, yet a writ of inquiry must afterwards be executed, in order to ascertain what damages the plaintiff may have actually sustained by the breach of covenant, &c. complained of (*i*). This, however, does not extend to bail-bonds, replevin bonds, bonds of petitioning creditors, or bonds for the

(*b*) See *ante*, 836: Barnes, 229.
(*c*) *Hughes* v. *Stewart*, 25th April, 1846, *semble* overruling *Weald* v. *Brown*, 2 C. & J. 673, per *Bayley*, J.: and *Arden* v. *Connell*, 5 B. & Ald. 885; 1 D. & Ry. 539, *S. C.*: and *Bale* v. *Hodgetts*, 1 Bing. 182; 7 Moore, 602, *S. C.*
(*d*) *Doran O'Reilly*, 5 Dowl. 233. And see *Bull* v. *Neale*, 1 Chit. Rep. 619.
(*e*) *Moody* v. *Pheasant*, 2 B. & P. 446.
(*f*) *Middleton* v. *Bryan*, 3 M. & Sel. 155.
(*g*) *Blackmore* v. *Fleming*, 7 T. R. 448: *M'Clure* v. *Duncan*, 1 East, 436. See *Nelson* v. *Sheridan*, 8 T. R. 395. See *ante*, 887.
(*h*) *M'Kenzie* v. *Gosford*, 5 Dowl. 403: *Bale* v. *Hodgetts*, 1 Bing. 182; 7 Moore, 602, *S. C.*
(*i*) 8 & 9 W. 3, c. 11, s. 8.

payment of a sum of money in gross, or other bonds named *post*, 902, 903.

Where the jury, on a trial at *Nisi Prius*, or before the sheriff under the 3 & 4 *W.* 4, *c.* 42, or at bar, act as an inquest—as, where they are to assess contingent damages on a demurrer, or where they are to assess damages on a judgment by default, as to some of the counts of the declaration (*k*), or where a demurrer to evidence is put in at the trial (*l*), and the jury omit to assess the contingent damages on the demurrer, or the damages on the judgment by default; or where, in trespass or replevin against an overseer of the poor, the plaintiff is nonsuit, or the defendant has a verdict, and the jury omit to inquire of the treble damages given to the defendant in such a case by stat. 43 *Eliz. c.* 2, *s.* 19 (*m*); or where, in *quare impedit*, the jury, after finding for the plaintiff, omit to inquire of the value of the living, &c. (*n*);—in all these cases, the omission of the jury to assess the damages may afterwards, upon application to the Court, be supplied by a writ of inquiry; and the same in all other cases where an attaint would not lie (*o*). But whenever an attaint (now abolished by the stat. 6 *G.* 4, *c.* 50, *s.* 60) would have lain, if the jury had assessed the damages,—as in an ordinary personal action, and the jury find a verdict for the plaintiff, but omit to assess the damages (*p*); or where issue is joined upon a plea in abatement, and the jury, upon finding for the plaintiff, omit to assess the damages (*q*),—the omission cannot be supplied by a writ of inquiry (*r*). Also, in a replevin for a distress for rent, if the jury find for the defendant, but omit to inquire of the arrears of rent, in pursuance of stat. 17 *C.* 2, *c.* 7, this omission cannot be remedied by a writ of inquiry; because the statute requires that the inquiry be made by the same jury who try the issue (*s*). And in this last class of cases the proper course is to award a *venire de novo*, as to which see *post*, *Part* 5, *ch.* 26, title "New Trial." Therefore, where, in an action for a libel, the defendant pleaded the general issue and nine special pleas, and a verdict was found for the plaintiff on the first issue and on two of the special pleas, without any damages, and for the defendant on the remaining seven pleas, and the Court, upon motion, awarded a writ of inquiry to assess the plaintiff's damages, on which judgment was entered up for the damages found on the inquisition; a writ of error being afterwards brought in the Exchequer Chamber to reverse the judgment as to the award of the writ of inquiry, that Court, holding the verdict on these

Where the jury omit to assess damages.

(*k*) See *ante*, 879, 887, and *Townshend* v. *Paul*, Barnes, 236.

(*l*) *Darvess* v. *Newbott*, Cro. Car. 143.

(*m*) *Valentine* v. *Fawcett*, Hardw. 138; 2 Str. 1221, *S. C.*: *Herbert* v. *Waters*, 1 Salk. 205; 1 L. Raym. 59, *S. C.*: *Dewell* v. *Marshall*, 2 W. Bl. 921; 3 Wils. 442, *S. C.*

(*n*) 10 Co. 118: Tidd, 9th ed., 575.

(*o*) See *Eichorn* v. *Le Maitre*, 2 Wils. 367: *Kinaston* v. *Mayor, &c. of Shrewsbury*, Hard. 295.

(*p*) *Clement* v. *Lewis*, 3 B. & B. 297; 7 Moore, 200, *S. C.*: *Pim* v. *Reid*, 6 M. & Gr. 1; 6 Scott, N. R., 1011; 1 D. & L. 512, *S. C.*

(*q*) *Ante*, 812.

(*r*) See *Eichorn* v. *Le Maitre*, 2 Wils. 367: *Pim* v. *Reid*, 6 Scott, N. R., 1011.

(*s*) *Herbert* v. *Waters*, 1 Salk. 205; 1 L. Raym. 59. *S. C.* See *Freeman* v. *Archer*, 2 W. Bl. 763.

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issues to be void, no damages having been assessed, and seeing that the plaintiff was entitled to some damages, ordered a *venire de novo* to be awarded to try the first issue, and also the last, so far as related to the two pleas on which the verdict for the plaintiff had been found (*v*).

On judgment non obstante veredicto, &c.

Where a verdict for the plaintiff is void, but the defendant's plea amounts to a confession, the Court will give judgment upon this confession, and award a writ of inquiry to ascertain the plaintiff's damages (*s*). Where the plaintiff obtains judgment *non obstante veredicto*, he may execute a writ of inquiry as of course, without applying to the Court (*y*).

Form of.

Form of, &c.]—The writ (which is a judicial one) is directed to the sheriff of the county in which the venue in the action is laid, unless otherwise ordered, (which may be the case in local actions (*z*)), stating the former proceedings in the action, and, "because it is unknown what damages the plaintiff hath sustained," commanding the sheriff or other officer having the execution of such writs, that, by the oath of twelve honest and lawful men of his county, he diligently inquire the same, and return the inquisition into court (*a*). If the writ is to be executed before a judge of assize or *Nisi Prius* (and which it may be in cases of difficulty, on obtaining a rule or order for that purpose, see *post*, 891) it is directed to both the judge of assize or *Nisi Prius* and the sheriff, the judge in such case being deemed an assistant to the sheriff.

Teste.

It is tested on the day on which it is issued, in actions within the Uniformity of Process Act (2 *W.* 4, *c.* 39, *s.* 11), which enacts, that all necessary proceedings to judgment and execution may be had in vacation (*b*). Before that act it must, in all cases, have been tested in term time.

Return.

Formerly it must have been returnable in term; but now, by stat. 1 *W.* 4, *c.* 7, *s.* 1, reciting that "the judgment and execution in actions brought in his Majesty's courts of law at Westminster are often delayed by reason of the interval between the terms," "for the prevention of such delay," it is enacted, "that any writ of inquiry of damages to be issued in or by either of the said courts, by whatever form of process the action may have been commenced, may be made *returnable* and be *returned on any day certain*, in *term* or *vacation*, to be named in such writ, and such writ shall be as valid and effectual as if the same had been returnable according to the course of the common law." The return-day is usually the day after that on which it is intended to execute the writ. It must not be before that day.

Must include

The writ must be against all the defendants, jointly, who

(*v*) *Lewis* v. *Clement*, 3 B. & Ald. 702. And see *Clement* v. *Lewis*, 3 B. & B. 297; 7 Moore, 200, *S. C.*: *Gregory* v. *Duke of Brunswick*, 1 D. & L. 805.

(*s*) *Lacy* v. *Reynolds*, Cro. El. 214: *Jones* v. *Bedinner*, Carth. 370.

(*y*) *Shepherd* v. *Hells*, 2 Dowl. 339. See *Price* v. *Reid*, 12 Law J., N. S., C. P., 289; 6 Scott, N. R., 1011; 1 D. & L. 812, *S. C.*

(*z*) *Post*, 891.

(*a*) See the forms of writs of inquiry, Chit. Forms, 327; the like into the county palatine of Lancaster, *Ib.* See the form of an award of on the roll, Chit. Forms, 330.

(*b*) The point, however, has not been decided. (See *Seaton* v. *Heap*, 5 Dowl. 247).

have allowed judgment to go by default. If two defendants, even in trespass, suffer judgment by default, and the plaintiff execute writs of inquiry against them separately, and take several damages against them, it will be irregular; and if final judgment be entered up for those several damages, it will be error (*c*). The only way the plaintiff has of remedying this evil is, by applying to the Court, before final judgment, to set aside his own proceedings, which they will allow him to do upon payment of costs (*d*). CHAP. V. all the defendants.

By the 3 & 4 *W.* 4, *c* 42, *s.* 22, the Court or a judge may, in a *local* action, order the inquiry to be executed in another county than that in which the *venue* is laid, and for that purpose may order a suggestion to be entered on the record, that the inquiry may be more conveniently executed in the other county. Place of trial may be changed in a local action.

In entering the proceedings to judgment on the roll, an award of the writ of inquiry is always inserted, and the writ must agree with it. Defects or errors in the writ may be amended by this award (*e*). Award of, on roll.

How sued out, &c.]—*Ingross the writ on plain parchment; get it sealed by one of the Masters in Queen's Bench or Common Pleas, or if in Exchequer get it sealed at the Exchequer Seal Office at Westminster, and in that Court get it also signed by one of the Masters. Indorse on it a memorandum of the day on which it is to be executed; and leave it at the sheriff's or deputy-sheriff's office two days before at latest if it is to be executed in the country, or one day before at the latest if it is to be executed in London or Middlesex (f); the sheriff will thereupon summon a jury for the execution of it.* If the Court of Exchequer Chamber or House of Lords on error brought on a judgment for the defendant, reverse it, and a writ of inquiry is necessary, the writ must issue out of the court below, as in ordinary cases (*g*). How sued out, &c.

Before whom to be executed.]—The writ is usually executed before the sheriff or his deputy (*h*). It may, however, under special circumstances, by leave of the Court or a judge, be executed before the chief justice or one of the judges of the court if the venue be laid in Middlesex or London; or before a judge of assize as an assistant to the sheriff, if the venue be laid in any other county (*i*). It is only, however, where some difficult point of law or nice questions of evidence are likely to arise in the course of the inquiry, or where the cause is of great importance, that this indulgence will be granted; and the mere importance of the facts will not in general, it seems, Before whom to be executed.

(*c*) *Mitchell* v. *Milbank*, 6 T. R. 199. And see *Field* v. *Pooley*, 3 M. & Gr. 786.

(*d*) *Cousins* v. *Orchard*, 1 Str. 422: *post*, [illegible].

(*e*) *Post*, 900.

(*f*) R. H., 23 G. 3, K. B.

(*g*) Vol. 1, p. 506, 507. And see *Vicars* v. *Haydon*, Cowp. 843.

(*h*) See *Wallace* v. *Homes*, Barnes, 231: *Davis* v. *Skyllins*, Id. 232. The sheriff cannot appoint more than one deputy to execute the writ. See *Denny* v. *Trapnell*, 2 Wils. 378: and per *Patteson*, J., in *Reg.* v. *Sheffield Railway Co.*, 11 A. & E. 201.

(*i*) See *Anon.*, 12 Mod. 610. See the forms, Chit Forms, 328, 329.

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induce the Court to grant it, when the *venue* is laid in Middlesex or London (*l*); for the under-sheriff of Middlesex and the secondary in London are generally men of experience, and fully competent to conduct a business of this kind. *The rule for this purpose, if application be made to the Court, is nisi only in the first instance* (*m*). *If the application be made to a judge, there must be a summons for it, and not an ex parte application. Serve a copy of the rule or order as in ordinary cases, and annex the rule or order to the writ of inquiry, and leave it at the sheriff's or deputy sheriff's office. You then enter the cause with the marshal, in the same manner as if it were a record, and pay him the same fees. The sheriff afterwards returns the inquisition as in other cases.*

Good jury.

Good Jury.]—Before the 6 *G.* 4, *c.* 50, *s.* 52, jurors summoned upon courts of inquiry, were of such inferior persons, that it was the common practice to obtain an order for the sheriff to return a "good jury," but this is now no longer the practice, though, if the case is of sufficient importance to warrant it, a judge's order upon summons (*n*) may be obtained for the sheriff to summon a jury from the special jury book (*o*). The costs of this jury are usually allowed as costs in the cause (*p*).

Notice of inquiry.

To whom given.

Notice of Inquiry.]—The plaintiff must give a written notice of executing the writ of inquiry (*q*) to the defendant's attorney in the cause, if the defendant has appeared, and the attorney be known (*r*); or, if the defendant has not appeared (*s*), or his attorney be unknown (*t*), then the notice should be delivered to the defendant himself, or left at his last or usual place of abode (*u*). If he cannot be personally served, and his place of abode is unknown, a judge's order may be obtained to stick it up in the Master's Office, and to leave a copy at his last known place of abode (*x*). In a joint action, the notice ought to be given to both the defendants (*y*): it seems, however, that a service of it upon either one, where both have suffered a judgment by default, will suffice; for by suffering such judgment they acknowledge a joint cause of action, and therefore *quoad hoc* are partners (*z*). By *R. H.*, 2 *W.* 4, *r.* 57, "notice of trial and inquiry, and of continuance of inquiry, shall be given in

(*l*) 1 Sellon, 344.
(*m*) See *The Archbishop of Canterbury* v. *Burlington*, 1 Dowl. & L. 285.
(*n*) See the form, Chit. Forms, 329. By R. H., 2 W. 4, r. 101, a *rule* for a good jury is unnecessary.
(*o*) See *Price* v. *Williams*, 5 Dowl. 160.
(*p*) *Wilkinson* v. *Malin*, 1 Dowl. 630: 1 C. & M. 238, *S. C.* Before the rule of H. T., 2 W. 4, r. 10, it was otherwise. (See *Calvert* v. *Gordon*, 3 M. & Ry. 124, 128; Chapman, 1 Add. 26.
(*q*) R. M. Anne, (c), Q. B.; Cas. Pr., C. P., 3.
(*r*) Tidd, 9th ed., 676: *Harding* v. *Stafford*, Say. 133; Cas. Pr., C. P., 62; Barnes, 300: *Mosely* v. *Sandford*, Barnes, 311; Pr. Reg. 276: *Knibbs* v. *Hayward*, 10 Price, 147: *Brookes* v. *Tidd*, 2 Y. & J. 276. And see *ante*, 294. See the form, Chit. Forms, 329.
(*s*) Tidd, 9th ed., 676; R. T., 1 Geo. 2, Q. B.; R. M., 1 Geo. 2, C. P.
(*t*) Tidd, 9th ed., 676; Say. 133, Q. B.; Cas. Pr., C. P., 62; Pr. Reg. 276, 126.
(*u*) Tidd, 9th ed., 676; R. T., 1 Geo. 2, Q. B.; R. M., 1 Geo. 2, C. P.
(*x*) See *Watson* v. *Dalrels*, 2 Dowl. 396: *Robin* v. *Locock*, 1 Dowl., N. S., 197.
(*y*) Pr. Reg. 443; Tidd, 9th ed., 676.
(*z*) See *Piggins* v. *Ward*, 2 Dowl. 394: *Arnold* v. *Evans*, 7 M. & W. 462; 9 Dowl. 219, *S. C.* nom. *Arnold* v. *Evans*.

town; but countermand of notice of trial or inquiry may be given either in town or country, unless otherwise ordered by the Court or a judge."

How long.

If the writ is to be executed in London or Middlesex, and the defendant resides within forty computed miles of London, eight days' notice must be given, which must be computed exclusive of the day of giving the notice, and inclusive of the day of executing the inquiry (*a*). Fourteen days' notice is required if the defendant resides at a greater distance, the same as a notice of trial (*b*). If the writ is to be executed in any other county, eight days' notice is sufficient, though ten days' notice is usually given, the same as a notice of trial (*c*). In *replevin* there should be fifteen days' notice of inquiry, under 17 *C.* 2, *c.* 7, *s.* 2 (*d*). Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, is reckoned as one of the days (*e*). The intervening days between Thursday next before and Wednesday next after Easter-day are also reckoned in notices of trial and inquiry, although not in other proceedings (*f*). A defendant residing at an hotel in London, from the time of his arrest till he was served with notice of inquiry, was holden not entitled to more than eight days' notice in a town cause, though his general residence was above forty computed miles from London (*g*). Also, where the defendant resides within forty miles of London, before and at the commencement of the action, eight days' notice of executing the writ of inquiry is sufficient, though the defendant has, in the intermediate time, removed permanently to a distance of above forty miles from London, provided he has not given the plaintiff notice of his removal, in which case he would be entitled to fourteen days' notice (*h*). If he reside above forty miles from London, he will be entitled to fourteen days' notice, although he may be in London when the notice is served (*i*). Where a defendant is master of a vessel, and resides on board, and has no home on shore, he is considered to reside where his ship is registered; and, if more than forty miles from London, is entitled to fourteen days' notice of executing a writ of inquiry (*k*). And, in general, the same rules that are applicable to notices of trial are equally applicable to notices of inquiry (*l*).

Short notice.

If the defendant be under terms to take "short notice" of inquiry, this is the same as short notice of trial, namely, four days in country causes, and two days in town causes (*m*). But being under terms to take short notice of trial does not bind the defendant to take short notice of inquiry (*n*).

(*a*) R. M., 4 A. c: R. H., 2 W. 4, r. 8. As to what must be taken to be defendant's residence, and how the miles are computed, see *ante*, 290.

(*b*) *Ante*, 290. See *Stevens* v. *Pell*, 2 Dowl. 356.

(*c*) R. M., 4 A. c: R. H., 39 G. 3, Exch., *ante*, 291.

(*d*) *Burton* v. *Hickey*, 6 Taunt. 37; 1 Marsh. 444, *S. C.*

(*e*) R. M., 4 A. c: R. H., 2 W. 4, r. 8, *ante*, 139.

(*f*) R. E., 2 W. 4, r. 1, *ante*, 131.

(*g*) *Lloyd* v. *Hooper*, 7 East, 694.

(*h*) *Rockfort* v. *Robertson*, 12 East, 497: *Spencer* v. *Hall*, 1 East, 688: *Brind* v. *Terris*, 2 W. Bl. 1205.

(*i*) *Blanso* v. *Chaters*, 6 Taunt. 445; 2 Marsh. 151, *S. C.*

(*k*) See *Blanso* v. *Chaters*, 6 Taunt. 458; 2 Marsh. 151, *S. C.*; and Vol. 1, p. 291.

(*l*) MS., H., 1830.

(*m*) See Vol. 1, p. 291: *Blanso* v. *Chaters*, 6 Taunt. 458; 2 Marsh. 151, *S. C.*

(*n*) *Stevens* v. *Pell*, 2 Dowl. 356; 2 C. & M. 421, *S. C.*

PART II.

Term's notice, when necessary.

A *term's notice* of inquiry is also necessary in cases where a term's notice of trial would be required if the cause had proceeded to trial (*o*). Therefore it is necessary if the plaintiff has delayed executing the writ of inquiry till a year after interlocutory judgment signed (*p*). By *R. H.*, 2 *W.* 4, *r.* 52, (*ante*, 133), "such notice may be given at any time before the first day of term."

When notice to operate from time of notice of trial, &c.

By the rule of *H. T.*, 2 *W.* 4, *r.* 59, "in all cases where the plaintiff in pleading concludes to the country, the plaintiff's attorney *may give notice of trial at the time of delivering his replication or other subsequent pleading;* and, in case issue shall afterwards be joined, such notice shall be available; but, if issue be not joined on such replication or other subsequent pleading, and the plaintiff shall sign judgment for want thereof, and forthwith give notice of executing a writ of inquiry, *such notice will operate from the time that notice of trial was given, as aforesaid.* And in all cases where the defendant *demurs* to the plaintiff's declaration, replication, or other subsequent pleading, the defendant's attorney, or the defendant if he plead in person, shall be obliged to accept *notice of executing a writ of inquiry on the back of the joinder in demurrer;* and in case the defendant pleads a plea in bar or rejoinder, &c., and the *plaintiff* demurs, the defendant's attorney, or the defendant if he plead in person, shall be obliged to accept *notice of executing a writ of inquiry on the back of such demurrer.*"

Form of notice.

The notice is in writing, and usually on a separate piece of paper. When the writ is to be executed before the sheriff, the notice states that it will be executed on a day therein stated, which must be on or before the return-day of the writ (*q*), not being Sunday (*r*), usually between two certain hours (*s*), as between the hours of ten and twelve o'clock in the forenoon, or between the hours of four and six o'clock in the afternoon (*t*), "at the Secondary's Office, No. 5, Basinghall Street, in the city of London," if in London; or "at the Sheriff's Office, in Red Lion Square, near Holborn, in the county of Middlesex," if in Middlesex; or, if in any other county, then at some place within the county appointed for that purpose, and particularly described in the notice (*u*). A notice of executing the writ "*by* ten o'clock" (*x*), or "at ten o'clock, or as soon after as the sheriff can attend" (*y*), will be bad for uncertainty; so, "between the hours of ten and two o'clock," has been holden insufficient, as not being sufficiently definite (*z*). But a notice to execute "at eleven o'clock" is good, it having been executed before twelve o'clock (*a*). And when the notice was given for

(*o*) Pugsley v. Bowden, 2 Str. 1160. See Smith v. Pearl, 3 Smith, 101. And see ante, 295, 133. See the form. Chit. Forms, 85.

(*p*) See per Parke, B., in Simpson v. Hands, 7 Dowl. 537.

(*q*) Davies v. Suter, 2 Salk. 647. Ryder v. Richardson, 2 L. Raym. 1449.

(*r*) Wade v. Commonalty, 1 Str. 367.

(*s*) Arnold v. Squire, Say. 282.

(*t*) Tidd, 9th ed., 579.

(*u*) See Cowper, 332: Squire v. Almond, Burnes, 287: Le Mark v. Nanneham, Id. 288: Arnold v. Squire, Say. 282; Pr. Reg. 447.

(*x*) Jean v. Powers, 2 Str. 1142.

(*y*) Hemingford v. Holman, Burnes, 288.

(*z*) Foster v. Smales, Burnes, 286, 295: Robinson v. Phillips, Id. 286; Cowper, 332. And see 1 Barnard. 139: Longridge v. Leech, Burnes, 288.

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Wednesday the 11th of June, when Wednesday fell on the 10th, on which day the inquiry was executed, the Court refused to set it aside, the defendant refusing to swear that he was misled by it (*b*); and the same where the notice was given for Tuesday the 14th, whereas the 14th fell on Thursday, on which day the writ was executed (*c*), the defendant not swearing that he was misled. If the writ is to be executed before the Chief Justice or judge of assize, the notice is given for the sittings or assizes generally (*d*), in the same manner as in the notice of trial, *ante*, 293.

Continuance or countermand of notice.

Notice of inquiry may be *continued or countermanded*, in the same manner as a notice of trial, and as to which, see *ante*, 295, 296 (*e*). It can be continued but once (*f*). The notice of continuance need not specify the place or hour, for it shall be taken to refer to the place and hour specified in the original notice (*g*). But a notice not stating the hour and place cannot operate as an *original* notice, though given ten days previously (*h*). Notice of continuance of inquiry must be given in town; but countermand of notice of inquiry may be given either in town or country, unless otherwise ordered by the Court or a judge (*i*).

Costs of day; for not proceeding on notice.

If the plaintiff do not either proceed to execute his writ according to the notice, or countermand it in time, the defendant will be entitled to his *costs of the day*, on an affidavit of attendance and necessary expenses incurred (*j*), in the same manner as for not proceeding to trial (*k*).

Irregularity in, how waived.

An *irregularity* in the notice of inquiry, or in the time and place of executing it, is *waived*, in general, by the defendant or his attorney attending at the inquiry, and making a defence on the execution of the writ (*l*). It has been held, that a defendant to whom an irregular notice of inquiry is given ought to return it forthwith, and state what objection he has to it, otherwise he would not be allowed the costs of an application to set aside the inquiry (*m*). But retaining the notice is no waiver of the irregularity (*n*).

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Subpœnaing Witnesses, &c.]—After the notice of inquiry, the next step to be taken is to subpœna the witnesses necessary to prove the amount of the damages (*o*). It would seem that the rules of court as to admission of documentary evidence apply to writs of inquiry, though not expressly mentioned in them. (*See ante*, 301).

(*b*) *Elden* v. *Haig*, 1 Chit. Rep. 11. And see *ante*, 293. But see *Abraham* v. *Noakes*, 1 Chit. Rep. 5.

(*c*) *Button* v. *Harrison*, 3 B. & P. 1.

(*d*) Tidd, 579; 1 Sellon, 353. And see *Wilson* v. *Nesbitt*, 1 Dowl., N. S., 677; 4 M. & Gr. 249.

(*e*) See form of a notice of continuance, Chit. Forms, 330; of countermand, 331.

(*f*) MS., H., 1820: *Price* v. *Bambridge*, Barnes, 297: *Burgess* v. *Royle*, 2 Chit. Rep. 29: *Fryer* v. *Binns*, B. C., M., 1837, 2 Jur. 15.

(*g*) *Jones* v. *Chuns*, 1 B. & P. 363.

(*h*) *Fryer* v. *Binns*, B. C., M., 1837, 2 Jur. 15, *S. C.*

(*i*) R. G., H., W. 4, s. 57, *ante*, 864.

(*j*) R. H., 6 G. 1 a. *See Sutton* v. *Bryan*, 2 Str. 728.

(*k*) See *ante*, 297, and *post*, pt. 5, ch. 22.

(*l*) See *ante*, 297.

(*m*) *Stevens* v. *Pell*, 2 Dowl. 355.

(*n*) Ib.; *ante*, 297.

(*o*) See *ante*, 327. See form of a præcipe for a subpœna, Chit. Forms, 331; of the subpœna, Ib.; of the subpœna ticket, Ib.

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(*o*) *Payton* v. *Burdus*, 2 Str. 1100. See *Smith* v. *Paull*, 3 Smith, 101. And see *ante*, 296, 132. See the form, Chit. Forms, 56.

(*p*) See per *Parke*, B., in *Simpson* v. *Heath*, 7 Dowl. 837.

(*q*) *Davies* v. *Salter*, 2 Salk. 627: *Dyke*, v. *Blackston*, 2 L. Raym. 1449.

(*r*) *Hoyle* v. *Cornewallis*, 1 Str. 367.

(*s*) *Arnold* v. *Squire*, Say. 181.

(*t*) Tidd. 9th ed., 579.

(*u*) See Comyns, 551: *Squire* v. *Almond*, Barnes, 297: *Le Mark* v. *Newcombe*, Id. 300: *Arnold* v. *Squire*, Say. 181; Pr. Reg. 447.

(*x*) *Isen* v. *Fowen*, 2 Str. 1142.

(*y*) *Hennaford* v. *Holman*, Barnes, 298.

(*z*) *Foster* v. *Smales*, Barnes, 295, 296: *Robinson* v. *Phillips*, Id. 296; Comyns, 551. And see 1 Barnard. 139: *Langstaff* v. *Lamb*, Barnes, 293.

(*a*) *Last* v. *Denny*, Barnes, 302.

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(*b*) Elton v. *Haig*, 1 Chit. Rep. 11. And see *ante*, 293. But see *Abraham* v. *Noakes*, 1 Chit. Rep. 5.

(*c*) *Sutton* v. *Harrison*, 3 B. & P. 1.

(*d*) Tidd, 579; 1 Sellon, 353. And see *Wilson* v. *Nesbitt*, 1 Dowl., N. S., 677; 4 M. & Gr. 248.

(*e*) See form of a notice of continuance, Chit. Forms, 330; of countermand, 331.

(*f*) MS., H., 1820: *Price* v. *Bambridge*, Barnes, 297: *Burgess* v. *Royle*, 2 Chit. Rep. 289: *Fryer* v. *Binns*, B. C., M., 1837, 2 Jur. 15.

(*g*) *Jones* v. *Chune*, 1 B. & P. 363.

(*h*) *Fryer* v. *Binns*, B. C., M., 1837, 2 Jur. 15, *S. C.*

(*i*) R. G., H., W. 4, s. 57, *ante*, 294.

(*j*) R. H., 2 G. 1 a. *See Sutton* v. *Bryans*, 2 Str. 728.

(*k*) See *ante*, 297, and *post*, pt. 5, ch. 22.

(*l*) See *ante*, 297.

(*m*) *Stevens* v. *Pell*, 2 Dowl. 355.

(*n*) Ib.; *ante*, 297.

(*o*) See *ante*, 297. See form of a præcipe for a subpœna, Chit. Forms, 331; of the subpœna, Ib.; of the subpœna ticket, Ib.

PART II.

Attending by counsel.

Attending by Counsel.]—If you wish to attend the execution of the writ of inquiry by counsel, you should give notice thereof to the opposite party (*p*), in order to get the expense of his attendance, and briefs, &c. allowed you. Moreover the sheriff may, it seems, at the request of the opposite party, postpone the execution of the writ, unless such notice be given (*q*). A written notice is not requisite (*r*). The Master may or may not, in his discretion, allow costs for the attendance of counsel, and preparing briefs, &c. (*s*)

The execution of the writ.

The Execution of the Writ.]—*Immediately upon the receipt of the writ, the sheriff will summon a jury. Attend at the time appointed, with your counsel and witnesses; and the inquest will be taken in nearly the same manner as at a trial at Nisi Prius,* excepting that the jurors cannot be challenged (*t*). Also, the execution of the writ may be *adjourned* by the sheriff, if necessary, after it is entered upon (*u*). The Court will not, at his instance, stay the execution of the writ (*v*). After the delivery of the verdict by the jurors, the under-sheriff will prepare the inquisition on parchment, and get the jurors to sign it.

Defendant must attend punctually.

If the defendant do not attend punctually at the time mentioned in the notice, and the writ be executed in his absence, the Court will not relieve him (*x*). On the other hand, if the defendant attend at the hour, he will not be warranted in leaving the court at the expiration of the time mentioned in the notice; for the sheriff may have prior business, which may detain him beyond that time (*y*). But, if the plaintiff, in the absence of the defendant, have the writ executed at a different time or place from that specified in the notice, it will be irregular, and the Court, upon application, will set it aside.

Evidence and damages.

All the plaintiff has to prove, or the defendant is permitted to controvert, is the *amount* of the *damages* (*z*); for the cause of action itself, as stated in the declaration, and the right to some damages in respect of it, is admitted by the defendant, by his suffering judgment to pass against him by default (*a*). Therefore, in an action on a deed, agreement, &c., expressly declared on, it need not be proved (*b*). So, if the action be on a bill of exchange or promissory note, it need not be proved, nor need any allegation

(*p*) See the form, Chit. Forms, 331.

(*q*) See *Elliott* v. *Micklin*, 5 Price, 641; *Coleman* v. *Mawby*, 2 Str. 853: *Markham* v. *Middleton*, Id. 1259: 1 Sel. 544.

(*r*) *Elliott* v. *Micklin*, 5 Price, 641.

(*s*) *Hullock* v. *Hemsworth*, Tidd, 9th ed., 80.

(*t*) *Anon.*, 3 Salk. 81.

(*u*) *Coleman* v. *Mawby*, 2 Str. 853: *Markham* v. *Middleton*, Id. 1259: *Elliott* v. *Micklin*, 5 Price, 641.

(*v*) *Stockdale* v. *Hansard*, 8 Dowl. 148.

(*x*) 1 Barnard. 253.

(*y*) *Williams* v. *Frith*, 1 Doug. 198; Lofft, 193, *S. C.*; 2 Barnard. 214.

(*z*) *De Gaillon* v. *L'Aigle*, 1 B. & P. 368.

(*a*) *Kadom* v. *Lutman*, 1 Str. 612. And see 2 Saund. 107, n. 2.

(*b*) *Collins* v. *Bybot*, 1 Esp. 157. See *Bunbury Union Guardians* v. *Robinson*, (12 Law J., N. S., 397, Q. B.; 1 Dav. & M. 92, *S. C.*), where a question arose and was not decided as to the necessity for producing and proving the agreement declared on in order to recover more than nominal damages. And see *Cooper* v. *Blith*, 2 Gale & D. 296; 2 Q. B. 915, *S. C.*: *Stephens* v. *Pell*, 2 Dowl. 629; 2 C. & M. 710, *S. C.*: *De Gaillon* v. *L'Aigle*, 1 B. & P. 368: *Shepherd* v. *Chester*, 4 T. R. 275.

time before final judgment signed (*z*), the defendant may move the Court to set aside the execution of it, or arrest the judgment, or, if in vacation, may apply to a judge (*a*) to stay the judgment made, to enable him to apply to the Court. The sheriff or other officer before whom the writ was executed may also prevent the signing of judgment immediately, if he certify under his hand upon the writ that judgment ought not to be signed till defendant shall have had an opportunity of applying to the Court to get the execution of the writ set aside (*b*). If such order or certificate is obtained and judgment thereby postponed, the judgment, if afterwards obtained, will be entered of record as of the day of the return of the writ, unless the Court otherwise order (*c*). If a party be unable to obtain an order or certificate as above, and in consequence thereof judgment be signed and execution issued, the Court have power, under the 1 *W.* 4, *c.* 7, *s.* 4, to order such judgment to be vacated and execution to be stayed or set aside, or to enter an arrest of judgment, or grant a new writ of inquiry; and thereupon the party affected by such execution will be restored to all that he may have lost thereby, in like manner as upon the reversal of a judgment by writ of error or otherwise, as the Court may direct (*d*). After the execution of the writ, and judgment and execution thereon, the Court have allowed the defendant to enter a suggestion to deprive the plaintiff of costs, under a court of requests act, and ordered the plaintiff to restore the amount of defendant's costs, at the same time restraining the defendant from bringing any action (*e*).

Suggestion under court of requests act.

The application to set aside the inquisition and have a new inquiry, is looked upon as on the same footing as an application for a new trial. As to the causes for which the Court will grant a new trial or inquiry, see *post*, *Part 5*, *ch.* 26. Upon moving for a new inquiry, &c., it will suffice to produce the under-sheriff's notes, verified by affidavit (*f*). If a misdirection by the sheriff is relied on, the Court can hear, from counsel in the cause, a statement made as to what passed at the trial (*g*). A motion to set aside an inquiry for excess in the damages will not be granted, unless a strong case be made out, and it seems that it will not be granted on the affidavits of the parties, unless corroborated by others (*h*).

The application to set aside, &c.

Where the Court, upon application, ordered a new inquiry, on the ground, that, as to part of the damages found, there was no evidence to warrant the finding of the jury; the defendant, however, in order to save the expense of a second inquiry, paid the plaintiff the whole of his demand; it was held, not-

Costs of first inquiry.

(*z*) Denny v. Trepnell, 2 Wils. 376.

(*a*) See 1 W. 4, c. 7, s. 1. See a form of the summons and order, Chit. Forms, 232, 233.

(*b*) 1 W. 4, c. 7, s. 1. See Vol. 1, p. 416, as to a certificate for speedy execution on a trial. And see form of certificate, Chit. Forms, 332.

(*c*) 1 W. 4, c. 7, s. 1.

(*d*) See *Angel* v. *Ihler*, 5 M. & W. 600; 7 Dowl. 846.

(*e*) —— v. ——, MS., Nov. 1832. See Hunt v. *Earle*, 2 M. & W. 363: *Bond* v. *Bailey*, 3 Dowl. 808: 2 C., M., & R. 246, *S. C.*: *Godson* v. *Lloyd*, 4 Dowl. 157: *Shaw* v. *Oates*, Id. 720: *Bernard* v. *Turner*, 1 M. & W. 580: *Johnson* v. *Veale*, 7 Dowl. 487.

(*f*) *Stephens* v. *Pell*, 2 Dowl. 629. As to the affidavit, &c., on an application for a new trial, or when a trial had before the sheriff, see Vol. 1, p. 416, &c.

(*g*) *Jones* v. *Lewis*, 9 Dowl. 145, per *Coleridge*, J.

(*h*) *Lothbury* v. *Brown*, 10 Moore, 106.

PART II.

though he brings forward no evidence whatever in support of his claim. In trespass, or any other action, where the damage actually sustained by the plaintiff is the measure of the damages to be given by the jury, if the plaintiff do not prove the nature of the injury, and the amount of the damage sustained by him, the jury always give nominal damages merely; and in such cases, therefore, it is expedient to prove nearly the whole cause of action. But where the jury are to imply the amount of the damages from the nature of the injury, and where no special damage could be proved, unless laid in the declaration,—as, for instance, in an action of slander, or the like,—there, although the plaintiff do not offer evidence, yet the jury may give such damages as the circumstances of the case warrant, and which they may estimate from the effect the slander set forth on the declaration is calculated and likely to have had on the character and prospects of the plaintiff (*r*).

Interest as damages.

The jury may give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in an action of trover or trespass *de bonis asportatis;* and over and above the money recoverable in an action on a policy of insurance made after the 14th of August, 1833 (*s*); and they ought to assess interest in the same cases in which it may be given by a jury at *Nisi Prius* (*t*).

Where the damages may be severed.

If there be two or more defendants who suffer judgment to go by default, the inquest cannot, even in trespass, sever the damages (*u*); but where there is judgment by default against one defendant, and judgment upon demurrer against the other, the inquest may sever the damages, because the defendants have severed in their pleading (*v*).

See further as to damages on a verdict, *Vol.* 1, *p.* 443.

Return of.

Return of.]—*Call at the sheriff's or deputy sheriff's office, at or after the expiration of four days from the return-day of the inquiry, and a clerk there will deliver to you the writ and the sheriff's return with the inquisition.* The return is indorsed on the writ. The inquisition is ingrossed on parchment, and signed and sealed in the name of the sheriff and by the jurors (*w*). If the sheriff refuse to make return, the Court will grant a rule absolute, in the first instance, to compel him to make it (*x*). The defendant is entitled to have the inquisition filed; and if the plaintiff's attorney refuses to file it or shew it to the defendant's attorney, the Court will compel him to do so, and to pay the costs (*y*).

Setting aside inquisition, &c.

Setting aside Inquisition, or staying Judgment, &c.]—Within four days after the return-day of the writ, or, it seems, at any

(*r*) *Tripp* v. *Thomas*, 3 B. & C. 427; 5 D. & R. 276, *S. C.*

(*s*) 3 & 4 W. 4, c. 42, s. 29.

(*t*) ——— v. *Edmunds*, 6 Taunt. 346. See 3 & 4 W. 4, c. 42, s. 38. And see *ante*, 446.

(*u*) *Onslow* v. *Orchard*, 1 Str. 422; *ante*, 449.

(*v*) *Chapman* v. *House*, 2 Str. 1140; but *quære*. See Vol. 1, p. 449, 450.

(*w*) See a form of the sheriff's return and inquisition, Chit. Forms, 332.

(*x*) *Stockdale* v. *Hansard*, 8 Dowl. 257. See *ante*, Vol. 1, p. 551, &c., as to compelling the sheriff to return writs.

(*y*) *Townsend* v. *Burns*, 1 Dowl. 669; 1 C. & M. 176, *S. C.*

time before final judgment signed (*z*), the defendant may move the Court to set aside the execution of it, or arrest the judgment, or, if in vacation, may apply to a judge (*a*) to stay the judgment made, to enable him to apply to the Court. The sheriff or other officer before whom the writ was executed may also prevent the signing of judgment immediately, if he certify under his hand upon the writ that judgment ought not to be signed till defendant shall have had an opportunity of applying to the Court to get the execution of the writ set aside (*b*). If such order or certificate is obtained and judgment thereby postponed, the judgment, if afterwards obtained, will be entered of record as of the day of the return of the writ, unless the Court otherwise order (*c*). If a party be unable to obtain an order or certificate as above, and in consequence thereof judgment be signed and execution issued, the Court have power, under the 1 *W.* 4, *c.* 7, *s.* 4, to order such judgment to be vacated and execution to be stayed or set aside, or to enter an arrest of judgment, or grant a new writ of inquiry; and thereupon the party affected by such execution will be restored to all that he may have lost thereby, in like manner as upon the reversal of a judgment by writ of error or otherwise, as the Court may direct (*d*). After the execution of the writ, and judgment and execution thereon, the Court have allowed the defendant to enter a suggestion to deprive the plaintiff of costs, under a court of requests act, and ordered the plaintiff to restore the amount of defendant's costs, at the same time restraining the defendant from bringing any action (*e*).

Suggestion under court of requests act.

The application to set aside the inquisition and have a new inquiry, is looked upon as on the same footing as an application for a new trial. As to the causes for which the Court will grant a new trial or inquiry, see *post*, *Part* 5, *ch.* 26. Upon moving for a new inquiry, &c., it will suffice to produce the under-sheriff's notes, verified by affidavit (*f*). If a misdirection by the sheriff is relied on, the Court can hear, from counsel in the cause, a statement made as to what passed at the trial (*g*). A motion to set aside an inquiry for excess in the damages will not be granted, unless a strong case be made out, and it seems that it will not be granted on the affidavits of the parties, unless corroborated by others (*h*).

The application to set aside, &c.

Where the Court, upon application, ordered a new inquiry, on the ground, that, as to part of the damages found, there was no evidence to warrant the finding of the jury; the defendant, however, in order to save the expense of a second inquiry, paid the plaintiff the whole of his demand; it was held, not-

Costs of first inquiry.

(*z*) Denny v. *Trapnell*, 2 Wils. 378.

(*a*) See 1 W. 4, c. 7, s. 1. See a form of the summons and order, Chit. Forms, 332, 333.

(*b*) 1 W. 4, c. 7, s. 1. See Vol. 1, p. 465, as to a certificate for speedy execution on a trial. And see form of certificate, Chit. Forms, 332.

(*c*) 1 W. 4, c. 7, s. 1.

(*d*) See *Angel* v. *Ihler*, 5 M. & W. 600; 7 Dowl. 846.

(*e*) —— v. ——, MS., Nov. 1832. See Hoole v. *Earle*, 2 M. & W. 363: *Bond* v. *Bailey*, 3 Dowl. 808: 2 C., M., & R. 246, *S. C.*: *Godson* v. *Lloyd*, 4 Dowl. 157: *Shaw* v. *Oates*, 1d. 790: *Bernard* v. *Turner*, 1 M. & W. 580: *Johnson* v. *Veale*, 7 Dowl. 487.

(*f*) *Stephens* v. *Pell*, 2 Dowl. 629. As to the affidavit, &c., on an application for a new trial, or when a trial had before the sheriff, see Vol. 1, p. 416, &c.

(*g*) *Jones* v. *Lewis*, 9 Dowl. 145, per *Coleridge*, J.

(*h*) *Lothbury* v. *Brown*, 10 Moore, 106.

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withstanding, that he was not bound to pay the plaintiff the costs of the first inquiry (*i*).

Amendment of inquisition, &c.

Amendment of Inquisition, &c.]—Defects or errors in a writ of inquiry may be amended by the award of it on the roll (*k*). If the jury, in an action of debt, omit the formal finding of damages which entitles the plaintiff to *costs de incremento*, the Court may order the requisite entry to be made on the *postea* (*l*). Where the writ and inquisition were lost, the Court ordered new ones to be made out according to the sheriff's notes, and that the costs before taxed should be indorsed by the Master (*m*). The want of a writ of inquiry, however, is said to be aided by the statutes of jeofails (*n*).

Final judgment, &c.

Final Judgment, &c.]—*At the expiration of four days from the return of the inquiry*, (if the sheriff has not certified on the writ as above mentioned, and a judge has not ordered the staying the judgment till a day not yet arrived, and the defendant has not moved to set aside the inquisition or in arrest of judgment, or if he has moved, and the inquisition be not set aside nor the judgment arrested), *get your costs taxed by one of the Masters and final judgment signed* (*o*), *as upon a postea, and you may then sue out execution.* By rule of *H. T.*, 2 *W.* 4, *r.* 67, "after the return of a writ of inquiry, judgment may be signed at the expiration of *four* days from such return without any rule for judgment." Where the damages assessed by the inquiry do not exceed 20*l.*, and the action is in *assumpsit*, debt, or covenant, the costs will be taxed on the reduced scale (*p*). When judgment is signed, the writ and return is filed in the Master's Office as if it were a *postea* (*q*). As to the entry of the judgment on the roll (*r*) and for other matters as to judgments in general, see *Vol.* 1, *p.* 463.

After death of defendant.

If the defendant die after interlocutory and before final judgment, and the interlocutory judgment be revived against the executor, &c., and a writ of inquiry executed, the final judgment in that case must be against the executor or administrator, and not against the testator or intestate (*s*).

Execution.

Execution.]—The execution after a writ of inquiry is the same as in ordinary cases.

(*i*) *Porter* v. *Cooper*, 3 Dowl. 662.

(*k*) *Johnson* v. *Toulmin*, 4 East, 173: *Camden* v. *Coulter*, Hardw. 314: *Hughes* v. *Alvares*, 1 Str. 684: *Ingham* v. *Chisholl*, Barnes, 15: *Pippett* v. *Hearn*, 1 D. & R. 266. See as to the amendment of writs of trial before the sheriff, Vol. 1, p. 415.

(*l*) *Bale* v. *Hodgetts*, 1 Bing. 169; 7 Moore, 602, *S. C.*

(*m*) *Bean* v. *Elton*, 2 Str. 1077.

(*n*) *Iles* v. *Pitt*, 2 Ld. Raym. 1397: *Mallory* v *Jennings*, 2 Str. 878.

(*o*) As to when it is considered as signed, see Vol. 1, p. 457.

(*p*) *Hoppell* v. *Leigh*, 3 Scott, 188. See *post*, pt. 5, ch. 31.

(*q*) *Townsend* v. *Burns*, 1 Dowl. 629.

(*r*) See a form of entry of judgment on the roll, Chit. Forms, 333.

(*s*) 2 Saund. 72, n.

SECT. 2.

Writ of Inquiry, &c. in Debt on Bond.

Statute as to, and in what Cases necessary, Sums recoverable, &c., 901.
Before whom executed, 904.
Proceedings after Judgment by Default, 904.
Proceedings after Judgment on Demurrer or Nul tiel Record, 907.
Proceedings upon Issue joined, 907.
Scire facias after, 908.

In what Cases necessary &c.]—Before the 8 & 9 *W.* 3, *c.* 11, the plaintiff, if he obtained a judgment in an action on a bond, recovered the full penalty of the bond besides costs of suit, and he was also entitled to take out execution for the whole without any regard to the damages which he had actually sustained by the breach of the condition, &c., and the defendant could only obtain relief against this by application to a court of equity. To remedy this it was enacted by that act, sect. 8, that, "In all actions which shall be commenced or prosecuted in any of his Majesty's courts of record, upon any bond or bonds, or on any penal sum, for non-performance of any covenants or agreements, in any indenture, deed, or writing contained, the plaintiff or plaintiffs may *assign* as many breaches as he or they shall think fit, and the jury, upon *trial* of such action or actions, shall and may assess not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned as the plaintiff upon the trial of the issue shall prove to have been broken (*a*); and that the like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions. And if judgment shall be given for the plaintiff on a demurrer, or by confession or *nihil dicit*, the plaintiff upon the roll may *suggest* as many breaches of the covenants and agreements as he shall think fit; upon which shall issue a writ to the sheriff of that county where the action shall be brought, to summon a jury to appear before the justices, or justice of assize or *Nisi Prius* [or now, in cases within the 3 & 4 *W.* 4,

In what cases necessary, &c.

Stat. 8 & 9 W. 3, c. 11, s. 8.

In actions on bond, &c., plaintiff to assign breaches.

On judgment on demurrer or by default, &c.

Breaches to be suggested.

Writ of inquiry to be issued, &c.

(*a*) It would seem that the enactment applies only to the assessment of damages on issues joined on breaches *assigned*, but does not provide for the case of a judgment by default after breaches *assigned*. But it would probably be held, that, on judgment by default after breaches assigned, the truth of the breaches would be confessed; and that a writ of inquiry would therefore be merely to assess the damages, and not to inquire into the truth of the breaches.

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c. 42, *s.* 16, *post*, 904, before the sheriff] of that county, to inquire of the truth of every one of those breaches, and to assess the damages that the plaintiff shall have sustained thereby; in which writ it shall be commanded to the said justices or justice of assize or *Nisi Prius*, that he or they shall make return thereof to the court from whence the same shall issue, at the time in such writ mentioned. And in case the defendant or defendants, after such judgment entered, and before any execution executed, shall *pay unto the court* where the action shall be brought, to the use of the plaintiff or plaintiffs, or his or their executors or administrators, such damages so to be assessed by reason of all or any of the breaches of such covenants, together with the costs of suit, *a stay of execution* of the said judgment shall be entered upon record; or if, by reason of any *execution* executed, the plaintiff or plaintiffs, or his or their executors or administrators, shall be fully paid or satisfied all such damages so to be assessed, together with his or their costs of suit, and all reasonable charges and expenses for executing the said execution, the body, lands, or goods of the defendant shall be thereupon forthwith discharged from the said execution, which shall likewise be entered upon record. But notwithstanding in each case such judgment shall remain, continue, and be as a *further security*, to answer to the plaintiff or plaintiffs, and his or their executors or administrators, such damages as shall or may be sustained for *further breach* of any covenant or covenants in the same indenture, deed, or writing contained; upon which the plaintiff or plaintiffs (*b*) may have a *scire facias* upon the said judgment against the defendant, or against his heir, terre-tenant, or his executors or administrators, suggesting other breaches of the said covenants or agreements, and to summon him or them respectively to shew cause why execution should not be had or awarded upon the said judgment upon which there shall be the like proceeding as was in the action of debt, upon the said bond or obligation for assessing of damages upon trial of issues joined upon such breaches, or inquiry thereof upon a writ to be awarded in manner as aforesaid; and that, upon payment or satisfaction in manner as aforesaid of such future damages, costs, and charges as aforesaid, all further proceedings on the said judgment are again to be stayed, and so *toties quoties*, and the defendant, his body, lands, or goods, shall be discharged out of execution, as aforesaid."

Payment into court of damages after judgment.

Or satisfaction of execution.

Judgment to stand for further breaches.

Scire facias and further proceedings on.

This statute of 8 & 9 *W.* 3 was made in favour of defendants, and receives a liberal construction. It has been consequently ruled, that it is obligatory; and although it enacts, that the plaintiff "may" assign, "may" suggest, &c., yet the word "may" is compulsory, and the plaintiff *must* assign or suggest the breaches, otherwise the proceedings will be erroneous (*c*).

Statute compulsory.

The statute extends to actions on bonds, &c., for the per-

To what

(*b*) The statute does not mention the executors or administrators of the plaintiff; it is apprehended, however, that it extends to them.

(*c*) *Hardy* v. *Bern*, 5 T. R. 636: *Reiss* v. *Roswell*, Id. 538, 540: *Drage* v. *Brand*, 2 Wils. 377: *Godwin* v. *Crowle*, 1 Coup. 350.

formance of covenants, &c., whether the covenant, &c. be contained in the same or in any other deed or writing (*d*). It extends to bonds, &c. for the payment of money by instalments (*e*), for the payment of an annuity (*f*), for the performance of an award (*g*), or for the performance of any other specific act, excepting for the payment of a sum of money in gross at a certain time, as *post-obit* bonds (*h*), and excepting other bonds for the payment of monies, which are provided for by the 4 *Anne*, *c.* 16, *s.* 13 (*i*), and excepting the case of a bail-bond (*k*), a replevin-bond (*l*), the bond of a petitioning creditor (*m*), and a bond for replacing stock (*n*), or a bond for payment of money by instalments, with a clause that all shall be due on one default (*o*), or indeed any bond where the damages to be assessed by the jury would be calculated to meet and satisfy the entire condition of the bond (*p*). It extends to written instruments though not under seal (*q*). But it is confined to actions of debt (*r*). A warrant of attorney for the payment of money by instalments, or to secure the payment of an annuity, is not within the act (*s*), and this, although a bond be also given (*t*). The Crown is not bound to pursue the course pointed out by the act (*u*).

cases it extends.

The defendant is accountable only to the extent of the *penalty* recovered; and a judge at chambers may order proceedings to be stayed on payment of the penalty and costs of the action (*x*). However, in an action on a *judgment* recovered on a bond, though it be a foreign judgment, interest may be recovered in damages beyond the penalty (*y*). Also, when the penalty is contained in any other instrument than a bond, damages may be recovered beyond it, for the plaintiff has his option either to sue for the penalty or for the breach of

What amount recoverable.

(*d*) *Collins* v. *Collins*, 2 Bur. 824, 826: *Hurst* v. *Jennings*, 5 B. & C. 650; 8 D. & R. 494, *S. C.*

(*e*) *Willoughby* v. *Swinton*, 6 East, 550; 2 Smith, 636, *S. C.* See *Maglen* v. *Touchet*, 2 W. Bl. 706, 958: *Van Sandau* v. ——, 1 B. & Ald. 214.

(*f*) *Walcot* v. *Goulding*, 8 T. R. 126.

(*g*) *Welch* v. *Ireland*, 6 East, 613; 2 Smith, 688, *S. C.*: *Hanbury* v. *Guest*, 14 East, 491.

(*h*) 2 Camp. 285, n.: *Murray* v. *Earl of Stair*, 2 B. & C. 82, 89; 3 D. & R. 278, *S. C.*

(*i*) *Cardoze* v. *Hardy*, 2 Moore, 220: Smith v. *Bond*, 10 Bing. 131; 3 M. & Scott, 328, *S. C.*

(*k*) *Mosely* v. *Pheasant*, 2 B. & P. 446. The reason why a bail-bond and replevin-bond are not within the act is because the courts of law can afford relief to the defendant in actions on them, without his being compelled to file a bill in equity; and therefore such cases do not fall within the rule which produced the statute, *viz.* that the defendant in actions on bonds for the performance of covenants, and the like, must proceed for relief in a court of equity.

(*l*) 2 Saund. 187, n. (7): *Middleton* v. *Brown*, 3 M. & Sel. 155. See note (*c*), *ante*, 282.

(*m*) *Smith* v. *Broomhead*, 7 T. R. 300: *Smithey* v. *Edmonson*, 3 East, 22. In this case the 6 G. 4, c. 16, s. 16, empowers the Lord Chancellor to assess the damages.

(*n*) *Saville* v. *Jackson*, 13 Price, 715.

(*o*) *James* v. *Thomas*, 5 B & Ad. 40; 2 N. & M. 663, *S. C.*

(*p*) See *Smith* v. *Bond*, 10 Bing. 125; 3 M. & Scott, 328, *S. C.*

(*q*) See *Drage* v. *Brand*, 2 Wils. 377.

(*r*) 1 Saund. 58 b, n.

(*s*) *Cox* v. *Radford*, 3 Taunt. 74: *Kinnersley* v. *Museon*, 5 Taunt. 264: *Shaw* v. *Lord Worcester*, 6 Bing. 385; 4 M. & P. 21, *S. C.* And see per *Littledale*, J., 5 B. & Ad. 41.

(*t*) *Austerbury* v. *Morgan*, 2 Taunt. 195. When otherwise, see *Hurst* v. *Jennings*, 5 B. & Cres. 650.

(*u*) *R.* v. *Pate*, 1 Y. & J. 171, per *Alexander*, C. B.

(*x*) *Branscombe* v. *Scarborough*, 13 Law J., N. S., Q. B., 247: *Brenquin* v. *Perrott*, 2 W. Bl. 1190: *Wilde* v. *Clarkson*, 6 T. R. 303: *Shutt* v. *Procter*, 2 Marsh. 227: *Overseers of St. Martin* v. *Warren*, 1 B. & Ald. 491; 1 Saund. 58 b, 6th ed. The case of *Lonsdale* v. *Church* (2 T. R. 388) is overruled by the case of *Wilde* v. *Clarkson* and subsequent cases.

(*y*) *M'Clure* v. *Dunkin*, 1 East, 436. And see *Grant* v. *Grant*, 3 Sim. 341: *Jeudwine* v. *Agate*, Id. 129.

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the contract (*z*). But where the penalty is recovered, as such, damages are never given (*a*), unless they be merely nominal in order to entitle the plaintiff to his costs (*b*).

Before whom inquiry executed.

Before whom executed.]—The statute of 8 & 9 *W.* 3, so far as it requires the writ to be executed before the justices, of assize or *Nisi Prius*, is, in cases where breaches are *suggested* on the roll after a judgment for the plaintiff on *demurrer*, or by confession or *nil dicit*, and perhaps in all cases where no issue is joined, altered by the statute 3 & 4 *W.* 4, *c.* 42, *s.* 16, which, to prevent delay, enacts that *all* writs issued under 8 & 9 *W.* 3, "shall, *unless the Court where such action is pending, or a judge of one of the said superior Courts, shall otherwise order*, direct the sheriff of the county where the action shall be brought to summon a jury to appear before such *sheriff*, instead of the justices or justice of assize or *Nisi Prius* of that county, to inquire of the truth of the breaches suggested, and assess the damages that the plaintiff shall have sustained thereby, and shall command the said sheriff to make return thereof to the Court from whence the same shall issue at a day certain, in *term* or in *vacation*, in such writ to be mentioned; and such proceedings shall be had after the return of such writ as are in the said statute in that behalf mentioned, in like manner as if such writ had been executed before a justice of assize or *Nisi Prius*." It has been said that this latter act does not extend to cases where the plaintiff *assigns* breaches of the condition of the bond, &c. in his declaration or replication (*c*); but this seems very doubtful, and the better opinion seems to be that it does (*d*). Where questions of difficulty, either in law or evidence, are likely to arise, the Court or a judge will order the writ to be executed before the Chief Justice in a town case or a judge of assize in a country case (*e*).

Proceedings after judgment by default.

Proceedings after Judgment by Default.]—If the writ of inquiry is to be executed before the sheriff, *enter the proceedings on the roll, as in the case of a judgment by default in debt, omitting these words in the judgment:* "By the Court here adjudged and with his assent; and the defendant in mercy," &c. *Then, in a new paragraph, suggest the breaches for which you seek damages; and in the same paragraph enter an award of a writ of inquiry* (*f*). *This suggestion of breaches, however, would be unnecessary if the breaches have been already assigned in the declaration, and which is now generally the case. Make a copy of the breaches, when thus suggested, and serve it on the defendant or his attorney or agent, if he has employed one in the action. Serve also the notice of inquiry, as ante,* 892, *to inquire of the*

(*a*) *Winter* v. *Trimmer*, 1 Black. 395; *Harrison* v. *Wright*, 13 East, 343: *Francis* v. *Wilson*, Ry. & M. 105; 1 Saund. 58 b.

(*a*) *Holrod* v. *Ebisson*, 10 Mod. 278. And see 1 Saund., 6th ed., 58 b, n. (*c*).

(*b*) In *Hellen* v. *Ardley*, 3 Car. & P. 12, Lord *Tenterden*, C. J., allowed 1*s.* for the detention of the debt; but this was disapproved of by the court in *Branscombe* v. *Scarborough*, 13 Law J., N. S., Q. B., 247.

(*c*) See Tidd's Sup. 1833, 135.

(*d*) See 1 Saund. 58 g, n. (1), 6th ed., by E. V. Williams.

(*e*) *Archbishop of Canterbury* v. *Burlington*, 1 Dowl., N. S., 925; where leave was granted to have the cause tried before the Chief Justice, the action being on an administration bond. See form of rule, Chit. Forms, 338.

(*f*) See the forms, Chit. Forms, 333, 334; 2 Saund. 187 b, n. (*c*); 1 Saund. 58 d.

truth of the breaches suggested, and to assess the damages (*f*). *Then sue out the writ of inquiry* (*g*) *as directed ante*, 891, *to be executed before the sheriff; deliver it to the sheriff or his deputy, who will thereupon summon the jury, and the writ will be executed accordingly. It seems that a copy of the writ should, in this case, be delivered to the defendant or his attorney or agent* (*h*). *The same practice as to attending by counsel, subpœnaing witnesses, and the mode of executing the writ of inquiry in ordinary cases, as noticed ante*, 895 *to* 898, *will apply to this case.* It may be here observed, that the defendant cannot plead (*i*) or demur (*j*) to the breaches suggested.

Leave to try at sittings or assizes.

Where questions of difficulty either as to the law or facts are likely to arise, and you are desirous that the writ shall be executed before the Chief Justice at the sittings if the *venue* is laid in Middlesex or London, or before a judge of assize if the venue is laid in any other county, you should obtain leave of the Court or a judge for that purpose, who may grant it under the power of the 3 & 4 *W.* 4, *c.* 42, *s.* 16, already noticed *ante*, 904. *The application for this should be made as directed ante*, 891, 892. *Having obtained and drawn up the rule as there directed, enter the proceedings on the roll, with the suggestion of the breaches, and make and serve a copy of such breaches, and the notice of the inquiry, as directed supra. Then sue out a writ of inquiry, as directed ante*, 891, *to be executed before the Chief Justice at the sittings, or the judges of assize at the assizes, according to the county in which the venue was laid* (*k*); *deliver it with the rule to the sheriff or his deputy, who will thereupon summon a jury, and annex the panel to the writ; then deliver the writ and panel to the associate. And, lastly, you must make out a copy of the record on plain paper or parchment, for the Chief Justice or judges of assize, and leave it with the marshal when you enter the cause.* When the cause is called on, the inquest is taken precisely in the same manner as a cause is tried at *Nisi Prius*.

The evidence.

As to the *evidence* on executing a writ of inquiry in general, see *ante*, 896, 897. The plaintiff need not prove the breaches if they have been assigned, or any averments contained in the declaration or replication, further than is necessary to entitle him to the damages sought to be recovered, the same as on a writ of inquiry in ordinary cases. But he must prove all averments and breaches (if any) that have been *suggested* in the record after judgment (*l*). In an action on a bond against a surety, it was held, that, if non-payment by the principal, after notice in writing required by the condition, be averred in the declaration, and the defendant suffer judgment by default, it is not necessary to give evidence of the notice, because the allegations of the declaration are not put in issue; though, if the breach be suggested in the record under the statute after judg-

(*f*) See 1 Saund. 58 f, 6th ed. See Chit. Forms, 339.

(*g*) See the form, Chit. Forms, 337, 338.

(*h*) Gillingham v. *Wesbett*, 13 Price, 28; M'Clel. 382, *S. C.*

(*i*) 1 Saund. 58 f, 6th ed. And see *Archbishop of Canterbury* v. *Robertson*, 1 C. & M. 690. But see *Plomer* v. *Rose*, 5 Taunt. 391.

(*j*) 1 Saund. 58 f, n. (*g*), 6th ed.: *Webb* v. *James*, Ib.; 3 M. & W. 645; 1 Dowl., N. S., 36, *S. C.*

(*k*) See the forms, Chit. Forms, 336, 337.

(*l*) See 1 Saund. 58 a, 5th ed.

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ment, it would be otherwise (*m*). So, on the execution of the writ of inquiry after judgment on demurrer, the execution of an instrument, which the defendant has stated in setting out the condition of the bond in his plea, need not be proved (*n*). Where, in debt on bond conditioned for the performance of covenants in an indenture, &c., or of an award, judgment is suffered to pass by default, and breaches are *suggested*, the plaintiff must prove the condition of the bond, the award, indenture, &c., as well as the breaches suggested (*o*). He must also prove that the bond mentioned in the suggestion and produced to the jury is that on which the action is brought (*p*). The defendant cannot offer evidence in excuse for the non-performance of the condition (*q*).

Final judgment, when signed, and execution issued.

The 3 & 4 *W.* 4, *c.* 42, *s.* 18, provides, "that, at the return of any such writ of inquiry, or writ for the trial of such issue or issues as aforesaid, *costs shall be taxed, judgment signed*, and *execution issued forthwith*, unless the sheriff or his deputy before whom such writ of inquiry may be executed, or such sheriff, deputy, or judge before whom such trial shall be had, shall *certify under his hand* (*r*), upon such writ, that *judgment ought not to be signed until the defendant shall have had an opportunity to apply to the Court for a new inquiry* or *trial*, or a *judge* of any of the said courts shall think fit to order that *judgment* or *execution shall be stayed* till a day to be named in such order."

How signed, and costs taxed.

If the inquiry was executed before the sheriff, *the inquisition and return will be framed* (*s*) *and procured as directed ante*, 898. *You may then proceed to tax your costs, and sign judgment as you would upon a verdict of a jury, after a trial before the sheriff, on a cause of action not exceeding 20l., as directed ante, Vol.* 1, *p.* 412, 413. If it was executed before the Chief Justice or justices of assize, *the associate will prepare the inquisition, and have it sealed with the seal of the Chief Justice or justices of assize, and annex it to the writ of inquiry* (*s*). *You may then proceed to tax your costs, and sign judgment as upon a postea, as directed ante, Vol.* 1, *p.* 460. The costs may be taxed and judgment signed immediately after the inquest found, even on the same day, if it be the return-day, but not before that day (*t*).

Entry of proceedings on roll.

The remaining proceedings are entered upon the roll thus:—after the award of the writ of inquiry, make an entry of the return of it and of the inquisition; then follows the judgment for the debt, damages, and costs, as in the usual form in debt; then an award of a writ of execution against the defendant's goods, lands, or person; and, lastly, if the writ be executed, follows the entry of the sheriff's return to the writ of execution, and of an acknowledgment of satisfaction by the plaintiff

(*m*) *Barwise* v. *Russell*, 3 C. & P. 608. And see *Archbishop of Canterbury* v. *Robertson*, 1 C. & M. 690.

(*n*) *Collins* v. *Rybot*, 1 Esp. Rep. 157.

(*o*) 1 Saund. 58 d. See *Williamson* v. *Sills*, 2 Camp. 519: *Bartlett* v. *Pentland*, 1 B. & Ad. 704.

(*p*) *Hodgkinson* v. *Marsden*, 2 Camp. 121.

(*q*) *Archbishop of Canterbury* v. *Robertson*, 1 C. & M. 690.

(*r*) See a form, Chit. Forms, 338; but instead of the words "to set aside the execution of the within writ," say, "for a new writ of inquiry."

(*s*) See the form, Chit. Forms, 338.

(*t*) See *Nicholls* v. *Chambers*, 2 Dowl. 693; 1 C., M., & R. 395, S. C.: *Gill* v. *Rushworth*, 2 D. & L. 416.

as to the amount levied (*u*). The judgment above mentioned includes the costs of the inquiry, but not the damages given by the inquest (*x*).

Form of execution.

The writ of execution must, of course, pursue the judgment, and be for the penalty, nominal damages, and costs, with interest, at 4*l.* per cent., from the day on which judgment was entered, or from the 1st of October, 1838, if judgment was entered before that day (*y*); but it must be indorsed to levy only the damages given by the inquest and costs of increase, and interest on those sums, together with the reasonable charges and expenses of executing the writ (*z*).

Proceedings after judgment on demurrer or nul tiel record.

Proceedings after Judgment on Demurrer or nul tiel Record.]—The proceedings after the judgment are the same as when judgment is allowed to pass by default. The judgment is entered in the same manner as in the judgment by default above mentioned, excepting, of course, in the statement of the judgment itself on the demurrer, or for non-production of the record.

Proceedings upon issue joined.

Proceedings upon Issue joined.]—In general the best way of declaring on a bond, within the act, is to set forth in the declaration the condition of the bond, and assign the breaches therein. The issue joined in this case is made up and delivered and tried as in ordinary cases, without a special *venire* (*a*).

If the declaration be not framed in this way, and is on the bond generally, without setting out the condition, and the defendant plead any plea which made it necessary at common law for the plaintiff to assign a breach in his replication, as, for instance, general performance (*b*), the plaintiff must still assign the breach in his replication, with this difference, that now he may *assign* several breaches under the statute, whereas at common law he could assign only one (*c*). The issue in this case is also made up, and delivered and tried, as in ordinary cases, without a special *venire* (*d*).

If to such a declaration the defendant plead any plea on which the plaintiff might at common law have taken an issue in his replication, without assigning a breach of the condition of the writ, (if, for instance, he plead *non est factum* (*e*), or *non est factum* and that the bond was obtained by fraud and covin (*f*), or the like), the plaintiff should still take such issue, and, in addition, he must enter a distinct and separate

(*u*) See the forms of the entry, Chit. Forms, 348, 342; 1 Saund. 58 c; 2 Saund. 187.

(*x*) See *Hankin* v. *Broomhead*, 3 B. & P. 607.

(*y*) See 1 & 2 Vict. c. 110, s. 17, and the forms of writ of execution framed by the judges. R. H. Vac., 1839; R. H. T., 3 Vict., *ante*, Vol. 1, 835.

(*z*) 1 Saund. 58 b, n. 1. See how a ca. sa. is to be indorsed, R. H. T., 3 Vict., and *ante*, Vol. 1, p. 536, 542, 604.

(*a*) Quin v. *King*, 1 M. & W. 42: *Parkins* v. *Hawkshaw*, 2 Stark. 391.

(*b*) When such a plea will suffice, see *Reakes* v. *Manser*, 14 Law J., N. S., C. P. 139, 1 Com. B. 581, S. C., and cases there cited. See also Ib., as to when the replication may conclude to the country.

(*c*) 2 Saund. 187 b, c: *De la Rue* v. *Stewart*, 2 N. R. 362: *Etheredge* v. *Jackson*, 8 T. R. 255: *Timbo* v. *Painter*, 13 East, 1: *Webb* v. *James*, 8 M. & W. 645, 656; 1 Dowl., N. S., 26, S. C. Where the plea is of specific performance of a specific condition, the replication need not assign a breach: see *Derbishire* v. *Butler*, 5 Moore, 198: *Smith* v. *Bond*, 10 Bing. 130; 3 M. & Scott, 528, *S. C.*

(*d*) *Scott* v. *Staley*, 4 Bing. N. C. 794; 5 Scott, 698; 6 Dowl. 714, *S. C.*; *Parkins* v. *Hawkshaw*, Quin v. *King*, *supra*.

(*e*) *Etheredge* v. *Jackson*, 8 T. R. 255.

(*f*) *Hemfrey* v. *Rigby*, 5 M. & Sel. 69.

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suggestion of breaches under the statute: he cannot incorporate such issue and such *suggestion* in one and the same replication (*g*). In this case the issue and award of *venire* must be special to try the issue or issues, and assess damages on the breaches suggested (*h*). If the issue in this case have been already delivered without the suggestion, a judge's order should be obtained for entering a suggestion: and a fresh issue, including the suggestion, should be delivered (*i*).

Evidence.

The evidence upon the issues joined, whether upon an assignment of breaches or otherwise, is the same as in ordinary cases. If the breaches be suggested, the plaintiff must prove the truth of them and the damages. The defendant cannot adduce anything in evidence in excuse for the breaches (*k*).

Verdict.

The *verdict* for plaintiff is the same as in ordinary cases; but the jury must also assess damages for the breaches.

Judgment.

The *judgment* for plaintiff is, that he recover the debt, and 1*s.* damages for the detention thereof, together with 40*s.* costs and the costs of increase; the latter, of course, including the costs of the trial (*l*).

Form of execution.

The writ of *execution* must pursue the judgment; but it must be indorsed to levy only the damages found upon the breaches, the costs of increase, with interest on those sums at 4*l.* per cent. from the day of entering judgment, or from 1st October, 1838, according as judgment was entered before or after that day (*m*), and the expenses of the execution, as mentioned *ante*, 907.

Scire facias on further breaches.

Scire facias after.]—If, after the first inquisition or trial, the defendant be guilty of any further breaches, as the statute says, that in such a case the judgment already signed shall remain as a security to the plaintiff, the plaintiff, in order to obtain damages, must sue out a *scire facias* on the judgment, and thereupon suggest the further breaches (*n*); and upon the defendant pleading thereto or making default, the plaintiff must proceed in the manner directed by the statute. We have seen (*ante*, 876) that this *scire facias* is not necessary on a judgment upon a warrant of attorney.

Form of scire facias.

The *scire facias* in this case should recite the whole proceedings in the former action, or at least so much of them as to make it appear that the judgment is warranted by the statute; and it must then suggest the further breaches (*o*). Or, if the plaintiff in the original action has set forth only some of the covenants, and he now wish to recover damages for breaches of others, it should seem that he may now state these latter covenants in the *scire facias*, and assign breaches on them (*p*).

(*g*) 2 Saund. 187 e, and cases *ante*, 907, n. (*c*).

(*h*) See *Etherscy* v. *Jackson*, 8 T. R. 255: *Quin* v. *King*, 1 M. & W. 42: *Scott* v. *Staley*, 4 Bing. N. C. 724; 5 Scott, 598; 6 Dowl. 714, S. C.

(*i*) *Etherscy* v. *Jackson*, 8 T. R. 255. And see *Hanbury* v. *Guest*, 14 East, 401. See the form of the issue, where the breaches are assigned in the pleadings, Chit. Forms, 49; and of the jury process thereon, Id. 74; of the issue, where the breaches are not assigned in the pleadings, Id. 49; and of the jury process thereon, Id. 74; of the *postea*, judgment, and execution for plaintiff, Id. 96, 108, 342.

(*k*) *Ante*, 905: *Archbishop of Canterbury* v. *Robertson*, 1 C. & M. 690.

(*l*) 1 Saund. 58 b, n. See the form, Chit. Forms, 340.

(*m*) See 1 & 2 Vict. c. 110, s. 17.

(*n*) See the forms, Chit. Forms, 342.

(*o*) 1 Saund. 58 e. See the form, Chit. Forms, 343.

(*p*) 2 Saund. 187 b.

Nothing can be suggested as a breach which might have been originally assigned or suggested as a breach (*q*).

What breach can be suggested.

The proceedings upon this *scire facias* are the same as in the original action; but it is not necessary that there should be any other judgment than the usual one in *scire facias*, namely, an award of execution (*r*). If the plaintiff obtain a judgment by default, he must issue a writ of inquiry. The judgment will be the common judgment in *scire facias*.

Proceedings on scire facias.

The plaintiff was always entitled to costs on this *scire facias*, even before the 3 & 4 *W.* 4, *c.* 42, *s.* 34, whether the defendant pleaded to it or not, notwithstanding sect. 3 of the 8 & 9 *W.* 3, *c.* 11, gave costs in suits upon writs of *scire facias* generally only in cases where the plaintiff obtained an award of execution after plea pleaded or demurrer joined (*s*).

Costs.

The execution will be for the amount of the debt and costs, as above mentioned, but indorsed to levy only the damages assessed, the costs of the *scire facias*, interest on those sums (*t*), and the reasonable charges and expenses of executing the writ when allowed, as to which see *ante*, 907. If the writ of execution be a *ca. sa.*, and the plaintiff seek to obtain interest under 1 & 2 *Vict. c.* 110, it should be stated in the body of the writ of execution that the sheriff is to levy interest on the damages assessed and costs taxed in that behalf at the rate of 4*l.* per cent. per annum from the day on which execution was awarded, unless execution was awarded before the 1st October, 1838, and in that case from that day (*u*).

Execution.

(*q*) 2 Saund. 187 *c*, n. (*g*), 7th ed.: *Harman v. Armitage*, 12 Price, 441. And see *Bate v. Jackson*, 13 Price, 715.

(*r*) 1 Saund. 58 *e*.

(*s*) Id.: *Brooke v. Booth*, 11 East, 587.

(*t*) R. H. T., 3rd Vict., *ante*, 536, 542.

(*u*) 1 & 2 Vict. c. 110, s. 17, *ante*, 536.

CHAPTER VI.

REFERENCE TO THE MASTER.

PART II.

In what cases.

THERE are many cases, which we have already noticed, *ante*, 886, where the plaintiff, instead of executing a writ of inquiry to ascertain the amount of damages, may have them assessed by the Master on a rule for that purpose, which is a much less expensive, and a more expeditious course of proceeding than by writ of inquiry; and in cases where this course of proceeding can, without doubt, be adopted, the plaintiff should not execute a writ of inquiry, for the costs of it would not be allowed him. Where the roll contained an award of a writ of inquiry, and afterwards an assessment of damages by the Court, upon a writ of error being brought for this cause, it was urged, on the authority of *Blackmore* v. *Flemyng* (*a*), that, by the award of the writ of inquiry, the plaintiff had made his election to have his damages ascertained by a jury, and could not afterwards retract, and have his damages assessed by the Court: the Court, however, affirmed the judgment (*b*).

Should be had where it can.

Where several counts.

Where there are two or more counts in the declaration, one of which is for a cause of action the damages upon which may be referred to the Master, and the others not, and the plaintiff has obtained interlocutory judgment upon all, if he has sustained no real damages upon the latter, or if he has, but is willing to abandon his claim to them, his course is to enter a *remittitur damna* as to these, and obtain a rule to compute as to the former (*c*). Such *remittitur* must be made and appear on the roll to have been entered before final judgment. Where a declaration contained a count on a promissory note for 216*l.* 14*s.*, and also counts for goods sold, &c., and the defendant, after the declaration was delivered, paid the plaintiff 150*l.* generally on account of the cause, leaving a balance due less than the amount of the note, it was held that the plaintiff could not enter a *remittitur damna*, nor have a rule to compute on the note, unless the defendant would consent to the plaintiff entering a *nolle prosequi* on the counts for goods sold, &c., and that the only course was to execute an inquiry (*d*). If there be several defendants who have suffered a judgment by default, though separate interlocutory judgments be signed against each, still there should be but one rule to compute, and the application for such rule should not be

Remittitur damna.

Where several defendants.

(*a*) 7 T. R. 446.
(*b*) *Gould* v. *Hammersley*, 4 Taunt. 148.
(*c*) *Fleming* v. *Langton*, 1 Stra. 532: *Heald* v. *Johnson*, 2 Smith, 44. *Duperay* v. *Johnson*, 7 T. R. 473: *Jones* v. *Shiel*, 6 Dowl. 579. See the form, Chit. Forms, 347.
(*d*) *Jones* v. *Shiel*, 3 M. & W. 433; 6 Dowl. 579, S. C. He could not enter a remittitur as to the damages on the counts for the goods, &c., because he had received them.

made until the last of the judgments is signed (*e*). So, if there be several defendants who have suffered judgment by default, there must be but one writ of inquiry (*f*).

Where bill lost, &c.

The rule to compute may be obtained even where the bill or note has been destroyed (*g*), or lost or stolen (*h*), and a copy of it only can be produced.

Time of applying for rule.

The application for the rule to compute cannot be made before the judgment is signed (*i*); but it may be made on the same day it is signed (*j*), or at any time afterwards. Where, however, judgment is signed upon demurrer, the practice is not to move for a rule to compute till the following day (*i*).

After death of plaintiff.

Where interlocutory judgment was signed, and the plaintiff died on a subsequent day in the term, the Court granted a rule to compute principal and interest on the bill on which the action was brought (*k*).

How rule obtained in term time.

The mode of obtaining the rule, and the proceedings as to it in *term time*, is thus:—*Make an affidavit of the cause of action, and that interlocutory judgment has been signed* (*l*). *Annex this affidavit to a motion paper, and give it to counsel, or in the Common Pleas to a serjeant, to move to have the matter referred to one of the Masters, and the Court will thereupon grant a rule nisi.* In the case of bills of exchange and promissory notes, *this is a motion of course* (*m*).

Service of rule nisi.

Draw up the rule with one of the Masters, and serve a copy of it on the defendant's attorney, or agent, if he has appeared by one; or on the defendant, if he has not appeared, or if he has appeared in person. If there be several defendants, a service of the copy of the rule on one will suffice (*n*). *The original rule need not be shewn, unless sight of it be demanded* (*o*). Where the service is to be made on the defendant, and not on his attorney, the copy should be served personally on the defendant, or left for him at his dwelling-house or usual place of abode (*p*), on a person whose business it is to deliver messages and notices to him. Therefore, service upon a servant of the defendant at his dwelling-house has been deemed sufficient (*q*). So has service at his dwelling-house on a person sworn to be part of his family (*r*); or on a person in the habit of receiving messages for him (*s*); or on

(*e*) *Field* v. *Pooley*, 3 M. & Gr. 756; 5 Scott, N. R., 524, *S. C.*

(*f*) *Ante*, 891.

(*g*) *Clarke* v. *Quince*, 3 Dowl. 26.

(*h*) *Brown* v. *Maunder*, 3 M. & Sel. 281: *Lane* v. *Mullins*, 1 Dowl., N. S., 562. In the case of *Saunderson* v. *Lee*, (7 Dowl. 7, the Court refused to decide the question as to the necessity for the production, but left it to the Master. And see *Lane* v. *Miller*, 1 Dowl. 420.

(*i*) *Mann* v. *Compton*, 6 Maule & S. 381.

(*j*) *Peacock* v. *Carpenter*, 3 M. & Sel. 45: *Haywood* v. *Chambers*, 5 B. & Ald. 22: 1 D. & R. 411, *S. C.*: *Russen* v. *Haywood*, 1 D. & R. 444; 5 B. & Ald. 32, *S. C.* See *Gordon* v. *Corbett*, 3 Smith, 178.

(*k*) *Berger* v. *Green*, 1 M. & Selw. 229.

(*l*) See the form, Chit. Forms. According to *Bridport* v. *Jones*, 3 M. & Gr. 61; 1 Dowl., N. S., 190, S. C., this affidavit is not necessary to obtain the rule nisi in C. P. The affidavit for a rule to compute on a bill of exchange may describe the defendant by initials, if he so signed the bill, and is so described in the writ. The affidavit in such a case should shew the form of signature to the bill. (*Hilbert* v. *Wilkins*, 8 Dowl. 139).

(*m*) See *Hoard* v. *Hunt*, C. P., M. T., 1838, 8 Jur. 24, *S. C.*

(*n*) *Carter* v. *Southall*, 3 M. & W. 128: *Amlot* v. *Evans*, 7 M. & W. 462. And see *Grant* v. *Stoneham*, 7 Dowl. 126: *Figgins* v. *Ward*, 2 Dowl. 364; 2 C. & M. 424, *S. C.*

(*o*) R. H., 2 W. 4, r. 51. See *Belaire* v. *Poultney*, 1 Chit Rep. 466, n.

(*p*) See per *Parke*, B., in *Braham* v. *Sawyer*, 13 Law J., N. S., Exch., 40.

(*q*) *Thomas* v. *Ld. Ranelagh*, 5 Dowl. 258.

(*r*) *Weedon* v. *Lipman*, 9 Dowl. 111: *Archer* v. *Evans*, 1 Dowl., N. S., 861, (where the service was on defendant's sister): *Warren* v. *Smith*, 2 Dowl, 216, (where the service was on his mother).

(*s*) *Edwards* v. *Napier*, 9 Dowl. 177.

PART II.

the landlord, or a servant at an inn in which the defendant i residing or making his usual place of abode (*u*). But service o the landlady of the house where defendant lodges will not suf fice (*x*); nor will service on a workman on the defendant's pre mises (*y*); or on a person whom deponent "believes" to be friend of the defendant staying at his house, and authorized t receive messages for him (*z*); nor will service on a clerk o servant at the counting-house, place of business, or warehous of the defendant, for he may not go there for some time (*a*) Service by leaving it in the apartments in which the defendan resided, no person being there at the time (*b*), or by leaving it a defendant's office, in which there is a letter-box, over which i written "Letters" (*c*), will not suffice. But the service in an of such cases will suffice, if it be made appear by affidavit tha the rule afterwards came to defendant's hands (*d*). Servic at a house where the defendant's family were still living though he himself had gone away, has been held sufficient (*e*) but not so service at the defendant's late residence, where it i clear he has ceased to reside there (*f*). Where the defendan cannot be found, and his residence is unknown, and servic cannot be effected after diligent efforts made for that pur pose, the Court, upon an affidavit satisfactorily establishin such efforts, will allow a copy of the rule to be stuck up i the office, and grant a rule to shew cause why the servic should not be deemed good, to be served in the same manne as the former rule (*g*). *On the day appointed by the rule nis for shewing cause against it, the defendant must shew cause, i he can; if none is shewn, the Court, on an affidavit of the ser vice of the rule, will make it absolute* (*h*). No irregularity i the judgment or previous to the judgment can be shewn a cause against the rule; but a cross rule must be obtained t set aside the judgment; and pending which rule, the Cour will enlarge the rule to refer (*i*). Nor is it any answer to th rule, that the defendant has filed a bill in equity against th

Shewing cause.

(*u*) *Tuck* v. *Corfe*, 13 Law J., N. S., 39, Exch.; *Gosling* v. *Best*, 333. See *Brandon* v. *Edwards*, 2 Dowl., N. S., 225.

(*x*) *Salisbury* v. *Sweetheart*, 5 Dowl. 81. But see *Lawes* v. *Scales*, 2 Dowl., N. S., 342.

(*y*) *Hitchcock* v. *Smith*, 5 Dowl. 248.

(*z*) *Brandon* v. *Edwards*, 2 Dowl., N. S., 225. And see *Taylor* v. *Whitworth*, 11 Law J., N. S., 137, Exch.: *Monroe* v. *Reader*, 1 Dowl., N. S., 564.

(*a*) *Rowland* v. *Vizetelly*, 7 Scott, N. R., 429; 1 Dowl. & L. 767, *S. C.*: *Warwick* v. *Bacon*, 8 Scott, N. R., 667: *Ibbotson* v. *Phelps*, 9 Law J., N. S., 232, Exch.; 6 M. & W. 626; 8 Dowl. 770, *S. C.*: *James* v. *Westdale*, 9 Dowl. 104: *Braham* v. *Sawyer*, 13 Law J., N. S., 40, Exch. Query, if it would suffice if it were sworn the clerk's business was to forward messages and notices to his master: see *Rowland* v. *Vizetelly*, 13 Law J., N. S., 15, C. P.: *King* v. *Tomlinson*, 6 Jur. 999.

(*b*) *Chaffers* v. *Glover*, 5 Dowl. 81.

(*c*) *Braham* v. *Sawyer*, 1 Dowl. & L. 466; 13 Law J., N. S., 40, Exch., *S. C.* Where the rule was put through the door of the chambers of defendant's attorney, there being a printed notice there to that effect, it was holden sufficien (*Warren* v. *Thompson*, 2 Dowl., N. S. 224).

(*d*) *Clarke* v. *Roberts*, 1 Dowl., N. S. 778: *Raynar* v. *Hodges*, 1 Dowl., N. S. 863: *Joseph* v. *Stingeman*, 7 Jur. 725.

(*e*) *Paget* v. *Hill*, 2 Dowl. 688. An see *Carew* v. *Winslow*, 5 Dowl. 543.

(*f*) *Black* v. *Cloup*, 5 Dowl. 271: Neil son v. *Shee*, 8 Dowl. 32.

(*g*) *Neilson* v. *Shee*, 8 Dowl. 32: Smith v. *Robertson*, 2 Dowl. 568: Brown v. *Stittle*, 1 M. & W. 672: *Gibson* v. *Le Raneiagh*, 7 Scott, 231, where the de fendant was abroad, and the service was allowed to be made on his general at tornies, &c.

(*h*) See forms, Chit. Forms, 347.

(*i*) *Marryatt* v. *Winkfield*, 2 Chit. Rep. 119: *Pell* v. *Brown*, 1 B. & P. 389: Dodg v. *Burton*, 2 H. & W. 138: *Lawford* v. *Groombridge*. 12 Law J., N. S., 99, B. C.: *Kelly* v. *Villebois*, 8 Dowl. 135. In this case, there being an affidavit that the judgment was irregular, *Littledale*, J., stayed the proceedings, in order that the defendant might apply to set aside the judgment; and see *Middleton* v. *Woods*, 6 M. & W. 136; 8 Dowl. 170, nom. *Middleton* v. *Hughes*, per *Parke*, B.

plaintiff for an account (*k*). It cannot be made absolute pending a rule *nisi*, with a stay of proceedings, or a summons, after it is attendable (*l*), to set aside the judgment; if it be, the Court will set it aside (*m*). *Having obtained a rule absolute* (*n*), *draw it up with one of the Masters, serve a copy of it on the defendant's attorney or agent, or on the defendant, if he have not appeared* (*o*), *or have appeared in person. Also, at the time of this service, or afterwards, serve an appointment by the Master* (*which is, however, generally marked on the copy of the rule*) *of the day and hour when he will proceed with the computation; and the service must be a reasonable time before, that the defendant may have an opportunity to attend* (*p*). *As the Master usually taxes the costs, and signs judgment at the time of the computation on the reference, the defendant should be served with the usual notice of the intended taxation of costs, one day or more before the taxation, as in other cases* (*q*). *At the time appointed for the computation, take the rule absolute and the judgment paper to one of the Masters, who will thereupon compute the sum due to the plaintiff for principal and interest, tax the costs, and sign final judgment as in ordinary cases.* The Master will compute what is due in the same way as a jury would upon a writ of inquiry (*r*), except that no evidence can be received by him *viva voce*, without an express authority in the rule (*s*). The defendant, of course, will not be let in to shew before the Master any matter which he might have pleaded as a defence to the action. As we have already seen, the bill, &c. need not necessarily be produced before the Master (*t*).

Rule absolute, &c.

Proceedings thereon.

In vacation, the rule may be obtained by application to a judge at chambers. For this purpose, *take out a summons for the defendant to shew cause why it should not be referred to one of the Masters to compute principal and interest, &c. Serve a copy on the defendant's attorney or agent, or on the defendant, if he have not appeared, or have appeared in person. The service should be in the same way as the service of a rule nisi as above noticed. Make the usual affidavit* (above noticed) *of the cause of action, and that interlocutory judgment has been signed. Attend with this affidavit before the judge at the time appointed by the summons; and, if no cause be shewn, and, on an affidavit of service of the summons and plaintiff's attorney's attendance, if the defendant does not attend the hearing, the judge will grant his fiat for the rule to compute. This fiat need not be served; but get a motion paper signed by counsel, and, upon the production of this and the fiat to one of the Masters, he will draw up the rule.* The subsequent proceedings will be the same as above directed.

How rule obtained in vacation.

(*k*) *Burdon* v. *Street*, 8 T. R. 226.
(*l*) *Anderson* v. *Southern*, 9 Dowl. 294.
(*m*) *Trego* v. *Tatham*, 2 Scott, N. R., 97: 2 Dowl. 276, & C.
(*n*) As to the service of rules, *post*, part 4, ch. 1.
(*o*) *Bank of England* v. *Atkins*, 1 Chit. Rep. 487: *Sellers* v. *Tufton*, Tidd, 9th ed., 590: *Hackfield* v. *Kendall*, 1 Chit. Rep. 639: from which it would seem that this notice is not necessary in Q. B.
(*p*) *Bunning* v. *Paterson*, 4 Taunt. 487: *Sellers* v. *Tufton*, Tidd, 9th ed., 590: *Hackfield* v. *Kendall*, 1 Chit. Rep. 639: from which it would seem that this notice is not necessary in Q. B.
(*q*) *Post*, Part 5, ch. 31.
(*r*) See *ante*, 896.
(*s*) See *Noy* v. *Reynolds*, 2 Ad. & E. 461.
(*t*) *Ante*, 897, 911.

PART III.

PROCEEDINGS IN PARTICULAR ACTIONS.

CHAPTER I.

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SECT. 1.

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1. *Nature of the Action, &c.*

1. Nature of the action.

WHENEVER a person entitled to land has a right of entry, he may, in a peaceable manner, and without using such violence as would amount to a forcible entry, enter and take possession without any legal formality (*a*). In general, however, and especially if the right of entry be fairly contested, it is best to proceed by an action for its recovery.

Right to enter upon land without action.

Whenever the right of entry is taken away, the right to recover in an action of ejectment is also gone; and before the statute 3 & 4 *W.* 4, *c.* 27, the effect of discontinuance, descents cast, &c., in taking away the right of entry, made it necessary in some cases for the party entitled to resort to a real action. But that statute has abolished all modes of tolling a right of entry (except by lapse of time), and done away with all real and mixed actions, except writ of right of dower, dower, *quare impedit*, and ejectment, which latter is therefore now the only action for the specific recovery of land. An action for not delivering possession may, in some cases, be maintained,

Ejectment, the only action for the specific recovery of land.

(*a*) *Taylor* v. *Cole*, 3 T. R. 295. See *Taunton* v. *Costar*, 7 T. R. 431: *Turner* v. *Meymott*, 1 Bing. 158; 7 Moore, 574, S. C.: *Butcher* v. *Butcher*, 7 B & C. 399; 1 M. & R. 220, S. C.; *Doe Roby* v. *Maisey*, 8 B. & C. 767; *Wildbore* v. *Rainforth*, M. & Malkmeigh v. *Gudge*, 7 Scott, N. R., [illegible] It seems, that if a party who has a right of entry upon land, forcibly enter upon it, he is not liable to an action of trespass *qu. cl. fr.* at the suit of the party in possession for so doing, but that he may be indicted for the forcible entry. *Taylor* v. *Cole*, *supra*: *Taunton* v. *Costar*, *supra*: *Argent* v. *Durrant*, 8 T. R. 403: *Turner* v. *Meymott*, *supra*: *Harvey* v. *Lady Bridges*, 9 Jur. 759; Dalton's Justice, c. 129, p. 431). But a possession gained by a forcible entry is not a lawful one; (*Newton* v. *Harland*, 1 Scott, N. R., 474); and therefore if a landlord forcibly enter upon premises in the possession of the tenant after the expiration of the tenancy, and, after requesting him to depart, and his refusing so to do, turn him out of possession, the landlord is liable to an action for an assault. (*S. C.* And see *Hilary* v. *Gay*, 6 C. & P. 284).

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but damages only (and not the land itself) can be recovered in that form of action.

Actual entry, or notice, when necessary before action.

An actual entry upon the premises sought to be recovered, or a claim where an actual entry is impracticable, or a notice given to the tenant to quit at the end of his period of tenancy, or a demand of possession, is in some cases necessary before an action of ejectment is commenced. An actual entry into lands is only necessary to avoid a fine with proclamations (*b*), and in the case of vacant possession mentioned in the next section; in all other cases, the entry being confessed according to the terms of the consent-rule is deemed sufficient. The entry, to avoid a fine, must be made within five years after the fine has been levied and the proclamations completed, provided the party be not an infant or a married woman, or insane, or beyond seas at the time, and then within five years after the disability ceases (*c*). And, by 4 & 5 *Anne*, *c.* 16, *s.* 16, no entry or claim shall be of force to avoid a fine with proclamations (or be sufficient within the 21 *Jac.* 1, *c.* 16, the statute which until lately governed the period of limitations in ejectment) unless the action be commenced within one year afterwards. These statutes are never pleaded specially in ejectment, but may be given in evidence under the general issue.

Notice to quit.

A notice to quit is, in general, necessary in order to determine a tenancy from year to year. The notice must be to quit at the end of the year of the tenancy, and must be given at least half a year (182 days) previously, except when the rent is payable on the usual quarterly feast-days, in which case notice given on one, to quit on the next but one, is sufficient (*d*). Where the letting is for less than a year, the time of notice must in general be equal to the period of the letting (*e*), such being the general usage. But, in the case of an ordinary weekly or monthly tenancy, a week's or month's notice to quit is not implied as part of the contract, unless there be an usage requiring such notice (*f*), and the usage must be proved.

Determination of tenancy at will.

In cases of tenancy at will, the will must be determined by either the landlord or tenant before action brought (*g*). This is generally effected by a demand of possession on the part of the landlord, and the demise may, perhaps, be laid immediately after the demand, as the tenant is not *de jure* entitled even to a reasonable time for taking away his goods (*h*).

Disclaimer

It is not necessary to give a notice to quit, or to make a de-

(*b*) *Berrington* v. *Parkhurst*, 2 Stra. 1066: *Doe Compere* v. *Hicks*, 7 T. R. 436; 1 Saund. 319 b, &c.: Adams on Ejectment, 2nd ed., ch. 6: Roac. on Evid., 6th ed., 414. Fines have been abolished, and other modes of assurance substituted for them, by the 3 & 4 W. 4, c. 74; but the necessity of an entry to avoid fines previously commenced must still be kept in mind, especially as no limit of time has been prescribed for completing them. See *Doe* d. *Blight* v. *Pett*, 4 P. & D. 278; 11 Ad. & E. 842.

(*c*) 4 H. 7, c. 24.

(*d*) See the forms, Chit. Forms, 349.

(*e*) *Doe* v. *Hazell*, 1 Esp. 94: *Roe Peacock* v. *Raffan*, 6 Esp. 4: but see *Huffill* v. *Armitstead*, 7 C. & P. 56.

(*f*) *Huffill* v. *Armitstead*, 7 C. & P. 56, per *Parke*, B.

(*g*) 2 Bl. Com. 146, &c. See *Roe* v. *Street*, 4 Nev. & M. 42. See what amounts to a determination of a tenancy at will, Co. Litt. 55, b.: *Doe Bennett* v. *Turner*, 7 M. & W. 226; 9 M. & W. 643, in error: *Lepierre* v. *M'Intosh*, 1 Per. & D. 629. And see further, Roe. Evid., 6th ed., 421.

(*h*) *Doe* v. *M'Kaeg*, 10 B. & C. 721. But, *semble*, he may enter to remove them without being subject to an action of trespass, provided he stays no longer than is absolutely necessary for that purpose, and does not disturb the landlord's possession.

mand of possession, as above, before commencing an action of ejectment, if the tenant has disclaimed the title of the landlord (*i*). CHAP. I. of landlord's title.

The Court will exercise an equitable jurisdiction over the proceedings in an action of ejectment, which, for the purposes of justice and convenience, may be said to be peculiarly its own creature (*k*). The whole proceeding in ejectment is founded, it may be said, upon contract between the parties; the lessor of the plaintiff on the one hand, and the defendant on the other (*l*). Equitable jurisdiction in ejectment.

2. *The Declaration.*

The first proceeding in an action of ejectment is the service on the person or persons in actual possession of the premises as tenants, or claiming an interest in them, of a declaration at the suit of a nominal plaintiff against a nominal defendant, called the "casual ejector;" the declaration stating a demise or several demises of the premises to the plaintiff, from the party or parties legally interested, and for whom the ejectment is brought, and an entry of the plaintiff and an ouster by the defendant. And to this declaration is written at the foot, or attached, a notice addressed to the tenant or tenants in actual possession from the nominal defendant, requiring him or them to appear in court to the ejectment in term time, and to be made defendant or defendants instead of him. This declaration and notice are in the place of a writ. What.

Form of.]—*Make out a draft of the declaration, and add a notice to appear at the bottom of it* (*m*). *If there be any difficulty in framing it, or doubt as to who should be the lessor or lessors of the plaintiff, get it drawn by a barrister or special pleader. Make as many copies as there are tenants.* It should be intitled in the court in which the defendant is to appear; but where the declaration was not intitled in any court, but the notice required the tenant to appear "in the Common Bench," the Court held the defect cured (*n*). Form of. Title of court.

The rules of *M. T.*, 3 *W.* 4, extend only to *personal* actions, commenced by the process prescribed by the Uniformity of Process Act, 2 *W.* 4, *c.* 39, and do not extend to ejectment (*o*); therefore the declaration in the Exchequer may still, and usually does, commence by stating the plaintiff to be the Queen's debtor (*p*), though, indeed, such statement is unnecessary, as is also the *quo minus* at the end (*q*). Commencement of.

The declaration also is usually intitled of the previous term, Title of term.

(*i*) See *Doe Grames* v. *Wells*, 10 Ad. & E. 427; 2 P. & D. 396. A tenant for a definite term of years does not forfeit his term by merely disclaiming his landlord's title, S. C. See *Doe Davies* v. *Evans*, 9 M. & W. 49: *Doe Williams* v. *Cooper*, 1 Scott, N. R., 36; 1 Man. & G. 135, *S. C.*: *Doe Burnett* v. *Long*, 9 C. & P. 773: *Doe Egan* v. *Stagg*, 7 Scott, 690. And see Roe, Evid., 6th ed., 423.

(*k*) Per *Bayley*, J., in *Thrustout* v. *Shenton*, 10 B. & C. 111. And see *Doe Grubb* v. *Grubb*, 5 B. & C. 457.

(*l*) *Doe Earl Egremont* v. *Stephens*, 2 D. & L. 996, per *Coleridge*, J.

(*m*) See the forms, Chit. Forms, 351.

(*n*) *Doe Gibson* v. *Roe*, 4 Scott, N. R., 434: *Doe Tattersall* v. *Roe*, 8 Dowl. 612. See *Doe Knowles* v. *Roe*, 1 Dowl. & L. 590: *Doe Evans* v. *Roe*, 9 Dowl. 999; *post*, 9 0.

(*o*) *Doe Gillett* v. *Roe*, 1 C., M., & R. 90; 2 Dowl. 690, *S. C.*; *Doe Haines* v. *Roe*, 2 Moo. & Sc. 619; *Doe Fry* v. *Roe*, 3 Moo. & Sc. 370; *Doe Evans* v. *Roe*, 2 A. & E 11.

(*p*) *Doe Gillett* v. *Roe*, 1 C., M., & R. 90; 2 Dowl. 690, *S. C.*

(*q*) *Doe Bloxham* v. *Roe*, 6 Dowl. 388; 3 M. & Wels. 187, *S. C.*

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but it seems that it is not absolutely requisite that it should be intitled of a term or of a particular day as of a term, and it is sufficient if it be intitled of a particular day (*r*). And the omission of (*s*), or a mistake in, the title of the term is not, in general, material, provided the notice gives the tenant sufficient notice to appear (*t*); and if both the day and term be stated correctly, a mistake in the year is of no consequence (*u*). Even where the declaration was intitled of "Trinity Term, 9 Vict.," which had not arrived, and the notice had no date, but required the tenant to appear in "next Michaelmas term," the Court granted a rule against the casual ejector (*v*). They would not, however, have done so, had not the notice specified correctly when the appearance was to be made (*x*), even though the mistake were explained verbally to the tenant (*y*).

Day of demise.

The day of the demise should be laid on a day subsequent to the accruing of the lessor's title, though it seems it may be laid on that day (*z*). It may be laid after the title of the declaration. The omission of the year in the date is no ground of nonsuit, nor, it seems, for arresting the judgment; the defendant, in case of such an omission, if he consider himself prejudiced by the uncertainty of the date, should apply to the Court or a judge to compel the plaintiff to insert the year of it (*a*).

Venue.

The declaration, as in other cases, should have a venue stated in the margin; a mistake in it is immaterial, if the county in which the premises are situate is properly stated in the body (*b*).

Situation of premises.

The situation of the premises must be stated (*c*); it seems, however, it will suffice to state the county, and that, though usual, the parish need not be stated (*d*); and if the defendant have any doubt as to the locality of the premises, he may by a judge's order obtain particulars of it (*e*).

Superfluous counts.

The rules prohibiting the use of several counts (*ante*, *Vol.* 1, *p.* 197) do not, perhaps, extend to ejectments; but a vexatious number of counts will not be allowed, and, if used, may be struck out after an appearance entered (*f*), under the general power of the Court to strike out superfluous matter, (*Vol.* 1, *p.* 196); and where the declaration, on the demise of the churchwardens and overseers of a parish, to recover parish property contained two sets of counts, one specifying the names of the

(*r*) *Doe Ashman* v. *Roe*, 1 Bing. N. C. 283; 1 Scott, 166, *S. C.*: *Doe Fry* v. *Roe*, 3 Moo. & Scott, 370.

(*s*) Adams on Eject., 2nd ed., 181; Tidd, 9th ed., 1204.

(*t*) *Doe Gore* v. *Roe*, 3 Dowl. 5: *Goodtitle* v. *Ranger*, 2 Chit Rep. 172: *Anon.*, Ib.: *Anon.*, Id. 173: *Doe* v. *Roe*, 2 Dowl. 186: *Doe Wills* v. *Roe*, 5 Dowl. 360: *Doe Evans* v. *Roe*, Id. 508: *Doe Crooke* v. *Roe*, 6 Dowl. 184: *Doe Channell* v. *Roe*, 9 Dowl. 67: *Doe Brook* v. *Roe*, Id. 347. *Doe Smith* v. *Roe*, 7 Scott, N. R., 580.

(*u*) *Doe Smithers* v. *Roe*, 4 Dowl. 374.

(*v*) *Doe Gyde* v. *Roe*, 15 Law J., N. S., Exch.: *Doe Woodruffe* v. *Roe*, 5 Scott, N. R., 800: *Doe Green* v. *Roe*, 8 Scott, 385: *Doe Saunders* v. *Roe*, 12 M. & W. 556: *Doe Yeomans* v. *Roe*, 2 D. & L. 23: and *Doe* v. *Roe*, 8 Jur. 449. The notice operated from the time of service.

(*x*) See *Doe Giles* v. *Roe*, 7 Dowl. 579: *Doe Meredith* v. *Roe*, 6 Jur. 1065: *Doe Rogers* v. *Roe*, 2 Dowl., N. S., 393: *Doe Vincent* v. *Roe*, 9 Dowl. 43: *Doe Newman* v. *Roe*, Id. 131. And see *Doe Goodland* v. *Roe*, 5 Dowl. 273.

(*y*) *Doe Tolley* v. *Roe*, 12 Law J., N. S., 97, Q. B.

(*z*) See *Doe Graves* v. *Wells*, 2 Per. & D. 396: *Doe Bennett* v. *Long*, 9 C. & P. 773.

(*a*) *Doe Parsen* v. *Heather*, 8 M. & W. 158; 1 Dowl., N. S., 64, *S. C.* The year cannot be inserted by the judge at the trial, *S. C.* And see *ante*, Vol. 1, p. 394.

(*b*) *Doe Goodwin* v. *Roe*, 3 Dowl. 322.

(*c*) *Doe* v. *Bath*, 2 N. & M. 440.

(*d*) See *Doe* v. *Gunning*, 2 N. & P. 260; 7 A. & E. 240, *S. C.* And see *Goodtitle* v. *Walker*, 4 Taunt. 671. And see how to describe the premises and the situation of them in general, 2 Chit. Pl., 7th ed., 670, n.

(*e*) See *post*, 945.

(*f*) *Doe Williamson* v. *Roe*, 15 Law J., N. S., Exch., 39. And see *Doe* d. *Will. IV* v. *Roe*, 13 Law J., N. S., Exch., 304.

Unnecessary statements.

individuals and the other not, the Court ordered one of them to be struck out (*g*). The declaration must not recite the original writ, as it formerly used to do, in proceedings by original; and if it does, the recital will not be allowed in costs (*h*), or defendant might obtain an order for striking it out. In general, if the declaration is out of the usual form and improperly framed, so as to prejudice the defendant, he may apply to the Court or a judge to compel the plaintiff to put it right.

Notice to appear. Direction of.

The Notice to appear.]—The notice to appear, at the foot of the declaration, should be directed to the tenant in possession by name, or to all the tenants, if more than one; but the latter, though usual, is not absolutely requisite, (unless, perhaps, in the case of joint tenants (*i*)); and it may be directed to the individual tenant who is served (*j*). In general, it is safest and best to insert the Christian as well as the surname of the tenant, where it can be ascertained (*k*), the same as in a writ of summons. And a notice directed to the personal representatives of a deceased tenant, without naming them, is bad (*l*). But a rule for judgment has been granted against the casual ejector, although, in consequence of the equivocation of the tenant's wife, the notice did not state the Christian name (*m*); and the same where the notice was directed to R. N., and served on R. A. N., it being sworn that he was the person intended, and there being no reason to suppose that any one else was intended (*n*); and in another case a rule was refused to set aside the service of the declaration, on the ground that the notice was addressed to the tenant by a wrong Christian name (*o*); for this would be, in effect, allowing a plea in abatement in ejectment, which was never allowed. In cases where the Christian name is altogether omitted, or the Christian or surname mis-spelt, the party serving the declaration had better inform the tenant served that he is the party for whom it is intended. Service of one of two tenants in possession, with notice directed to the other, is not good (*p*). It is, however, sufficient if each tenant be rightly named in his own notice; and mistakes in the names of the other tenants are immaterial, at least if their identity be sworn to (*q*). Where, upon a motion for judgment against a casual ejector, it appeared that, at the time of serving the declaration and notice, the name of the tenant in possession was not known, but a person on the premises came forward, and said that he

(*g*) *Doe Llandeilo* v. *Roe*, 4 Dowl. 227.

(*h*) R. H., 2 W. 4, r. 4.

(*i*) *Doe* v. *Roe*, 10 Moore, 493.

(*j*) *Doe Barton* v. *Roe*, 7 T. R. 477: *Doe Pearson* v. *Roe*, 5 Moore, 73: *Doe* v. *Roe*, 2 C. & J. 670: *Doe Field* v. *Roe*, 1 H. & W. 515: *Doe Lanford* v. *Roe*, 3 Dowl. 189.

(*k*) *Doe* v. *Roe*, 1 Chit. Rep. 573 a: *Doe* v. *Smith*, Id. 215 a; Adams on Eject., 2nd ed., 262: *Doe* v. *Roe*, 1 Moore, 113: *Doe Atkins* v. *Roe*, 2 Chit. Rep. 179: *Doe Crush* v. *Roe*, 7 Jur. 1016, B. C., 11 Nov. 1843.

(*l*) *Doe St. Margaret* v. *Roe*, 1 Moore, 123: *Anon.*, 1 Chit. 162.

(*m*) *Doe Warne* v. *Roe*, 2 Dowl. 517. See *Doe Pearson* v. *Roe*, 5 Moore, 73: *Doe* v. *Roe*, 6 Dowl. 629: *Doe Smith* v. *Roe*, Ib.

(*n*) *Doe Smart* v. *Roe*, 9 Dowl. 340.

(*o*) *Doe Stainton* v. *Roe*, 6 M. & Sel. 203. And see *Doe* —— v. *Roe*, 1 Chit. Rep. 573, where the Christian name was abbreviated: *Doe Smith* v. *Roe*, 6 Dowl, 629, where there were thirteen tenants in possession, and the Christian names of two of them were omitted in all the notices: *Doe* —— v. *Roe*, 6 Dowl. 629: *Doe Folkes* v. *Roe*, 2 Dowl. 567: *Doe Frost* v. *Roe*, 3 Dowl. 563. If there be any doubt as to the name, it will be safer to inform the tenant at the time of service that he is the person meant.

(*p*) *Doe Smith* v. *Roe*, 5 Dowl. 254.

(*q*) *Doe Peach* v. *Roe*, 6 Dowl. 62.

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was the tenant, but refused to give his name, and the name of the original lessee was then filled in, and the tenant was served, the Court granted a rule *nisi* (*r*). The notice should be addressed to the tenant in actual possession or claiming the right to immediate possession, and not to a mere bailiff or receiver, even though the receiver be appointed by the Court of Chancery (*s*).

At what time it should require appearance.

If the venue (which is always local) be laid in London or Middlesex, the notice should require the tenant's appearance in the court on the first day of the next term, or within the first four days of the next term (*t*). If the venue be laid in any other county, the notice should be to appear in the next term generally; and this, whether such term be issuable or not (*u*). A notice to appear "in due time" (*v*), or "in eight days of St. Hilary," instead of Hilary Term generally (*x*), is bad. Where the notice was dated the 9th of May, 1836, and required an appearance "next Easter Term," (which literally meant Easter, 1837), a rule *nisi* for judgment was granted in Trinity Term, 1836 (*y*). A notice to appear in "next Hilary," without saying "Hilary Term," has been held sufficient (*z*). And, in general, a mistake in this part of the notice will not be fatal, where the tenant cannot reasonably have been misled by it. In an ejectment, not against a tenant within the provisions of the 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 36 (*a*), where the notice required the tenant to appear and plead within ten days, the Court refused to set aside a judgment against the casual ejector for irregularity, the declaration and notice having been served before the term (*b*).

In what court, &c.

The notice should require the tenant to appear in the proper court. Where the declaration was intitled in the Common Pleas, with notice to appear in the Exchequer, the latter Court refused leave to sign judgment against the casual ejector (*c*). The omission of the words "wheresoever" &c., in the notice in an ejectment by original, is not material (*d*). A notice omitting to state the consequence of not appearing is defective; but where a notice was so defective, a rule *nisi* to amend and sign judgment within a week was granted (*e*).

Date, &c.

The notice is, in general, dated, and the name of the casual ejector subscribed; and the date will, as we have seen, sometimes cure a defective title of the declaration (*f*). The date, however, is not material, and it may be omitted altogether if the declaration is properly dated as of the preceding term, so that the tenant may thereby discover which term it is meant he shall appear in; and it is no objection to the notice that

(*r*) *Doe Fitzwygram* v. *Roe*, 2 Dowl., N. S., 672.

(*s*) See *Goodtitle* v. *Badtitle*, 1 B. & P. 385.

(*t*) *Holdfast* v. *Freeman*, 2 Str. 1049.

(*u*) See R. E., 2 G. 4: *Doe Jacques* v. *Roe*, 8 Scott, N. R., 39.

(*v*) *Doe Forbes* v. *Roe*, 2 Dowl. 490: *Doe Isherwood* v. *Roe*, 2 Nev. & M. 476.

(*x*) *Lackland* v. *Badland*, 8 Moore, 79.

(*y*) *Doe Watts* v. *Roe*, 5 Dowl. 149: *Doe Saunders* v. *Roe*, 1 Dowl. & L. 655. But see *Doe Beaumont* v. *Roe*, 1 Dowl. & L. 345.

(*z*) *Doe Dimond* v. *Roe*, 8 Dowl. 308. And see *Doe* v. *Roe*, 1 C. & J. 330.

(*a*) *Post*, 978.

(*b*) *Anon.*, 1 Dowl. 18. It is not stated in the report of this case where the premises were situate. If not situate in London or Middlesex, it would seem the decision would not apply. And its correctness appears doubtful. (See *Doe Isherwood* v. *Roe*, 2 Nev. & M. 476).

(*c*) *Doe Knowles* v. *Roe*, 1 D. & L. 390; 12 M. & W. 849. And see *Doe Evans* v. *Roe*, 9 Dowl. 999: *Doe Phillips* v. *Roe*, 1 D. & L. 915; 7 Scott, N. R., 891.

(*d*) *Doe Thomas* v. *Roe*, 2 Chit. 171.

(*e*) *Doe Darwent* v. *Roe*, 3 Dowl. 336.

(*f*) *Ante*, 917, 918.

it is dated of a day subsequent to the delivery of the declaration (*g*). Where the notice was subscribed in the name of the plaintiff instead of the casual ejector, the mistake was held immaterial (*h*); and perhaps the total omission of either name would be of no consequence.

Where two notices annexed.

Where the declaration was served with two notices annexed, one requiring the appearance of the defendant, and the other that he should enter into recognizances on his appearance, the latter was rejected as surplusage (*i*).

3. *Service of Declaration.*

When to be made.

When to be made.]—It was formerly requisite that the declaration and notice should be served before the *essoign day* of term (*k*); but now, by the rule of *T. T.*, 1 *W.* 4, "declarations in ejectment may be served before the *first day* of any term, and thereupon the plaintiff shall be entitled to judgment against the casual ejector, in like manner as upon declarations served before the essoign or first general return-day" (*l*). The service cannot be effected on any of the days between Thursday next before and Wednesday next after Easter-day that happen to fall within the time appointed for Easter Term, such days being directed by 1 *W.* 4, *c.* 3, *s.* 3, to be deemed part of the term (*m*). The service must not be made on a Sunday; even where the declaration was left at the house of the tenant in possession on Saturday, and received by him on the next day, Sunday, it was held, that this was service of process on a Sunday, within the 29 *C.* 2, *c.* 7, *s.* 6, and void (*n*).

Service, how made.

How made.]—*After the draft of the declaration has been prepared, ingross it on plain paper; make as many copies of it as there are tenants in possession of the premises in dispute, and let a copy be served on each tenant before the first day of the next term.* In general, the party serving it should deliver it personally to the tenant or his wife. It is not necessary to the validity of the service, however, that the tenant or his wife receive the copy of the declaration; it is sufficient if it be tendered to him or her; after which it may be left for them at the place where the tender was made (*o*). Where the person serving the declaration began to read and explain it to the tenant, but before he could deliver it, the tenant turned him out of the house, and he then thrust the declaration under the door, it was held sufficient (*p*); but in a similar case, where the clerk, instead of leaving the declaration, brought it away, *Parke*, J., granted a rule *nisi* only (*q*). And where the

(*g*) *Doe Evans* v. *Roe*, 2 A. & E. 11.

(*h*) *Hazlewood* v. *Thatcher*, 3 T. R. 351; overruling *Peacemble* v. *Troublesome*, Barnes, 173.

(*i*) *Doe Roberts* v. *Roe*, 5 Dowl. 508.

(*k*) *Doe Bird* v. *Roe*, Barnes, 172: *Roe Hazlewick* v. *Doe*, 14 East, 441.

(*l*) *Doe Hooton* v. *Roe*, 3 Jur. 510.

(*m*) *Doe Fredsham* v. *Roe*, 6 Dowl. 541: *Doe* v. *Grace*, 7 Jur. 628, B. C.

(*n*) *Doe Warren* v. *Roe*, 8 D. & R. 362. And see *Doe* v. *Roe*, Id. 592; 5 B. & C. 764, S. C.: *Doe Hine* v. *Roe*, 5 Scott, N. R., 174. But see *Goodtitle* v. *Thrustout*, Barnes, 183.

(*o*) *Bagshaw* v. *Toogood*, Barnes, 195: *Halsall* v. *Wedgwood*, Id. 174: *Farmer* v. *Thrustout*, Id. 180. And see *Douglass* v. ——, 1 Str. 575: *Sprightly* v. *Dunch*, 2 Burr. 1116: *Anon.*, 2 Chit. Rep. 185: *Doe Courthorpe* v. *Roe*, 2 Dowl. 441: *Doe Forbes* v. *Roe*, Id. 452: *Doe Viger* v. *Roe*, Id. 449.

(*p*) *Doe Frith* v. *Roe*, 3 Dowl. 569: *Doe Ross* v. *Roe*, 7 Scott, 846: *Doe Burrow* v. *Roe*, 1 Scott, N. R., 25.

(*q*) *Doe Forbes* v. *Roe*, 2 Dowl. 452.

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person serving the declaration saw the tenant's wife on the premises, and she, instantly that she ascertained his object, ran into the house and closed the door; and he then went to the door, read aloud the notice, explained it, and afterwards stuck a copy of the declaration and notice on the door; *Patteson, J.*, granted a rule *nisi* (*r*).

Explaining the service, &c.

In serving the declaration, the notice at the foot of it should be read over, or at least the purport of it should be signified, and the nature and meaning of the service explained, to the person upon whom it is served, so as to be fully understood by him (*s*). It is not sufficient to read it over without explaining it (*t*), but it seems it is to explain it without reading it over (*u*); it is more prudent to do both. Where the tenant was a Welchman, and did not know English, and the person who served him did not know Welch, but got a neighbour to explain to him the nature of the declaration and notice, that was held sufficient (*x*). Service before the first day of term, and explanation after it, will not suffice (*y*). If the tenant or his wife, &c. refuse to listen to the reading or explanation, or prevent it by turning out, or refuse to let in, the person endeavouring to effect the service, he ought to effect it as well as he can under the circumstances; for instance, by reading and explaining the notice loudly outside the door, and putting a copy of the declaration under it, and by posting another copy on some conspicuous part of the premises (*z*). Where a declaration was tendered to the tenant's wife in her shop, upon the premises, and the person serving it attempted to read to her the notice, but she refused to hear it, and left the shop, and the declaration and notice were thereupon left in the shop; the Court were of opinion that the notice should have been read aloud in the shop, but they granted a rule to shew cause why this should not be deemed good service (*a*). Where the tenant's wife prevented the person serving it from giving an explanation or reading it over, the service was held sufficient (*b*). In another case, when the attorney, after explaining the contents of the declaration to the tenant's wife, was proceeding to read the notice, she said she could read it herself, and ran her eye over it as if she had read it; this was held to be sufficient (*c*). And the same, where the tenant himself read it over, and said that he understood it (*d*).

When tenant an attorney.

It is not necessary to give the above explanation, if the tenant in possession be an attorney (*e*).

(*r*) *Doe Nash* v. *Roe*, 8 Dowl. 306.

(*s*) See *Doe* v. *Roe*, 3 Jur. 24.

(*t*) *Doe Wade* v. *Roe*, 6 Dowl. 51, C. P.

(*u*) *Doe* v. *Roe*, 1 Dowl. 428; 2 Dowl. 199. See *Doe Downes* v. *Roe*, 4 Dowl. 566, in which case, on an affidavit merely stating that the tenant "appeared to be acquainted with the intent of the declaration," *Patteson*, J., said that the deponent ought to have shewn that he had read over and explained the notice, or, at least, that he had begun to do so, and was prevented by the tenant from proceeding, but granted a rule *nisi*. And where the nature and object of the declaration were explained, but in consequence of the tenant's refusal it was not left with him, a rule *nisi* was granted. (*Doe Forbes* v. *Roe*, 2 Dowl. 452. And see *Doe Mann* v. *Roe*, 11 M. & W. 77). Explanation to a foreigner by an interpreter not upon oath is sufficient. (*Doe Probert* v. *Roe*, 3 Dowl. 335).

(*x*) *Doe Probert* v. *Roe*, 3 Dowl. 335: *Doe Cattell* v. *Roe*, 9 Dowl. 1023.

(*y*) *Doe* v. *Roe*, 1 D. & R. 563.

(*z*) See *Doe Summers* v. *Roe*, 5 Dowl. 552: *Doe Rose* v. *Roe*, 7 Scott, 846: *Doe Mann* v. *Roe*, 11 M. & W. 77; and the numerous cases referred to in the following pages. "He that can hear, and won't hear, does hear." (*Doe Lowndes* v. *Roe*, 7 M. & W. 439: *Doe Roberts* v. *Roe*, 6 Scott, N. R., 833).

(*a*) *Doe Neal* v. *Roe*, 3 Wils. 263.

(*b*) *Doe George* v. *Roe*, 3 Dowl. 541: *Doe Nash* v. *Roe*, 8 Dowl. 306.

(*c*) *Goodright* d. *Waddington* v. *Thrustout*, 2 W. Bl. 800. And see *Doe Jones* v. *Roe*, 1 Dowl. 518.

(*d*) *Doe Jones* v. *Roe*, 1 Dowl. 518.

(*e*) *Doe* d. *Portland* v. *Roe*, 1 Dowl., N. S., 183; 4 Scott, N. R., 22; 3 M. & G. 397, *S. C.*

Where different parts of the premises are in possession of different tenants, each of them must be served with a copy of the declaration, otherwise you can only obtain a rule for judgment against the casual ejector as against those actually served (*f*). Where premises were let on lease by A. to B., and B. underlet them to several persons—in ejectment by A. it was held, that the declaration should have been served on all the tenants in possession (*g*); otherwise only such part of the premises as were occupied by the tenants actually served could be recovered in the action. But where the premises consisted of several cottages, and the tenants of all of which, except one, had been duly served, as to which it appeared that there was no one on it, and that a copy of the notice and declaration had been affixed on the door; a rule *nisi* for judgment against the casual ejector was granted (*h*). And a service of the declaration on one of two or more *joint tenants* in possession is good service on all, if the notice to appear be addressed to all (*i*). Where one of two joint tenants is dead, and the service is on the survivor, the rule for judgment will be granted as against the survivor only (*j*). Where the tenants in possession were three sisters, not joint tenants, service of declaration on two on the premises, and a copy left for the third, with the usual explanation, was held sufficient for a rule *nisi* (*k*). Service on the acting partner of a firm in possession of the premises is sufficient (*l*).

Where several tenants.

Service in ordinary Cases on the Tenant or his Wife.]—The declaration should regularly be served on the tenant himself or his wife (*m*). On the former it may be served anywhere (*n*), even abroad (*o*). On the latter, either on the premises or at the husband's house or place of business (*p*); or, it seems, anywhere else, provided she be living with her husband at the time (*q*): but in all other cases it must be served upon the premises. Service on the wife on the premises has been held

Service in ordinary cases on the tenant or his wife.

(*f*) *Doe Bromley* v. *Roe*, 1 Chit. Rep. 16: *Doe Edwards* v. *Roe*, 3 Moore, 578: *Doe Iles* v. *Roe*, 8 Dowl. 65.

(*g*) *Doe Lord Darlington* v. *Cook*, 4 B & C. 229.

(*h*) *Doe Timothy* v. *Roe*, 6 Scott, 126: *Doe Hindle* v. *Roe*, 3 M. & W. 279. But see *Doe Lord Darlington* v. *Cook*, 4 B. & C. 229. See *Doe Hanson* v. *Roe*, 1 Dowl. & L. 657.

(*i*) *Doe Williamson* v. *Roe*, 10 Moore, 468. And see *Doe Bromley* v. *Roe*, 1 Chit. Rep. 141: *Doe Bailey* v. *Roe*, 1 B & P. 359: *Doe Hutchins* v. *Roe*, 2 Dowl. 418: *Doe Collier* v. *Roe*, 6 Dowl. 291. The affidavit of service should shew them to be joint tenants.

(*j*) *Doe Hanson* v. *Roe*, 5 Dowl. 404.

(*k*) *Doe Grimes* v. *Roe*, 4 Dowl. 86; 1 H. & W. 289, & C.

(*l*) *Doe Gwarton* v. *Roe*, 9 Dowl. 1039.

(*m*) *Goodright* v. *Thrustout*, 2 W. Bl. 892: *Doe Monk* v. *Roe*, 2 Wils. 263. In *Doe Walker* v. *Roe*, (4 Moo. & P. 11), the service was on a woman who represented herself to be the tenant's wife, and it was held sufficient. The affidavit upon which the motion for judgment is made should state, in such a case as this, that the deponent believes such representation to be true. (*Doe Grange* v. *Roe*, 1 Dowl., N. S., 274: *Doe Brenner* v. *Roe*, 8 Dowl. 135. And see *Doe Simmons* v. *Roe*, 1 Chit. Rep. 228: *Doe Smith* v. *Roe*, 1 Dowl. 614: *Doe Pamphilon* v. *Roe*, 1 Dowl., N. S., 186. See forms of affidavit of service, Chit. Forms).

(*n*) Tidd, 1210; 2 Sellon, 96: *Wright* d. *Bayley* v. *Wrong*, 2 Chit. 185.

(*o*) *Doe Daniel* v. *Wondreffe*, 7 Dowl. 494; 8 Law J., N. S., Exch., 254.

(*p*) *Doe Graef* v. *Roe*, 6 Dowl. 456: *Doe Lord Southampton* v. *Roe*, 1 Hodges, 24: *Doe Moriand* v. *Bayliss*, 6 T. R. 765: *Doe Baddam* v. *Roe*, 2 B. & P. 55. And see *Right* v. *Wrong*, 2 D. & R. 84: *Doe Boullott* v. *Roe*, 7 Dowl. 463.

(*q*) *Doe Briggs* v. *Roe*, 2 C. & J. 202; 1 Dowl. 312, S. C.: *Doe Mingay* v. *Roe*, 6 Dowl. 182: *Doe Wingfield* v. *Roe*, 1 Dowl. 693: *Doe Boullott* v. *Roe*, 7 Dowl. 463: *Doe Bath (Marquis of)* v. *Roe*, 7 Dowl. 692, where service on the wife "near the premises" was held sufficient for a rule *nisi* for judgment, the rule *nisi* to be served on the husband.

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sufficient, even where the husband had left the kingdom an settled abroad (*r*).

The modes of service which may be adopted, where regula service on the tenant or his wife cannot be effected, will no be considered in the following order :—

Service on child, servant, &c., with proof that tenant received it before term.

Service on Child, Servant, &c., with Proof that Tenant receive Declaration before Term.]—Service on a child or servant, o other person than the tenant or his wife, will not in genera suffice. Even service on the tenant's attorney (*s*), or a receive appointed by the Court of Chancery, to manage an estate fo an infant, is by itself insufficient (*t*). If, however, the tenan or his wife be not at home, and the declaration be served on hi child (*u*) or servant, or, as it seems, on any other person (*x*) and it afterwards appear, from the acknowledgment of th tenant (*y*), or his attorney (*z*), or from other sufficient evi dence (*a*), that the tenant received the declaration before th first (*b*) day of the term, the service will be deemed sufficient (*c*) The wife's acknowledgment in such a case will not, in general suffice (*d*). An acknowledgment made *within* the term of receipt *before* the term, is sufficient (*e*). But unless it appear from the acknowledgment, or otherwise, that the declaratio was received before the term, not even a rule *nisi* will b granted (*f*). Service on a clerk of the tenant, (an attorney) who, in his absence, accepted service thereof for him, has bee held sufficient (*g*).

Service on servant, &c., when sufficient for a rule *nisi*.

Also, where service has been effected on a servant, child, &c. on the premises, if only a reasonable probability of the declara tion having come to the tenant's hands before the first day o term is made out, a rule *nisi* for judgment will be granted Thus, where the declaration was served on the son of the tenant on the premises, of which the tenant was immediately after wards informed, when he said, "Then I have no time to lose;" *Patteson*, J., granted a rule *nisi* for judgment (*h*). So,

(*r*) *Doe* v. *Roe*, 1 D. & R. 514.

(*s*) *Doe* d. *Collins* v. *Roe*, 1 Dowl. 613.

(*t*) *Goodtitle* d. *Roberts* v. *Badtitle*, 1 B. & P. 385.

(*u*) See *Doe Emerson* v. *Roe*, 6 Dowl. 736.

(*x*) *Doe Harris* v. *Roe*, 2 Dowl. 607.

(*y*) *Doe Hambrook* v. *Roe*, 14 East, 441: *Doe Agar* v. *Roe*, 6 Dowl. 624: *Doe Harris* v. *Roe*, 1 Dowl., N. S., 704.

(*z*) *Doe Teverell* v. *Smee*, 2 D. & R. 5: *Anon.*, 2 Chit. Rep. 187. And see *Doe* v. *Roe*, 2 D. & R. 12: *Jenny* d. *Mills* v. *Cutts*, 1 Scott, 52: *Doe Gibbard* v. *Roe*, 9 Dowl. 844; 3 Scott, N. R., 363. *S. C.*

(*a*) See *Doe Eaton* v. *Roe*, 7 Scott, 194.

(*b*) Before the rule of T. T., 1 W. 4, *ante*, 921. it was necessary that the acknowledgment should be, that he received it before the essoign day. See *Doe* v. *Roe*, 5 B. & C. 764: *Doe Warren* v. *Roe*, 8 D. & R. 342: *Doe Hambrook* v. *Roe*, 14 East, 441: *Doe Halsey* v. *Roe*, 1 Chit. Rep. 100.

(*c*) See *Goodtitle* v. *Thrustout*, Barnes, 183: *Smith* v. *Hurst*, 1 H. Bl. 644. See form of affidavit of service in such a case, Chit. Forms, 355.

(*d*) *Goodtitle* v. *Badtitle*, 1 B. & P. 384: *Doe James* v. *Staunton*, 1 Chit. Rep. 121; 2 B. & Ald. 371, *S. C.*: *Doe Briggs* v. *Roe*, 1 Dowl. 312: *Doe Wilson* v. *Smith*, 3 Id. 379. But see *Doe* v. *Roe*, 2 D. & R. 12, which case, however, seems to have been decided on some implied agency of the tenant's daughter: it was cited without effect in *Doe Finch* v. *Roe*, (5 Dowl. 295), and, as it would be unjust to allow the tenant to be prejudiced, even by the assertions of third persons, it seems absurd to call upon him to rebut their acknowledgments. See also *Doe Tucker* v. *Roe*, 2 Dowl. 775; 4 Moo. & Sc. 165, & *C.*

(*e*) *Doe Smith* v. *Roe*, 4 Dowl. 295: *Doe Durrant* v. *Roe*, 8 Scott, 459: *Doe Pigrim* v. *Roe*, 2 Scott, N. R., 448; 2 Man. & G. 294, *S. C.* But see *Doe Ensley* v. *Roe*, 1 Man. & G. 846.

(*f*) *Doe Finch* v. *Roe*, 5 Dowl. 295: *Doe Brittlebank* v. *Roe*, 4 Moo. & Sc. 364. See *Doe Marsdell* v. *Roe*, 2 A. & E. 588; 4 Nev. & M. 553, *S. C.*: *Doe Hine* v. *Roe*, 5 Scott, N. R., 174: *Doe Ginger* v. *Roe*, 9 Dowl. 336.

(*g*) *Doe Gower* v. *Roe*, 6 Scott, N. R., 41: 2 Dowl., N. S., 923, *S. C.*

(*h*) *Doe Brickfield* v. *Roe*, 1 Dowl. N. S., 270.

where the service was effected on a servant of the tenant in possession, on the premises, and the day after the commencement of term the tenant consented that the service should be sufficient, and at the time the tenant had the declaration and notice in his hands, but he had not admitted that the papers had reached him before term, a similar rule was granted (*i*). So, service of the declaration on a son of the tenant in possession, who said that his father was unable to attend to business, coupled with a subsequent admission by the wife of the tenant that he had received it, has been held sufficient to grant a rule *nisi* calling on the tenant to shew cause why it should not be a good service (*j*). So, service on the daughter of the tenant, on the premises, with an acknowledgment by the wife, before the term, that the declaration had come to the hands of her husband, has been held sufficient for a rule *nisi* for judgment (*k*). So has service on the tenant's mother-in-law, who lived with him, upon the premises, coupled with an admission by his wife made on the day before term, that the declaration and notice had been delivered to her (*l*). So has service on the son of the tenant in possession, on the premises, coupled with a statement by the son that his father came home that night and received the declaration (*m*). So, where the service was effected on a servant, who afterwards admitted that she had given the declaration to her master, and the tenant afterwards refused to make any acknowledgment on the subject of the service, but referred to his attorney, who also declined making any acknowledgment, a rule *nisi* for judgment was granted (*n*). And service on a servant, she stating her mistress to be too ill to be seen, and that she had given the declaration to her mistress, has been held sufficient for a rule *nisi* (*o*). So, where the son-in-law of the tenant had been served near to the premises in dispute, and a summons for particulars was subsequently taken out by the attorney of the tenant, the Court granted a rule *nisi* for judgment (*p*). So, where the service of the declaration was on an attorney, who represented himself to be the agent of the tenants in possession, and would appear for them, the Court granted a rule *nisi* that it should be good service, and directed the rule to be served on the attorney (*q*). So, where the declaration was served upon a servant of the tenant on the premises, who promised to deliver it to her master, and it was afterwards, on the same day, seen in the hands of the tenant's attorney, a rule *nisi* was granted (*r*). But where the declara-

(*i*) *Doe Middleton* v. *Roe*, 1 D. & L. 149, B. C.

(*j*) *Anon.*, 2 Chit. Rep. 182: *Doe Oebaldeston* v. *Roe*, 1 Dowl. 456: *Doe Cockburn* v. *Roe*, Id. 692: *Doe Wetherell* v. *Roe*, 2 Dowl. 441.

(*k*) *Doe Chaffey* v. *Roe*, 9 Dowl. 100.

(*l*) *Doe Morgan* v. *Roe*, 1 Dowl., N. S., 338, B. C.: *Doe* d. *The Governors of the Guy Coat Hospital* v. *Roe*, 8 Scott, N. R., 294.

(*m*) *Doe Timmins* v. *Roe*, 6 Dowl. 765: *Doe Trotter* v. *Roe*, 4 Jur. 699, B. C.: *Doe Thruster* v. *Roe*, 1 Dowl., N. S., 261: *Doe Ashton* v. *Roe*, 7 Scott, 121.

(*n*) *Doe Elderton* v. *Roe*, 1 Dowl., N. S., 338: *Doe* v. *Roe*, 2 Dowl. 198.

(*o*) *Doe Messer* v. *Roe*, 5 Dowl. 716: *Doe* v. *Roe*, 1 Dowl. 692: *Doe* v. *Roe*, 2 D. & R. 12: *Doe Frost* v. *Roe*, 8 Dowl. 301. The affidavit in this case, upon which the motion for judgment was made, stated that the deponent believed the statement to be true. See *Doe Overy* v. *Roe*, 7 Scott, N. R., 519.

(*p*) *Doe Evans* v. *Roe*, 2 Dowl., N. S., 334, B. C., *Wightman*: *Doe Varlet* v. *Roe*, 6 Jur. 1016, B. C. See *Anon.*, 6 Jur. 371, B. C.: *Doe Gibbard* v. *Roe*, 3 Scott, N. R., 363: *Doe Terrell* v. *Roe*, 5 Jur. 24, B. C.

(*q*) *Anon.*, 2 Chit. Rep. 181. See *Doe Walker* v. *Roe*, 2 C. & J. 381. And see *Doe* v. *Roe*, 1 Dowl. 613, *cont.*

(*r*) *Doe* v. *Roe*, 2 Dowl 184. See *Doe Weatherall* v. *Roe*, 2 Dowl. 441.

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tion was served on the brother-in-law of the tenant on the premises in S., the tenant being then seriously ill at W., and on the next day service was made on a person at the house where the tenant was, and, on the same day, he died; *Coleridge*, J. refused the rule, saying, that it was not likely that any papers should have been delivered to the tenant in the state in which he then was (*s*). And where the service was effected upon the sister of F., one of the tenants in possession, on the premises the Court refused to grant a rule *nisi* upon an affidavit stating that one S., another of the tenants in possession, in a conversation with him, had spoken of F. as his "under-tenant," and had stated that he had received the papers from F., and had handed them to his superior landlord (*t*).

Service where tenant resides abroad, or evades service.

Service where Tenant resides Abroad, or evades Service.]—Where the tenant has absconded to another country (*u*), or resides abroad (*x*), or is clearly keeping out of the way to avoid being served (*y*), a copy of the declaration should be delivered (*z*), if possible, to his relation or servant, or some other person on the premises, to whom the notice should be read over and explained, and another copy had better be affixed on the outer-door, or some conspicuous part of the premises; and thereupon, if it be made to appear to the satisfaction of the Court that due diligence has been used (*a*), and that the tenant resides abroad, or has absconded, or kept out of the way to avoid being served, the Court, on an affidavit of the facts, will grant a rule *nisi*, that the service on his relation or servant, or by posting, &c., shall be deemed good service, and direct in what manner the rule shall be served (*b*). Where the tenant had absconded, leaving the key of the house in the care of a broker, with directions that he should let the premises, and a copy of the declaration had been served on the broker, and another copy had been affixed to the door of the house, the Court granted a rule absolute in the first instance (*c*). So, where the tenant absconded, leaving the key of the premises with his attorney, to whom he by letter referred the landlord; it was held, that service of the declaration and notice, by affixing a copy on the door of the premises, and by delivering another copy to the attorney, was sufficient to entitle the landlord to judgment against the casual ejector (*d*). Where the service was effected at the house of the tenant in possession, by sticking a copy on

(*s*) *Doe Hartford* v. *Roe*, 1 Har. & W. 352.

(*t*) *Doe Harris* v. *Roe*, 1 Dowl., N. S., 704. See *Doe* d. —— v. *Roe*, 6 Jur. 15: *Doe Tubrum* v. *Roe*, 3 Jur. 682, Exch.: *Doe Dobler* v. *Roe*, 2 Dowl., N. S., 333.

(*u*) *Doe Robinson* v. *Roe*, 3 Dowl. 11.

(*x*) *Doe Treat* v. *Roe*, 4 Dowl. 278: *Doe* v. *Roe*, 4 B. & Ald. 653: *Doe Potter* v. *Roe*, 1 Hodg. 316: *Doe Robinson* v. *Roe*, 3 Dowl. 11: *Doe Harrison* v. *Roe*, 10 Price, 30: *Doe Mather* v. *Roe*, 5 Dowl. 552. See *Roe Fenwick* v. *Doe*, 3 Moore, 576; 1 D. & R. 514: *Doe Fabay* v. *Roe*, 1 D. & L. 118, B. C.

(*y*) *Doe Luff* v. *Roe*, 3 Dowl. 575.

(*z*) See *Doe Wilson* v. *Roe*, 7 Jur. 513, B. C.: *Doe Turiny* v. *Roe*, 1 Chit. Rep. 506: *Anon.*, 2 Chit. 177.

(*a*) *Doe George* v. *Roe*, 3 Dowl. 9. See *Doe Turiny* v. *Roe*, 1 Chit. Rep. 506: *Doe Nottage* v. *Roe*, 4 Scott, N. R., 706.

(*b*) *Douglass* v. ——, 1 Str. 575: Tidd, 9th ed., 1214: *Doe Mather* v. *Roe*, 5 Dowl. 552, and cases there cited: *Doe Cathcart* v. *Roe*, 1 Dowl. 456: *Doe Morpeth* v. *Roe*, 3 Dowl. 577: *Doe Luff* v. *Roe*, 1d. 575. See *Roe Fenwick* v. *Doe*, 3 Moore, 576. It may be generally stated, that wherever a *bond fide* attempt to effect regular service is frustrated by the fraud or artifice of the tenant, the Court will grant a rule *nisi*. See *Doe Frith* v. *Roe*, 3 Dowl. 569, and per *Tindal*, C. J., *Doe Wright* v. *Roe*, 6 Dowl. 455.

(*c*) *Doe Scott* v. *Roe*, 8 Scott, 468; 6 Bing. N. C. 907; 8 Dowl. 254, S. C. See *Doe Haggett* v. *Roe*, 6 Jur. 250, B. C.: *Doe Nottage* v. *Roe*, 1 Dowl., N. S., 739: 4 Scott, N. R., 706, S. C.

(*d*) *Doe Dowston* v. *Roe*, 5 Scott, N. R., 174.

the door of the house, and by serving another copy on a female there, who equivocated as to the tenant being at home, and, on the papers being explained, said she knew what they were, for that the lessor of the plaintiff had already been endeavouring to effect service, but could not; *Tindal*, C. J., observing that he was inclined to think there was something like trickery, granted a rule *nisi*, which was afterwards made absolute on an affidavit that the same female was served with the rule in a yard attached to the tenant's house, and that she was his servant (*e*). Where the person effecting the service went to the house sought to be recovered, and, being informed that the tenant was at home, he put a ladder against the drawing-room window, and got up to it, and, while there, believing that the tenant was in the room, he explained at the window the nature of the proceeding, and stuck a copy upon the door, it being sworn that the tenant was keeping out of the way to avoid being served, *Coleridge*, J., granted a rule *nisi* to be served personally, if possible, but if not, then in the same way as the copy of the declaration (*f*). So, where the clerk went to the tenant's house, knocked at the door, and received no answer, but heard some one whom he believed to be the tenant come to the door to listen, and he then read the declaration aloud, and explained it, and put a copy of it through a broken pane near the door, *Patteson*, J., granted a rule *nisi* (*g*). And where the service was effected by passing the copy of the declaration and notice under the door of the dwelling-house, the tenant being at the time in the house, but refusing to open the door or to listen to the explanation which was attempted to be given of the object and notice of the service, a rule absolute was granted (*h*). In ejectment for lands upon which there is no house, and the tenant's residence cannot be ascertained, service of the declaration and notice upon the tenant's agent, leaving copies at his last ascertained dwelling-house, and affixing a notice on a conspicuous part of the land, is sufficient for a rule *nisi* for judgment (*i*). Where the premises consisted of a small piece of land, which had been inclosed by the tenants, and to which there was no access save through their brewhouse, which they refused to permit, and the declaration and notice had been left at their counting-house adjoining the premises, a rule *nisi* was granted, calling upon the tenants to shew cause why such service should not be a good one (*k*). So, where lodgers in a house could not be served, service on the keeper of the house, at the house, accompanied with the usual reading and explanation, was held sufficient for a rule *nisi* for judgment (*l*). So, where several ineffectual attempts had been made to serve the tenant, who was denied by the servant, and the last time the servant stated that his master was in his house, but refused to be seen by any person, unless he sent in his name and message, whereupon the declaration was delivered to the servant, the Court

(*e*) *Doe Wright* v. *Roe*, 6 Dowl. 455.

(*f*) *Doe Colson* v. *Roe*, 6 Dowl. 765. See *Doe Marshobe* v. *Roe*, 2 Dowl. 444: *Doe Tunnicliff* v. *Roe*, 1 H. & W. 371.

(*g*) *Doe Frost* v. *Roe*, 3 Dowl. 314: *Doe Wells* v. *Roe*, 3 Dowl. 582: *Doe Hellier* v. *Roe*, 7 Jur. 899, B. C.

(*h*) *Doe Lewendon* v. *Roe*, 7 M. & W. 439.

(*i*) *Doe Johnson* v. *Roe*, 12 Law J., N. S., 97, B. C., *Patteson*. *Semble*, that in such a case service on the agent alone would be sufficient, *S. C.* (*Anon.*, 6 Jur. 960, B. C.)

(*k*) *Doe Barrow* v. *Roe*, 1 Scott, N. R., 25; 1 Man. & G. 238, *S. C.*

(*l*) *Doe Threader* v. *Roe*, 1 Dowl., N. S., 261.

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granted a rule *nisi* (*m*). And, in another case, where the servants refused to call their master or to receive the declaration, saying they had orders to take no papers, it was ordered (on motion) that leaving it at the house should be sufficient (*n*). So, where the tenant afterwards admitted that he was keeping out of the way to avoid being served, the Court granted a rule *nisi* (*o*). But where the tenant's wife admitted that she had taken care to keep her husband out of the way, it was held that this admission of the wife could not be received against the husband, and the rule was refused (*p*).

Where premises wholly abandoned.

It should be here observed, that where the premises are unoccupied, and the possession entirely *abandoned*, then the ejectment must be proceeded with as on a *vacant* possession; but not so where the tenant has *discontinued to occupy* the premises, and still retains the virtual possession of them (*q*). Also, if the premises be incapable of occupation, as if they be in an unfinished state, the ejectment must, perhaps, be proceeded with as on a vacant possession (*r*).

Service in case of lunacy.

Service in case of Lunacy.]—Where the tenant in possession was a lunatic, but no committee had been appointed either of her person or estate, a service upon her was held to be sufficient (*s*). And where the tenant in possession was a lunatic, and the declaration was served on a person who resided with her, and transacted her business, (no committee being appointed), the Court granted a rule to shew cause why this should not be deemed good service (*t*). But where the service was on the daughter of a lunatic tenant in possession, who carried on the business for him on the premises, and it appeared that he was confined in a lunatic asylum, *Patteson*, J., refused a rule for judgment, observing, that the service might have been effected on the lunatic himself (*u*). Where the tenant was a lunatic, and was not permitted by the keeper of the lunatic asylum to be seen, and service of the declaration had been effected on his sister-in-law on the premises, and also on the keeper of the lunatic asylum, a rule *nisi* for judgment was granted (*x*).

Service in case of bankruptcy.

Service in case of Bankruptcy.]—Where the tenant in possession had become bankrupt, service of the declaration and notice addressed to the assignees upon a person who represented himself to be messenger in possession under the fiat, and on the official assignee, was held sufficient for a rule absolute (*y*). So, service on one of the assignees, who is stated to be tenant in possession, is good service (*z*).

(*m*) *Doe Hervey* v. *Roe*, 2 Price, 112: *Doe Halsey* v. *Roe*, 1 Chit. Rep. 100, n. (*a*). See *Doe Cockburn* v. *Roe*, 1 Dowl. 692: *Doe Croley* v. *Roe*, 2 Dowl., N. S., 344: *Doe Moody* v. *Roe*, 8 Dowl. 306.

(*n*) *Douglass* v. ——, 1 Str. 575.

(*o*) *Anon.*, 2 Chit. 186.

(*p*) *Doe* v. *Smith*, 3 Dowl. 379. See *Doe Fraser* v. *Roe*, 5 Dowl. 720.

(*q*) See further as to this, *post*, 964. *Doe Newman* v. *Roe*, 2 Dowl. 399.

(*r*) *Doe Scovell* v. *Roe*, 3 Dowl. 691; 2 C., M., & R. 42, S. C. nom. *Shovell*. And see *Doe* v. *Roe*, 4 Dowl. 173.

(*s*) *Doe Gibbard* v. *Roe*, 3 Scott, N. R., 363; 3 Man. & G. 87; 9 Dowl. 844, *S. C.*: *Doe Brown* v. *Roe*, 6 Dowl. 270.

(*t*) *Doe* v. *Wright*, Barnes, 190. See *Doe Aylesbury* v. *Roe*, 2 Chit. Rep. 183; Lofft, 401: *Goodtitle* v. *Bastitte*, 1 B. & P. 385.

(*u*) *Doe Brown* v. *Roe*, 6 Dowl. 270.

(*x*) *Doe* d. —— v. *Roe*, 7 Jur. 725, B. C., 5 June, 1843.

(*y*) *Doe Baring* v. *Roe*, 6 Dowl. 456: *Doe Johnson* v. *Roe*, 1 Dowl., N. S., 493: *Doe Chadwick* v. *Roe*, 9 Dowl. 492.

(*z*) *Doe Ash* v. *Roe*, 6 Jur. 238, B. C. See *Doe Groves* v. *Roe*, 6 Jur. 438, B. C.: *Doe Wyatt* v. *Roe*, 6 Jur. 781, B. C.

Service on parish.

Service on Parish.]—In ejectment for a house rented by a parish for the purpose of harbouring some of the parish poor, service on the churchwardens and overseers has been deemed sufficient (*a*). But the overseers cannot be treated as joint-tenants; and, in order to recover property in their possession, they must all be served (*b*).

Service on holders of chapel.

Service on Holders of Chapel.]—In ejectment for the recovery of a chapel which is vested in the minister, service on the chapel-warden, sexton, or other person holding the keys, and sticking it up on the chapel doors, will suffice, if the minister cannot be found (*c*). Where, the tenant in possession having quitted England, and not being likely to return, service was made on the clerk, who was entrusted with the keys, on the wife of the tenant, on his gardener, on a person claiming as mortgagee, and by affixing a copy on the notice-board, the Court granted a rule absolute for judgment against the casual ejector (*d*). And service on the surviving lessees and the sextoness has been held sufficient (*e*); and so has service by serving the minister and one of the trustees, on sticking up a copy of the declaration and notice on the door (*f*). And service on the trustees of a dissenting meeting-house, and at the house, is sufficient for a rule *nisi*, and service of that rule on the trustees for a rule absolute (*g*). Where the property sought to be recovered consisted of a Baptist chapel, with a school-room attached, and the service had been effected on the person who was in the occupation of the school-room, and also on the person who paid the rates and outgoings of the chapel, it being believed that there was no fixed minister appointed to do duty at the chapel; *Littledale*, J., granted a rule *nisi*, and directed it to be served on the above persons, and a copy of it to be put up on the door of the chapel (*h*).

Service on corporations, public companies, &c.

Service on Corporations, Companies, &c.]—If the ejectment be against a corporation aggregate, service on the mayor or other head officer, or on the town-clerk, clerk, treasurer, or secretary, (as the case may be), at his office or on the premises, will, in analogy to the service of a writ of summons against it, in general suffice (*i*). Service on a book-keeper of a railway company on the premises, part of which he occupied, has been held sufficient (*k*). If the act incorporating the company authorises "proceedings" to be served in a particular way, the service may be effected in such way (*l*); the rule for judgment in which case is absolute in the first instance (*m*). If the ejectment be against a trading or other company or body within the 7 *W.* 4 & 1 *Vict. c.* 73, service of the declaration on the clerk of the company or body, or leaving it at the head office

(*a*) *Tupper* v. *Doe*, Barnes, 181.
(*b*) *Doe Weeks* v. *Roe*, 5 Dowl. 405.
(*c*) *Doe Scott* v. *Roe*, 6 Scott, 738.
(*d*) *Doe Dickens* v. *Roe*, 7 Dowl. 121: *Doe Scott* v. *Roe*, 8 Scott, 468.
(*e*) *Doe Kirschner* v. *Roe*, 7 Dowl. 97. And see *Anon.*, T. 1839, B. C.; 3 Jur. 488.
(*f*) *Doe Smith* v. *Roe*, 8 Dowl. 509.
(*g*) *Doe Gray* v. *Roe*, 7 Dowl. 700.
(*h*) *Doe Somers* v. *Roe*, 8 Dowl. 292.
(*i*) *Doe Cooper's Company* v. *Roe*, 8 Dowl. 134: *Doe Fisher* v. *Roe*, 10 M. & W. 21; 2 Dowl., N. S., 225, *S. C.*: *Doe Rose* v. *Roe*, 5 Dowl. 147.
(*k*) *Doe* v. *Roe*, 1 Dowl. 23.
(*l*) *Doe Martyns* v. *Roe*, 6 Scott, 610, (*The Southampton Railway Company*).
(*m*) *Doe Bromley* v. *Roe*, 8 Dowl. 858.

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for the time being of the company or body, or, in case such clerk of the said office be not found or known, then service on any agent or officer employed by the company or body, or leaving the declaration at the usual place of abode of such agent or officer, will suffice (*n*). Where the premises were in possession of a charitable association, service upon the matron on the premises, and upon the secretary, and a subsequent acknowledgment by the solicitor to the association, that he had received the declaration, was held sufficient for a rule *nisi* (*o*). Where part of the premises sought to be recovered was a free school, and service was effected on the master, and a copy of the declaration, &c. stuck on the door, a rule absolute for judgment was granted (*p*). In an ejectment brought for land taken in by road commissioners, service effected upon one of the commissioners, and also upon their clerk, was considered insufficient (*q*).

Charitable institutions.

Free school.

Road commissioners.

4. *Affidavit of Service.*

4. Affidavit of service.

How made.

After serving the declaration and notice, *ingross an affidavit of the service on plain paper, and let it be sworn before a judge in town or a commissioner in the country* (*r*). It may, it seems, be made before the attorney in the cause (*s*), if he be not the attorney actually on the record (*t*). It may be made either by the person who actually served the declaration, or by one who was present at the time of the service, and who saw and heard what took place (*u*). It must be intitled in the court and cause. Where the ejectment is on several demises, it must be intitled "*Doe* on the several demises of *A.*, *B.*, *C.* (*naming all*) v. *Roe*" (*x*). An affidavit intitled "*John Doe* on the demise or demises of *A. B.* and *C. D.*," would be bad (*y*). But, by mistake, inverting the order of the lessors is of no consequence (*z*). Though the declaration describes the lessors in a particular character, as executors, assignees, &c., they need not be so described in the title of the affidavit (*a*); and where the declaration contains both joint and several demises, an affidavit intitled in the names of all the lessors severally is sufficient (*b*). Where the declaration described the lessor of the plaintiff as *A. B. C.*, known at the time of the demise as *A. B.*, an affidavit of service describing him only as *A. B.*, was held sufficient (*c*). It should not be intitled in the names of the real defendants (*d*). It should appear from the affidavit when the service was made: an affidavit stating that the service was effected on the 26th of May, without saying "last" or mentioning any year, has been held insufficient (*e*). It must also

Form of, &c.

(*n*) 7 W. 4 & 1 Vict. c. 73, s. 16.
(*o*) *Doe Fishmongers' Co.* v. *Roe*, 2 Dowl., N. S., 689, (*South London Institution*).
(*p*) *Doe Smith* v. *Roe*, 8 Dowl. 509.
(*q*) *Doe White* v. *Roe*, 8 Scott, 146; 8 Dowl. 71, S. C.
(*r*) See the forms, Chit. Forms, 354.
(*s*) *Doe Cooper* v. *Roe*, 2 Y. & J. 284.
(*t*) See R. H., 2 W. 4, r. 6: *Doe Grant* v. *Roe*, 5 Dowl. 409.
(*u*) *Goodtitle* v. *Baddiele*, 2 B. & P. 120. But see *Doe Hulme* v. *Roe*, 8 Law J., N. S., 16, C. P.
(*x*) *Doe Cousins* v. *Roe*, 4 M. & W. 68; 7 Dowl. 53, S. C.: *Doe Thorn* v. *Roe*, 7 Scott, 172: *Doe Pryme and another* v. *Roe*, 8 Dowl. 340.
(*y*) *Doe Neville* v. *Lloyd*, 2 Dowl., N. S., 330.
(*z*) *Doe* v. *Butcher*, 2 Chit. 174: *Doe Montgomery* v. *Roe*, 1 Dowl. & L. 695.
(*a*) *Doe Jenks* v. *Roe*, 2 Dowl. 55.
(*b*) *Doe Barlee* v. *Roe*, 5 Dowl. 467.
(*c*) *Doe Fust* v. *Roe*, 1 Dowl., N. S., 879.
(*d*) *Anon.*, 2 Chit. Rep. 181: *Doe Anderson* v. *Roe*, 5 Jur. 508, B. C.
(*e*) *Doe Foster* v. *Roe*, 8 Dowl. 764.

appear positively from the affidavit that the declaration has been served on the "*tenant in possession:*" merely stating a service on the "*person*" in possession, or upon a person whom deponent believes to be tenant in possession, would be insufficient (*f*). Stating that it was served on the tenant "*as executor*" would not suffice (*g*); nor would an affidavit that the service was on a tenant in "*legal*" possession (*h*), nor on the "occupier," the words "tenant in possession" being in ordinary cases indispensable (*i*). But where the premises were used as a gambling-house, and it was impossible to gain access or information, a rule *nisi* was granted on an affidavit which stated service on the tenant in possession, as deponent believed (*k*). The affidavit must also be certain and positive: an affidavit of service on *J. S.* his tenant, or *C.* his wife, has been holden bad (*l*): so has an affidavit of service on the wives of *A.* and *B.*, "who, or one of them, are tenants" (*m*); so has an affidavit of the service "on a woman on the premises, who represented herself to be the wife of the tenant in possession," without adding, that the deponent believed her to be his wife (*n*). So, an affidavit stating deponent to have "personally served *J. T.*, *W. E.*, *J. E.*, and *C. T.*, the four tenants in possession, with true copies of the declaration," is not sufficient, but each should be sworn to have been personally served (*o*); but, as we have seen *ante*, 923, an affidavit of service upon one of several joint tenants will suffice, if it be sworn that they are such. An affidavit of service on the wife, "as she informed deponent, and as he verily believes," has been deemed sufficient (*p*). It must appear from the affidavit that the notice was read over or explained to the party on whom it was served, or that he understood its import or contents (*q*), unless he is an attorney (*r*). If the affidavit states that the tenant has since acknowledged that he understood the meaning and intention of the service, it will suffice, without any statement of the reading or explanation (*s*). Where the service is made upon a servant or other third person, the affidavit must shew that the tenant (*t*) has acknowledged that he has received the declaration, or that he has known of the service thereof, previous to the *first* day of the term (*u*): the affidavit need not

(*f*) Tidd, 1245: *Doe* v. *Roe*, 1 Chit. Rep. 574: *Doe* v. *Bedtitle*, 1 Chit. Rep. 515; Id. 505: *Doe Oldham* v. *Roe*, 4 Dowl. 714: *Doe Fraser* v. *Roe*, 5 Dowl. 720: *Doe Daby* v. *Hitchcock*, 2 Dowl., N. S., 1: *Doe Story* v. *Roe*, 5 Scott, N. R., 838.

(*g*) *Doe* v. *Roe*, 2 C. & J. 45; 1 Dowl. 286, S. C. But in such cases, if the interest be in fact of a chattel nature, the affidavit may be in the common form, describing the executor (*not in the representative character*) as *tenant in possession*, notwithstanding he be not in the *actual* occupation of the premises. (See *Doe Rigby* v. *Roe*, 4 Dowl. 14).

(*h*) *Doe Oakshotton* v. *Roe*, 30th April, 1838, Q. B.

(*i*) *Doe Jackson* v. *Roe*, 4 Dowl. 609. And see *Doe Jones* v. *Roe*, 5 Dowl. 226: *Doe Barrows* v. *Roe*, 7 Dowl. 326: *Doe Lewins* v. *Roe*, 6 Jur. 463, B. C.

(*k*) *Doe George* v. *Roe*, 3 Dowl. 22. See *Doe Hunter* v. *Roe*, 5 Dowl. 553.

(*l*) *Birbeck* v. *Hughes*, Barnes, 173.

(*m*) *Harding* v. *Greensmith*, Barnes, 174.

(*n*) *Doe Simmons* v. *Roe*, 1 Chit. Rep. 228: *Doe Walker* v. *Roe*, 4 Moo. & P. 11: *Doe Smith* v. *Roe*, 1 Dowl. 614: *Doe Grange* v. *Roe*, 1 Dowl., N. S., 274.

(*o*) *Doe Levi* v. *Roe*, 7 Dowl. 102: *Doe Cock* v. *Roe*, 6 Scott, N. R., 961.

(*p*) *Doe Delby* v. *Roe*, Barnes, 194. See *Doe Jenks* v. *Roe*, 5 Dowl. 155.

(*q*) See *ante*, 922: *Doe* v. *Roe*, 1 Dowl. 428: *Doe Jones* v. *Roe*, Id. 518.

(*r*) See *ante*, 922.

(*s*) *Doe Thompson* v. *Roe*, 2 Chit. Rep. 196: *Anon.*, Id. 184: *Doe Quentin* v. *Roe*, Ad. Eject. 215.

(*t*) An acknowledgment by his wife will not do. (*ante*, 924).

(*u*) *Doe Wilson* v. *Roe*, Ad. Eject. 209: *Doe Tindale* v. *Roe*, 2 Chit. Rep. 180: *Doe Martin* v. *Roe*, 1 H. & W. 46. *Ante*, 924.

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shew *when* such acknowledgment was made (*x*). Even a rule *nisi* will not be granted, unless the affidavit shew some probable grounds for believing that the tenant has received the declaration before the term (*y*). If no one be in the house or premises, and the declaration is stuck up thereon, the affidavit must state the deponent's belief that the tenant absconded to avoid the service (*z*); but merely stating deponent's belief that the tenant keeps out of the way to avoid service is not sufficient (*a*).

Where several tenants in possession.

When several tenants have been served with copies of the same declaration, and it is meant but as *one* ejectment, and to be followed by one judgment, one affidavit of the service of all is sufficient, annexed to the copy of one declaration, if all the copies are alike, or to several copies if all are not alike. If the ejectments are made *several*, so as to have several judgments, writs of possession, &c., then an affidavit of the service must be annexed to separate copies of the declaration (*b*). When there were fifty-four tenants, all of whose names had been introduced into the original notice at the foot of the declaration and who had been served, but the copy served on each tenant had his name only; *Williams*, J., held, that the notice at the foot of the declaration attached to the affidavit ought to have had the name of all the tenants, as in the original declaration, and that the affidavit should have stated that the copy served on each tenant had been addressed to him (*c*). The affidavit, as we have just seen, (*ante*, 931), must, in general, state the service upon each of the tenants separately.

Supplemental affidavit.

Where the service is good, but the affidavit defective, the defect may, in general, be remedied by a supplemental affidavit (*d*).

5. *Judgment against the casual Ejector.*

5. Judgment against casual ejector.

The Motion and Rule for.]—If the tenant, upon whom the declaration and notice were served, does not take steps to have himself made a party to the action, (that is, unless he, in due time, enter into the common consent-rule to confess lease, entry, ouster, and possession, and plead), the plaintiff becomes entitled to judgment by default against the casual ejector, which is obtained on a rule for it.

Motion, &c. for, when to be made.

In *town* causes, the motion for this judgment in the Queen's Bench must be made some time in the term in which the tenant is required by the notice to appear (*e*); and, if not then applied for, a fresh ejectment must be served (*f*); though in one case, where, by reason of there being negotiations pending between the parties as to the settlement of the action, the

(*x*) *Doe Durrant* v. *Roe*, 8 Scott, 459: *Doe Figgins* v. *Roe*, 2 Scott, N. R., 448. But see *Anon.*, 2 Chit. Rep. 187.

(*y*) *Doe Read* v. *Roe*, 5 Dowl. 85: *Doe Read* v. *Roe*, 1 M. & W. 633: *ante*, 924.

(*z*) *Doe Lowe* v. *Roe*, 1 Chit. Rep. 505, n.; 2 Chit. Rep. 177; Harrison, L. & T. 333. See *ante*, 926.

(*a*) See *Doe Jones* v. *Roe*, 1 Chit. 213.

(*b*) 2 Sell. Prac. 178. See *Doe Vorley* v. *Roe*, 2 Dowl., N. S., 52; *post*, 934.

(*c*) *Doe Ludford* v. *Roe*, 8 Dowl. 508.

(*d*) 2 Sellon, 99: Tidd, 1216.

(*e*) *Fenwick's case*, 1 Salk. 275; 2 Ken. 272; R. T., 18 C. 2 (*a*); R. E., 2 G. 4; 4 B. & Ald. 539.

(*f*) *Doe Graves* v. *Roe*, 4 Dowl. 88, per *Coleridge*, J.: *Doe Wilson* v. *Roe*, 4 Dowl. 124.

time had been allowed to elapse without moving for judgment, *Coleridge*, J., granted a rule for judgment in the following term, without a fresh service (*g*). In the Common Pleas (*h*) and Exchequer (*i*), the motion may be made either in the term in which the tenant is required to appear or in the next subsequent term; but, if made in the latter term, a rule *nisi* only will be granted (*k*). In *country* causes, in all the courts, the motion may be made either in the term in which the tenant is required to appear or in the next subsequent term: if made in the latter term, the rule is absolute in the first instance in the Queen's Bench (*l*); but in the Common Pleas (*m*) and Exchequer (*n*), a rule *nisi* only will be granted. The motion cannot, either in town or country causes, be made after the expiration of two terms after the service of the declaration (*o*); though, in one case, the Court allowed it so to be made, where the proceedings in ejectment had been suspended in consequence of a Chancery suit, there being no prospect of the determination of such suit, on service of notice of intention to proceed with the ejectment (*p*). In all the courts, it may be made at any time during the term. In town causes it is usually made at the beginning of the term; in country causes, usually at the latter end of it (*q*). It cannot, it seems, be made whilst the proceedings in the cause are stayed by an injunction (*r*). If the defendant has appeared and pleaded under the rule of *H. T.*, 4 *Vict.*, and the plaintiff has omitted to obtain a rule for judgment within the time limited for him so to do, he is entitled, on production of the plea, to an order of a judge for leave to draw up a rule for judgment, as of the time at which it would have been obtained (*s*). If the ejectment be by a *landlord*, under the provisions of the 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 36, see the directions, *post*, 978. As to the time in which the tenant or landlord must appear and plead, see *post*, 938.

Practical directions as to motion and rule.

In order to move for judgment against the casual ejector, *annex the affidavit of service* (*t*) *to the declaration, and indorse on them*—"*To move for judgment against the casual ejector.*" *In the Court of Exchequer, the motion is in all cases made in*

(*g*) *Doe Fell* v. *Roe*, 1 Dowl., N. S., 771.

(*h*) *Doe Wilson* v. *Roe*, 4 Dowl. 124. And see *Doe Barth* v. *Roe*, 6 Scott, 433.

(*i*) *Doe Walker* v. *Roe*, 1 Dowl., N. S., 623; 9 M. & W. 426, *S. C.*

(*k*) *Doe Reeve* v. *Roe*, 1 Gale 16: *Right d. Jeffery* v. *Wrong*, 2 Dowl. 348, Exch.: *Doe Wilson* v. *Roe*, 4 Dowl. 124, C. P.; *Doe Manchester* v. *Roe*, 8 Scott, 471: *Doe Warwick* v. *Roe*, 9 Dowl. 714.

(*l*) *Doe Crooke* v. *Roe*, 6 Dowl. 270: *Doe* v. *Roe*, 2 Dowl. 196: *Doe Wiggs* v. *Roe*, 5 Dowl. 662.

(*m*) *Doe Wilson* v. *Roe*, 4 Dowl. 124.

(*n*) *Right d. Jeffery* v. *Wrong*, 3 Dowl. 362: *Doe Reeve* v. *Roe*, 1 Gale, 15.

(*o*) *Doe* v. *Roe*, 1 Dowl. 495; 2 Id. 196: *Doe Thompson* v. *Roe*, 3 Dowl. 575: *Doe Tristam* v. *Roe*, 1 Har. & W. 218: *Doe Rush* v. *Roe*, 4 Bing. N. C. 675.

(*p*) *Doe Crooke* v. *Roe*, 7 Jur. 970, B. C.

(*q*) See *Doe Lanyford* v. *Roe*, 1 Bing. N. C. 161: *Doe Glynn* v. *Roe*, 2 Dowl. 822. By a rule in the C. P., H. T., 1 Vict., it is ordered, "that on and after the first day of next Easter Term, every motion for judgment against the casual ejector in ejectment, in London and Middlesex, may be made on any day during the term." Formerly in the C. P., in town causes, it must have been made within a week after the first day of Michaelmas or Easter Term, or within four days after the first day of Hilary or Trinity Term. (R. T., 32 C. 2).

(*r*) *Doe Beaufort* v. *Roe*, 2 Scott, N. R., 548.

(*s*) R. H. T., 4 Vict. And see the rule, *post*, 938.

(*t*) *Ante*, 930. The Court have refused to allow a rule for judgment against the casual ejector to be drawn up on producing to the officer an affidavit to be made and filed on a subsequent day, although the motion for the rule was made on the last day of term. (*Doe Morgan* v. *Roe*, 2 Scott, N. R., 584).

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court. In the Queen's Bench and Common Pleas the motion-paper requires only counsel's, or, in the Common Pleas, serjeant's, signature, if the declaration have been regularly and perfectly served on the tenant or his wife in the ordinary way, and should be at once taken to the Master's Office, with the affidavit, without applying to the Court (*u*); *and the Master will draw up the rule as of course. But if the service was in any other manner, the motion must be made in court, and the particular manner of the service mentioned* (*x*). The rule is a conditional rule for judgment, unless the tenant shall appear and plead within the time therein mentioned (*y*). *It is not served on the tenant in possession, nor has he any actual notice thereof given to him; he must, therefore, search for the rule in the Master's book; and, at all events, appear and plead before the expiration of the time thereby limited, or judgment may be signed against the casual ejector.*

When a rule *nisi*.

We have seen, that, in some cases, the Court will grant a rule *nisi* only in the first instance (*z*). In such cases *move the Court, upon affidavit of the facts, for a rule to shew cause why the service in question should not be deemed good service, and that leaving a copy of the rule with some person on the premises, or affixing it upon the outer-door, if no person can be met with, shall be deemed good service of the rule* (*a*). *Draw it up with one of the Masters, and serve a copy of it in the manner directed by the rule* (*b*); *and if no sufficient cause be afterwards shewn, the Court will make the rule absolute upon an affidavit of service and of compliance with the terms of the rule* (*c*).

Several tenants.

The rule *nisi* need not be directed to any particular person (*d*). If there be but one ejectment, one rule is sufficient, although there are several tenants, and although the name of each tenant was separately prefixed to the notice served on him, instead of the names of all (*e*). Care should be taken that no one unconnected with the premises is served with the rule, as it appears that any one unnecessarily brought before the Court will be entitled to reasonable costs (*f*).

In what time rule must be drawn up.

The rule for judgment must, in Queen's Bench and Common Pleas, be drawn up and taken from the Master's Office within two days after the end of the term in which it was moved for; otherwise it shall not be drawn up or entered, nor shall any further proceedings be had in such ejectment (*g*). *But this is not the practice in the Exchequer.*

Setting aside rule.

An application to set aside the rule, on the ground of irregularity, must be made promptly (*h*).

Judgment, when and how signed.

Judgment, when and how signed.]—At the expiration of the time limited by the rule for the tenant's appearance (*i*), if the

(*u*) *Doe Welchon* v. *Roe*, 5 Dowl. 271.
(*x*) See *ante*, 924, 930.
(*y*) See the form as to the whole of the premises, Chit. Forms, 356; the like as to part, Ib.; the like where there are several tenants, Id. 357.
(*z*) See *ante*, 924, 926; Chit. Sum. Prac. 219.
(*a*) See the form of the rule, Chit. Forms, 355, &c.
(*b*) See *Doe Clifton* v. *Roe*, 7 Jur. 701, B. C.
(*c*) See form of affidavit, Chit. Forms, 356. See *Douglass* v. ——, 1 Str. 575: *Fenn* v. *Denn*, 2 Burr. 1181: *Mothold* v. *Norright*, 1 W. Bl. 290: *Gulliver* v. *Wagstaff*, Id. 317: *Fenn* v. *Roe*, 1 New Rep. 293; Ch. Sum. Pr. 290.
(*d*) *Doe Aylesbury* v. *Roe*, 2 Chit. Rep. 183.
(*e*) *Doe Burton* v. *Roe*, 7 T. R. 477: *Doe Pearson* v. *Roe*, 5 Moore. 73: *Doe* v. *Rowe*, 2 C. & J. 670: *Doe Varley* v. *Roe*, 2 Dowl., N. S., 52, B. C.; *ante*, 932. See *Doe Faithful* v. *Roe*, 7 Dowl. 718.
(*f*) *Doe Tansley* v. *Roe*, 1 Scott, N. R., 401.
(*g*) R. M., 31 G. 3. r. 1, K. B.; R. E., 48 G. 3, C. P.; 4 T. R. 1.
(*h*) *Doe Parr* v. *Roe*, 1 Q. B. 700; 1 G. & D. 290, *S. C.*
(*i*) See *post*, 938.

tenant have not entered an appearance, or, in other words, *if no plea and consent rule on his part have been delivered*, judgment may be signed against the casual ejector at the opening of the office in the afternoon of the day next after the time given by the rule has expired; and if Sunday be the last day, the plaintiff must wait till the afternoon of Tuesday (*k*). *In order to sign the judgment, make an incipitur on plain paper, and an incipitur on the roll, and upon producing them and the rule for judgment at the Master's Office, the Master will sign judgment.* In the Queen's Bench, if the proceeding be by bill, which, however, is now rarely the case, it is necessary to enter a common appearance for the casual ejector, previously to signing this judgment (*l*); but in the Queen's Bench, by original, or in the Common Pleas and Exchequer, it is not necessary, and the costs of it would be disallowed (*m*). There is no occasion for a rule to plead (*n*), nor for a demand of plea. There is no distinction, in point of effect, between this judgment and a judgment obtained upon a verdict against the tenant or other person claiming title, except that it is against the nominal defendant. It should seem, that, unless a rule for judgment has been duly drawn up, the defendant may appear and plead at any time before judgment has been signed against the casual ejector (*o*).

Execution on.

Execution on.]—When judgment against the casual ejector has been duly signed, you may obtain possession of the premises in respect of which such judgment has been signed by a writ of possession; and this may be at once issued, unless a party has appeared as landlord and obtained the usual rule for that purpose, in which case execution cannot issue against the casual ejector without leave of the Court (*p*). As to the issuing and execution of a writ of possession, see *post*, 959, 960.

Setting aside judgment by default, &c.

Where regular.

Setting aside Judgment by Default, &c.]—At any time before the writ of possession is executed, the Court or a judge, upon an affidavit of merits, or that the defendant believes there is a good defence, may set aside or stay the proceedings, though the same be regular, on payment of costs, and let in the tenant (*q*) or other person claiming title to defend the action, by obliging the plaintiff to accept a plea (*r*). But this indulgence to parties will not in general be granted after execution executed (*s*),

(*k*) *Doe* v. *Hedges*, 4 D. & Ry. 393. And see *Hyde* v. *Thrustout*, Say. 303. It query if in Q. B. and Exch. the judgment may not be signed at the opening of the office in the morning.

(*l*) Tidd, 9th ed., 1244; R. T., 14 C. 2, 1; R. M., 33 C. 2; 2 Sellon, 100.

(*m*) *Doe Morgan* v. *Roe*, 2 M. & W. 423; Dowl. 686. S. C.

(*n*) Ad. Eject., 2nd ed., 222.

(*o*) Chit. Sum. Prac. 221. *Ante*, Vol. I. 282, 283.

(*p*) See *post*, 941.

(*q*) *Doe Mullarkey* v. *Roe*, 11 A. & E. 333.

(*r*) *Anon.*, 2 Salk. 516: *Dobbs* v. *Passer*, Str. 933: *Doe Troughton* v. *Roe*, 4 Burr. 1966.

(*s*) *Doe Ledger* v. *Roe*, 3 Taunt. 506: *Doe* v. *Bastide*, 4 Taunt. 890: *Doe Thompson* v. *Roe*, 4 Dowl. 115. But in the first of these cases, the landlord was guilty of negligence in not instructing his attorney. In the second there must have been laches, for the lessor of the plaintiff had sold and transferred possession of part of the premises previously to the application: and the principle there acted on—if your tenant has done you wrong, that is only a matter between him and you—appears untenable. (See *per Cur.* 4 Burr. 1996, cited *infra*). The last case in which the Court of C. P. refused to let in a person claiming to be landlord to defend after judgment and execution (there being no collusion suggested between lessor of the plaintiff and the tenant) was decided on the authority of the two former; and the affidavit on which the person claiming to be landlord applied

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or, as it seems, after a trial has been lost (*t*). Where the la
lord, after notice to quit, brought an ejectment against
tenant, and obtained a verdict, and the latter still continuin
possession, he distrained on him for rent, which became
after the verdict, and which he paid, it was held, that the e
cution in the ejectment could not be stayed, as the ten
should have disputed the distress (*u*). The Court of Exc
quer, however, set aside a regular judgment and writ of
session executed, on an affidavit by the attorney for the la
lord and tenant, that he had received instructions for ente
an appearance, but had neglected it, owing to matters pers
ally affecting himself, which had prevented his attending
it (*x*). In another case, a judgment against the casual ejec

was weak and inexplicit, not stating how or when he became landlord, nor shewing any of the usual claims to indulgence. Mr. Serjeant Adams says, that, as the situations of claimant and defendant in ejectment are materially different, the courts are liberal in their rules for setting aside judgment against the casual ejector, though regularly signed, and will grant them, even after writ of execution executed, upon affidavit of merits or other circumstances which, in their discretion, they may deem sufficient: and he cites *Dobbs* v. *Prasser*, 2 Str. 975, (where the Court observed, that great inconveniences might arise from changing the possession, —timber might be felled, &c.): *Mason* v. *Hodgson*, Barnes, 250, (in which case the appearance was entered by mistake in a wrong term, and judgment regularly signed; but, "*as the title had not been tried*," judgment was set aside on payment of costs, entering an appearance as of the proper term, and entering into the common rule by consent): *Doe Grocers' Company* v. *Roe*, 3 Taunt. 305, (which was a case of collusion; and the Court said, that there was no general rule which prevented them from setting aside a writ of possession after execution had). And see *Doe Troughton* v. *Roe*, 4 Burr. 1966, where the Court were clearly of opinion, that the possession ought not to be changed by judgment in ejectment where there had been *no trial or opportunity of trying*, although the obtaining the judgment might be owing to the default or treachery of the defendant's own tenant. See also *Doe Mullaney* v. *Roe*, 11 Ad. & E. 333: *Doe Shaw* v. *Roe*, 13 Price, 269: *Doe Ingram* v. *Roe*, 11 Price, 367: *Doe Maydick* v. *Roe*, 2 C. & J. 682. From these cases it may be collected, that wherever judgment has been signed and writ of execution executed without a trial or an opportunity of trying, either by collusion between the lessor of the plaintiff and the tenant of the applicant, default or evident treachery of the tenant, 4 Burr. 1966; 2 C. & J. 682: but see 4 Taunt. 820), mere slip or accidental laches of applicant's attorney, or error in matter of form, (under this head may be classed the cases where judgment signed on account of insufficiency in the consent rule has been set aside for the purpose of amending and obtaining a trial, as in *Doe* v. *Robinson*, 4 Dowl. 707, where the consent rule was for a certain "tin-bound," setting out the abstract, when it ought to have been for the nine-under the "tin-bound"), provided there has been no negligence in instructing co sel, &c. before judgment signed, laches after it has been signed, and the applicant's title is explicitly stat affidavit, there can be little doubt the Court or a judge will set aside judgment on the condition of pa costs, &c., in order to obtain a trial the merits. Indeed, were this not case, the landlord would suffer all disadvantage arising from the want that notice which would be required form of action more strictly legal, w out deriving any benefit from the eq able discretion which Courts of law always been inclined to exercise in action of ejectment. A case (*Doe* Sa v. *Roe*, cor. *Vaughan*, J., at Chamb 14th December, A. D. 1836, MSS.) serve as an illustration. On Novem 1st, the declaration was served on tenant, who neglected to deliver it to landlord till November 19th. The l lord, on receiving the declaration, sen by a third person to his attorney, w directions to take the necessary st Owing to some mistake in the mess the attorney being particularly engag and expecting further instructions, not examine the papers for more tha week, when, to his surprise, finding an appearance was to be entered in Chaucmas Term, then nearly elapsed, applied to his client, and received structions to appear for him immedia but it was too late, judgment having regularly signed against the casual e On an affidavit by the landlord and attorney, stating the circumstance their belief that the landlord had a defence, and shewing how and wh became landlord, notwithstanding affidavit by the lessor of the plai claiming as heir-at-law of the same son through whom the landlord cla but not explicit), judgment and w possession executed were set aside, the landlord let in to defend, on pay of costs. To take advantage of suc order, obtain a rule directing the les the plaintiff to restore possession, in case of a refusal apply for an attach for the contempt. (2 Salk. 588, per C. J.: *Davies* v. *Pengy*, 2 W. Bl. As to the mode of proceeding where lessor of the plaintiff cannot be ob with this rule, see post, 962.

(*t*) 2 Salkeld, 176.

(*u*) *Doe Hindson* v. *Davies*, 2 M 382.

(*x*) *Doe Shaw* v. *Roe*, 13 Price, *Doe Mullaney* v. *Roe*, 11 Ad. & E. 3

was set aside after execution executed, on the ground that there had been no notice given to the landlord by the tenant in possession of the premises, and consequently no trial of the merits; and the terms made were, that the landlord should pay costs to the lessor of the plaintiff, and that the possession should be, in the meantime, retained by the latter (*y*); and in a similar case, where the tenant was brought before the Court, he was made to pay the costs (*z*). And in cases of collusion between the lessor of the plaintiff and the tenant, the Court will always thus interfere (*a*), and in most cases will order possession to be restored. If the Court or judge will not interfere, then the landlord's or tenant's remedy is to bring an ejectment and try his right (*b*).

When signed irregularly.

If judgment by default be signed irregularly, or sooner than the practice of the Court warrants, it will be set aside on application by the tenant or the landlord. Thus, where a rule was obtained for judgment against the casual ejector, unless the tenant should appear and plead, and the tenant did not appear, but a judge's order was obtained for a delivery of particulars to defendant, and a further order by consent that defendant should have ten days' time to plead after delivery, pleading issuably, rejoining gratis, and taking short notice of trial, and the lessor of the plaintiff, after having taken no step for a year, delivered particulars, and at the expiration of the ten days signed judgment against the casual ejector, without giving a term's notice, the judgment was set aside as irregular, but without costs, as the defendant was a nominal party (*c*).

Tenant must enter appearance.

If the application to set aside the judgment be made on the behalf of the tenant, he must appear to the action before making it, otherwise it cannot be entertained (*d*).

6. *The Appearance, Consent Rule, and Plea.*

6. Appearance, consent rule, and plea by tenant.

By Tenant.]—The tenant, if he wishes to defend, must do so by entering an appearance, and signing a consent rule, and delivering a plea with such rule. A plea without such rule, or such rule without a plea, would be a nullity (*e*). Until an appearance is entered by the tenant, he has no *locus standi*, and is a stranger to the cause, so that he cannot in general make any application to the Court or a judge in respect of it (*f*).

Tenant not bound to appear, &c.

It should be remarked, that a tenant is not bound to appear, even although his landlord offer to indemnify him (*g*); nor can the landlord appear and defend the ejectment in the tenant's name, without his consent (*h*); and if he do, the appearance and plea would be irregular, and the Court would order it

(*y*) *Doe Ingram* v. *Roe*, 11 Price, 507. And see *Doe Maprick* v. *Roe*, 2 C. & J. 682. The case was not sufficiently strong to authorize an order for restitution.

(*z*) *Doe Troughton* v. *Roe*, 4 Burr. 1996.

(*a*) See *Doe Grocers' Company* v. *Roe*, 5 Taunt. 202: *Goodtitle* v. *Badtitle*, 4 Taunt. 820.

(*b*) See 2 Saliom. 220; Harr. L. and T. 820.

(*c*) *Doe Vernon* v. Roe, 7 Ad. & E. 14; Nev. & P. 227. And see *Goodtitle* d. *Harrell* v. *Badtitle*, 9 Dowl. 1009: *Doe* v. *Hodges*, 4 D. & Ry. 293.

(*d*) *Doe Williamson* v. *Roe*, 15 Law J., N. S., Q. B., 39.

(*e*) See *Doe* d. *Falmouth* v. *Alderson*, 4 Dowl. 701: *Doe Faithful* v. *Roe*, 7 Dowl. 718.

(*f*) See *Doe Williamson* v. *Roe*, 15 Law J., N. S., Exch., 39: *Doe* d. *William IV* v. *Roe*, 13 Law J., N. S., Exch., 304: *Doe Vernon* v. *Roe*, 7 Ad. & E. 14: *Doe Cox* v. *Brown*, 6 Dowl. 471: *Doe Williamson and another* v. *Roe*, 15 Law J., N. S., Q. B., 39.

(*g*) *Right* v. *Wrong*, Barnes, 173.

(*h*) *Roe Jones* v. *Doe*, Barnes, 178.

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a mortgagee (*k*) severally to defend the action. And where a lord, claiming by escheat, applied to be admitted a defendant in an action brought by one claiming as heir, the Court directed the lord to bring an ejectment, and the heir to be admitted to defend; and said, that, if the lord refused, they would discharge his rule to be admitted; or, if the heir refused, they would allow the lord to defend (*l*). But a mortgagee will not be permitted to come in, and defend as landlord, unless he be interested in the result of the suit, and be not put forward merely to further the purposes of the tenant (*m*). And if the question be, whether the party claiming as landlord be landlord or not, as if the heirship of the party claiming as heir, or the will under which the party claims to be devisee be the point to be contested, the case does not fall within the meaning of the enactment (*n*). Where the tenant came into possession under an agreement with the lessor of plaintiff for a term of years, but afterwards disclaimed the tenancy, the Court held that a stranger, claiming a title, should not be admitted to defend; or that, if he happened to be admitted, he should not be allowed to impeach the title of the lessor of the plaintiff, or to set up any other defence than that of which the tenant might have availed himself had he appeared (*o*). And where, upon an ejectment against the tenant in possession, who came into possession as tenant of the lessor of the plaintiff, a third person, having an adverse title, entered into a consent rule to defend as landlord, the Court discharged such rule, with costs (*p*). As to what defences by the tenant the landlord may set up, see *post*, 943. If a rule be obtained by a party allowing him to defend as landlord, who is not so within the meaning of the above act, the Court or a judge will set it aside, on application for that purpose (*q*).

Time of applying for rule.

The rule for allowing the landlord to be admitted to defend should be obtained within the time limited for the tenant to appear, &c., as noticed, *ante*, 938. Before the rule of *H. T.*, 4 *Vict.*, (*ante*, 938), it could not be obtained until after the rule for judgment against the casual ejector; but this, it is apprehended, is now otherwise (*r*). The Court have, in some instances, as we have seen, (*ante*, 935), even after judgment against the casual ejector, let the landlord in to defend the action.

The rule, &c., how obtained, and proceedings on by landlord.

The motion for the landlord to be admitted to defend, either with the tenant or by himself, is a motion of course, and requires only counsel's signature. Get the motion paper signed by counsel, or in the Common Pleas by a serjeant; take it to one of the Masters, and draw up the rule (*s*), *and annex a copy of it to the consent rule and plea, before you deliver them to the plaintiff's attorney or agent. You then proceed as in ordinary cases, as mentioned, ante*, 939, *where the tenant appears alone* (*t*). If

(*k*) *Doe Tilyard* v. *Cooper*, 8 T. R. 645: *Doe Tubb* v. *Roe*, 4 Taunt. 887.
(*l*) *Fairclaim* v. *Shamtitle*, 3 Burr. 1290.
(*m*) *Doe Pearson* v. *Roe*, 6 Bing. 613; 4 Moo. & P. 437, S. C.
(*n*) See *Fairclaim* v. *Shamtitle*, 3 Burr. 1304: *Lovelock* v. *Doncaster*, 3 T. R. 783.
(*o*) *Doe Knight* v. *Smythe*, 4 M. & S. 347.
(*p*) *Doe Herton* v. *Rhys.*, 2 Y. & J. 88
(*q*) *Doe Harwood* v. *Lippencott*, Ad. Eject. 260: *Doe* v. *Jordan*, 4 Scott, 370.
(*r*) *Doe Enemy* v. *Roe*, 7 Scott, 769.
(*s*) See the form, Chit. Forms, 350.
(*t*) See *ante*, 939.

for on the part of the plaintiff; and the intention of it is to give the tenant the benefit of an opportunity to come in and defend the action, without putting him to the trouble of searching to see if judgment against the casual ejector has been moved for. The rule is not very clearly expressed as to the consequences of the plaintiff not proceeding afterwards; but, at all events, it is applicable to those cases only where parties have availed themselves of its provisions (*s*). It may be added, that if a *nem. pros.* under this rule were signed before the lessor of the plaintiff had entered into the consent rule, the defendant will not be thereupon entitled to costs (*s*).

The appearance, plea, and consent rule, how entered, &c.

The mode of appearing for the tenant is thus:—*Get a blank consent rule from a law stationer's, fill it up, and let the defendant's attorney sign it, leaving room above his signature for that of the attorney for the plaintiff. Then make out a memorandum for the appearance on parchment* (*t*), *and take it with the rule to the proper clerk at the Master's Office, who will thereupon enter the appearance, and at the same time mark the appearance on the consent rule.* Or if the ejectment be by bill, *get a common bail-piece at the stationer's; fill it up* (*x*) *and take it, together with the consent rule, to the proper clerk at the Master's Office, who will number* (*y*) *and file the bail-piece for the tenant, and at the same time mark the appearance on the consent rule. In the next place, whether the ejectment be by original or by bill, ingross the general terms upon plain paper* (*z*)*; annex the draft rule to it, and deliver both to the plaintiff's attorney or agent, as in other cases* (*a*). As to the plaintiff's proceedings on the rule, see *post*, 944.

Form of consent rule.

By *R. M.*, 1820, Q. B. (*b*), *R. H.*, 1 & 2 *G.* 4, C. P. (*c*), *R. E.*, 2 *G.* 4, Exch. (*d*), the defendant shall specify in the consent rule "for what premises he intends to defend, and shall therein consent to confess upon the trial, [not only lease, entry, and ouster, but] that he (if he defends as tenant, or if he defends as landlord, then that his tenant) was at the time of the service of the declaration in the possession of such premises; and that if upon the trial the defendant shall not confess such possession, as well as lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the defendant, then no costs shall be allowed for not prosecuting the same, but the defendant shall pay costs to the plaintiff in that case, to be taxed." It is also provided by the rule, that, if the defendant succeeds, the lessor of the plaintiff shall pay his costs. The object of this rule is merely to pre-

(*s*) Doe Preston v. *Beard*, 7 Jur. 69, per Pardo, B.; 12 Law J., N. S., Exch., 19; 8 Dowl., N. S., 526, *S. C.*

(*t*) See the form, Chit. Forms, 357.

(*x*) See the form, Chit. Forms, 361.

(*y*) R. E., 33 G. 3.

(*z*) See the form of plea, Chit. Forms, 361.

(*a*) The R. H., 1 Vict., Q. B., after reciting, that, "by the practice of this court, in all actions of ejectment, it is necessary that the plea and consent rule should be filed at the chambers of one of the judges of the same court," orders, "that, from and after the last day of this present term, the said practice be discontinued, and in all such actions, the plea, with the consent rule annexed thereto, be delivered in like manner as pleas in other actions, the defendant's appearance being first entered with the proper officer, as heretofore." The rule of H. T., 4 W. 4, r. 1, that no plea, &c. shall be filed, but shall be delivered, was held not to apply to proceedings in ejectment. (See *Doe Williams* v. *Williams*, 2 Ad. & E. 361; 4 Nev. & M. 295, *S. C.*) In the Common Pleas it was the practice, before this rule, to file the plea and consent rule at the prothonotary's; and, in the Exchequer, to file them with the clerk of the pleas.

(*b*) 2 Chit. Rep. 375, 379.

(*c*) 5 Moore, 310.

(*d*) 9 Price, 299.

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vent the necessity of proving the identity of the premises in litigation at the trial, by which necessity plaintiffs had been previously frequently defeated, without the merits of the case being at all investigated. The confession admits nothing at all, but that the defendants defend for certain specified premises (*f*). Notwithstanding the rule requires the premises to be specified, it is still the inveterate practice, where the tenant or landlord defends for all the premises, to designate them with the same obscure generality as in the declaration (*g*). But if the defendant defends for part only of the premises, it is necessary to state with particularity for what premises he intends to defend, on account of costs; for otherwise, if the plaintiff succeeds in establishing his right to any portion of the premises, he will be entitled to his general costs of the cause, and this though the defendant succeeds in respect of those premises for which only he really intended to defend (*h*). It may be here added, that, if part only be defended for by the consent rule, the plaintiff may sign judgment as of course against the casual ejector for the residue when the time for appearing and pleading has expired. The above rule of court extends to all defendants, including corporations (*i*). But where the ejectment is brought by one tenant in common against another (*k*), or by one coparcener or joint tenant against another (*l*), the Court or a judge, upon application and an affidavit of the facts, will let in the tenant, &c. to defend, upon his confessing lease and entry only, so as to put the lessor of the plaintiff to prove at the trial an actual ouster; provided the tenant do not dispute the plaintiff's title as tenant in common, &c. (*m*), and denies actual ouster. Unless this is done, the defendant will be prevented at the trial from contending that he is tenant in common, &c. (*n*) The consent rule need not set out the christian and surname of the lessor of the plaintiff (*o*). It must, however, be correctly intitled in the action; and where four ejectments were brought on the demise of the same lessor, to recover thirteen houses, each ejectment being for a portion of the thirteen, and each declaration was for thirty messuages, and the landlord entered into a consent rule treating the four actions as one, but brought on several demises, and for a hundred and twenty messuages, it was held that the consent rule was a nullity, and that a writ of error *coram nobis*, describing the cause in the same manner, was no stay of execution (*p*). If the declaration be amended by the judge at the trial, the consent rule is still applicable to it (*q*).

Plea.

According to the usual terms of the consent rule, the de-

(*f*) *Doe Parr* v. *Roe*, 1 Q. B. 700.

(*g*) 4 Nev. & M. 45, n. (*a*). See *Doe* v. *Hughes*, 4 Dowl. 412; 1 Gale, 263, S. C.

(*h*) See *post*, pt. 5, ch. 31. See *Doe Davenport* v. *Rhodes*, 1 Dowl. & L. 292; 11 M. & W. 600, S. C. *Doe Bishton* v. *Hughes*, 4 Dowl. 412.

(*i*) *Doe Parr* v. *Roe*, 1 Q. B. 700.

(*k*) *Oates* v. *Brydon*, 3 Burr. 1895. But the tenant of tenant in common is not entitled to this privilege, unless, at all events, on behalf of his landlord, and the latter join in the application. *Doe Wills* v. *Roe*, 4 Dowl. 638; 1 M. & W. 668, S. C.

(*l*) *Doe Ginger* v. *Roe*, 2 Taunt. 397. And see *Doe White* v. *Cuff*, 1 Camp. 173: Rose. on Evid., 2nd ed., 32.

(*m*) *Anon.*, 7 Mod. 39.

(*n*) *Culley* v. *Doe d. Taylerson*, 11 A. & E. 1008, 1015: *Oates d. Wigfall* v. *Brydon*, 3 Burr. 1897.

(*o*) *Doe Spencer* v. *Reid*, 3 Moore, 36.

(*p*) *Doe Faithful* v. *Roe*, 7 Dowl. 712: *Doe Hunchcorne* v. *Roe*, 2 D. & L. 96.

(*q*) *Doe Edwards* v. *Leach*, 3 Scott, N. R., 509; 9 Dowl. 577, S. C.

What pleadable, &c.

fendant can plead "not guilty" only (*r*); but the Court or a judge may give him leave to plead to the jurisdiction, such as that the lands lie in a county palatine (*s*), or in the cinque ports (*t*), or in London (*x*), or that they are held in ancient demesne (*y*), or the like. Such plea to the jurisdiction must be pleaded within four days, or within the first four days of the term (*z*), although that happen to be before the expiration of the time limited for the tenant's appearance. The Court have allowed it to be filed *de bene esse*, within the first four days of the term, pending a rule *nisi* for permission to allow the plea to be pleaded (*a*). A plea *puis darrein continuance*, of a release by one of the lessors of the plaintiff, is bad on demurrer (*b*). If the plaintiff, after issue and before trial, enter into part of the premises, the defendant might plead it as a plea *puis darrein continuance*, as in other cases (*c*). Where the name of the plaintiff's lessor was inserted in the body of the plea, (as the person complaining), instead of that of the nominal plaintiff, judgment signed against the casual ejector, under the idea that the plea was null and void, was set aside with costs, as irregular (*d*).

Appearance and plea, &c. by landlord, &c.

By Landlord, &c.]—We have already seen, (*ante*, 937), that, although the tenant in possession is not bound to appear and defend the action, yet he is obliged, by the 11 *G.* 2, *c.* 19, *s.* 12, under penalty, to give his landlord notice when a declaration in ejectment has been served on him. And, by *s.* 13 of that act, the Court may allow the landlord to make himself defendant by joining with the tenant, if the tenant appear; but if the tenant neglect or refuse to appear, judgment shall be signed against the casual ejector, for want of such appearance; yet, if the landlord shall desire to appear by himself, and consent to enter into the like rule the tenant must have entered into had he appeared, the Court shall permit him to do so, and shall order a stay of execution upon the judgment against the casual ejector, until they shall make further order therein. It seems that the first part of this enactment, in allowing the landlord to join in the defence with the tenant, effected no alteration in the law as it previously stood, for that the landlord might always come in and enter into such joint defence (*e*). The enactment in other respects was intended to prevent collusion between the claimant and the tenant, and for that purpose provided that the landlord might defend alone. A liberal construction has been given to it (*g*); and the Court have let in the heir or devisee of the landlord, although the heir or devisee had never been in possession or received rent (*h*), a remainderman under the same title with the original landlord (*i*), and

(*r*) See *Doe* v. *Heather*, 8 M. & W. 159.
(*s*) Com. Dig. Eject., D. 2.
(*t*) Id., D. 3.
(*x*) Anon., 3 Leon, 142.
(*y*) See, as to the affidavit necessary to support an application for leave to plead a plea of ancient demesne, *Doe Rust* v. Roe, 2 Burr. 1046.
(*z*) *Doe Wrout* v. *Fenn*, 8 T. R. 474. See ante, 937.
(*a*) *Doe Morton* v. *Roe*, 10 East, 523.
(*b*) *Doe Byne* v. *Brewer*, 4 M. & Sel. 300: 2 Chit. Rep. 323, *S. C.*
(*c*) 2 Sel. 192: *ante*, 923, &c.
(*d*) 2 Sel. 183.
(*e*) See per *Wilmot*, J., in *Fairclaim* v. *Goodwild*, 3 Burr. 1302.
(*g*) *Doe* v. *Birchman*, 9 Ad. & E. 663, per *Coleridge*, J.
(*h*) *Lovelock* v. *Doncaster*, 4 T. R. 122. And see 3 T. R. 783, *S. C.*
(*i*) *Lovelock* v. *Doncaster*, 3 T. R. 783.

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the Court or a judge will stay the proceedings until security be given for costs (*c*), or his guardian undertake for the payment of them (*d*), or some real and responsible person be named as plaintiff (*e*). So, if the lessor of the plaintiff reside abroad (*f*), or die pending the action (*g*) or after verdict (*h*), the Court or a judge will stay the proceedings until such security be given. But where a similar application was made, upon the ground of the lessor of the plaintiff having privilege of Parliament, it was refused (*i*).

Staying proceedings, &c.

Staying Proceedings, &c.]—As to when the proceedings may be stayed in a second action until the costs in the first are paid, &c., see *post, Pt. 5, ch. 9.*

Not for cesser of title.

Where the defendant moved to stay proceedings in an ejectment, upon the ground that the title of the lessor of the plaintiff had determined since the commencement of the action, the Court refused the rule, saying that the plaintiff had a right to proceed for the recovery of his damages and costs (*k*).

For non-repair.

In ejectment on a clause of re-entry in a lease for breach of covenant to repair, the Court has no power to stay proceedings (unless the lessor of the plaintiff consents) even on payment of costs, though it is sworn by the defendant that the necessary repairs were done at the time of making the application (*l*).

For non-payment of rent.

By the 4 *G.* 2, *c.* 28, *s.* 4, in ejectment for non-payment of rent, if the tenant or his assignee shall at any time before trial pay or tender to the landlord, his executors or administrators, or to the attorney in the cause, or pay into court, all rent and arrears, together with the costs, then all further proceedings shall cease and be discontinued. See this further considered, *post*, 970.

By mortgagee against mortgagor.

Also, by the 7 *G.* 2, *c.* 20, *s.* 1, in ejectment by a mortgagee, (or in an action on a bond for payment of the money secured by the mortgage, or performance of the covenant therein contained), where no suit in equity for foreclosure or redemption is depending, if the person having a right to redeem (provided that such party be a defendant in the action) (*m*) shall, at any time pending the action (*n*), pay to the mortgagee, or, in case of his refusal, pay into court, the principal and interest due on the mortgage, with such costs as have been expended in any suit at law or in equity on such mortgage, (such money for

(*c*) *Anon.*, 1 Wils. 130; *Throgmorton* d *Miller* v. *Smith*, 2 Str. 932.

(*d*) *Anon.*, Cowp. 129.

(*e*) *Noke* v. *Wyndham*, 2 Str. 69; *Doe Roberts* v. *Roberts*, 6 Dowl. 556. See a form, Chit. Forms, 366.

(*f*) *Denn Lucas* v. *Fulford*, 2 Burr. 1177. *Aliter*, if there be several lessors, and all are not abroad (*post*, Pt. 5, ch. 11).

(*g*) *Thrustout* d. *Turner* v. *Gray*, 2 Str. 1056.

(*h*) *Doe Cozens* v. *Cozens*, 1 Q. B. 496; 9 Dowl. 1040; 1 G. & D. 503, not *S. P.*: *Doe Earl of Egremont* v. *Stephens*, 2 D. & L. 995; *post*, 950.

(*i*) *Preston* v. *Lingden*, 1 Str. 479; 8 Mod. 20, *S. C.*

(*k*) *Thrustout* v. *Gray*, 2 Str. 1056. See *Spicer* v. *Dodd*, 1 Dowl. 306; 2 C. & J. 165, *S. C.*: *Doe Cozens* v. *Cozens*, 9 Dowl. 1040; *post*, 970.

(*l*) *Doe Mayhew* v. *Asby*, 10 Ad. & E. 71; 2 Per. & D. 302, *S. C.*

(*m*) *Doe Hurst* v. *Clifton*, 6 Nev. & M. 857; 4 A. & E. 814, *S. C.* The mortgagor sufficiently shews that he has become defendant, by stating in his affidavit that he has entered an appearance, without going on to say that he has signed the consent rule. (*Doe Cas* v. *Brown*, 6 Dowl. 471).

(*n*) See *Doe Tubb* v. *Roe*, 4 Taunt. 887. The act does not, it seems, apply, if judgment has been signed, and plaintiff is entitled to execution. (*Ames* v. *Lloyd*, 2 Ves. & B. 15).

the landlord appear by himself, the rule, following the words of the statute, gives liberty to the plaintiff to sign judgment against the casual ejector, but execution thereon to be stayed until further order (*x*). The plaintiff, in that case, thereupon immediately signs judgment against the casual ejector; and if the landlord does not appear at the trial, the plaintiff, upon producing the *postea* and office copies of the rules, must move for leave to sue out execution, and the Court will accordingly grant a rule *nisi* (*y*). But if the landlord does appear, and the cause be tried, and a verdict and judgment be obtained against him, execution may be issued against him without any further order of the Court (*z*). Where there were four actions all upon the same demises, but against different sets of tenants, and upon the landlord appearing, he entered into but one rule as to the four, treating the whole as one action, the Court held his consent rule to be a nullity, and that the plaintiff might sign judgment against the casual ejector (*a*).

Setting aside rule, &c.

If there be any irregularity in the rule, or it be obtained by a party who has no right to appear in the character of landlord, the Court or a judge will discharge it, on an application made in due time (*b*), and generally with costs.

Where the tenant is a pauper.

Where a party is landlord of the whole, and tenant of part of the premises, and the tenants are paupers, if he alone be the real party defending, and the tenants claim no interest in the premises, he should appear and defend as landlord for the premises in the possession of his tenants, and as tenant for the residue; or, in default thereof, a rule or order may be obtained for setting aside the appearances and pleas of the tenants, and that judgment may be signed against the casual ejector (*c*); and the case would be the same, though the landlord were not tenant of any part. But the Court or a judge would not interfere in this way where the tenant claims any interest in the premises, and does not repudiate the appearance entered for him (*d*); nor would they make a third party, not a claimant to the premises, pay the costs of an appearance which he had induced a pauper tenant to enter into, but which the pauper would not otherwise have done (*e*).

Security for costs.

A party residing abroad may, upon being admitted to defend as landlord, be required to give security for costs (*f*).

What defences by tenant landlord may set up.

It may be here stated that the landlord or party let in to defend as such cannot avail himself of every defence that the tenant could have done had he defended: thus, where the lessor of the plaintiff claimed by virtue of a judgment against the party in possession, which he had executed by *elegit*, the defendant, who claimed under a conveyance from that party, and who defended alone, was held precluded from setting up the want of a notice to quit, since the tenant in possession had ad-

(*x*) See *Doe* v. *Bennett*, 4 B. & C. 897; 7 Dowl. & R. 261.

(*y*) See the form of the rule, Chit. Forms, 374.

(*z*) See *Doe Lucy* v. *Bennett*, 4 B. & C. 897; 7 D. & R. 261, *S. C.*; *Doe Roberts* v. *Gibbs*, 1 Chit. Rep. 47; *Doe Simons* v. *Masters*, Id. 233; *post*, 969.

(*a*) *Doe Faithful* v. *Roe*, 7 Dowl. 718.

(*b*) See *Doe* d. *Harwood* v. *Lippencott*, Ad. Eject. 260: *Doe* d. *Curr* v. *Jordan*, 4 Scott, 370.

(*c*) *Thrustout* v. *Shenton*, 10 B. & C. 111; 5 Man. & R. 543: *post*, 956, 957.

(*d*) *Doe* v. *Gee*, 9 Dowl. 612.

(*e*) *Doe* v. *Smith*, 8 Dowl. 517. And see *Evans* v. *Rees*, 1 Dowl., N. S., 338.

(*f*) *Doe Hudson* v. *Jameson*, 4 M. & Ry. 570.

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the Court or a judge will stay the proceedings until security be given for costs (*c*), or his guardian undertake for the payment of them (*d*), or some real and responsible person be named as plaintiff (*e*). So, if the lessor of the plaintiff reside abroad (*f*), or die pending the action (*g*) or after verdict (*h*), the Court or a judge will stay the proceedings until such security be given. But where a similar application was made, upon the ground of the lessor of the plaintiff having privilege of Parliament, it was refused (*i*).

Staying proceedings, &c.

Staying Proceedings, &c.]—As to when the proceedings may be stayed in a second action until the costs in the first are paid, &c., see *post*, *Pt. 5, ch. 9.*

Not for cesser of title.

Where the defendant moved to stay proceedings in an ejectment, upon the ground that the title of the lessor of the plaintiff had determined since the commencement of the action, the Court refused the rule, saying that the plaintiff had a right to proceed for the recovery of his damages and costs (*k*).

For non-repair.

In ejectment on a clause of re-entry in a lease for breach of covenant to repair, the Court has no power to stay proceedings (unless the lessor of the plaintiff consents) even on payment of costs, though it is sworn by the defendant that the necessary repairs were done at the time of making the application (*l*).

For non-payment of rent.

By the 4 *G.* 2, *c.* 28, *s.* 4, in ejectment for non-payment of rent, if the tenant or his assignee shall at any time before trial pay or tender to the landlord, his executors or administrators, or to the attorney in the cause, or pay into court, all rent and arrears, together with the costs, then all further proceedings shall cease and be discontinued. See this further considered, *post*, 970.

By mortgagee against mortgagor.

Also, by the 7 *G.* 2, *c.* 20, *s.* 1, in ejectment by a mortgagee, (or in an action on a bond for payment of the money secured by the mortgage, or performance of the covenant therein contained), where no suit in equity for foreclosure or redemption is depending, if the person having a right to redeem (provided that such party be a defendant in the action) (*m*) shall, at any time pending the action (*n*), pay to the mortgagee, or, in case of his refusal, pay into court, the principal and interest due on the mortgage, with such costs as have been expended in any suit at law or in equity on such mortgage, (such money for

(*c*) *Anon.*, 1 Wils. 130: *Throgmorton* d. *Miller* v. *Smith*, 2 Str. 932.

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(*e*) *Noke* v. *Wyndham*, 2 Str. 69: *Doe Roberts* v. *Roberts*, 6 Dowl. 556. See a form, Chit. Forms, 366.

(*f*) *Denn Lucas* v. *Fulford*, 2 Burr. 1177. *Alter*, if there be several lessors, and all are not abroad (*post*, Pt. 5, ch. 11).

(*g*) *Thrustout* d. *Turner* v. *Gray*, 2 Str. 1056.

(*h*) *Doe Cozens* v. *Cozens*, 1 Q. B. 426; 9 Dowl. 1040; 1 G. & D. 503, not *S. P.*: *Doe Earl of Egremont* v. *Stephens*, 2 D. & L. 995; *post*, 950.

(*i*) *Preston* v. *Lingden*, 1 Str. 479; 8 Mod. 20, *S. C.*

(*k*) *Thrustout* v. *Gray*, 2 Str. 1056. See *Spicer* v. *Dodd*, 1 Dowl. 306; 2 C. & J. 165, *S. C.*: *Doe Cozens* v. *Cozens*, 9 Dowl. 1040; *post*, 970.

(*l*) *Doe Mayhew* v. *Asby*, 10 Ad. & E. 71; 2 Per. & D. 302, *S. C.*

(*m*) *Doe Hurst* v. *Clifton*, 6 Nev. & M. 857; 4 A. & E. 814, *S. C.* The mortgagor sufficiently shews that he has become defendant, by stating in his affidavit that he has entered an appearance, without going on to say that he has signed the consent rule. (*Doe Cas* v. *Brown*, 6 Dowl. 471).

(*n*) See *Doe Tubb* v. *Roe*, 4 Taunt. 887. The act does not, it seems, apply, if judgment has been signed, and plaintiff is entitled to execution. (*Ames* v. *Lloyd*, 2 Ves. & B. 15).

principal, interest, and costs to be ascertained by the Court where such action is pending, or by its officer), it shall be deemed and taken to be in full satisfaction of the mortgage, and the Court (*o*) shall discharge the mortgagor of and from the same accordingly, and order a re-conveyance, &c. This, however, by sect. 3, does not extend to cases where the right of redemption is controverted (*p*), or the money due is not adjusted (*q*); nor shall it prejudice any subsequent mortgage (*r*). A reference under the act will not be granted unless all the defendants admit the lessor of the plaintiff's title (*s*). A reference was refused where the defendant had agreed to sell the equity of redemption to the lessor of the plaintiff, and had declined to complete the contract (*t*). But where a first mortgagee brought an action of covenant on the covenant in the mortgage-deed, having received notice from a second mortgagee not to deliver up the deed, and the mortgagor applied to the Court to compel the plaintiff, under the act, to re-convey the premises upon payment of the principal, interest, and costs, the Court held it to be a case within the act, and made the order (*u*). The defendant is entitled to have the proceedings stayed, under the act, without paying any bygone interest, or the expense of preparing the mortgage-deed, or any assignment of it (*x*), or any collateral debt (*y*). The costs also are taxed only as between party and party, and not as between attorney and client (*z*).

Where property in possession of the Crown.

If an ejectment be brought for the purpose of recovering property in the possession of the Crown, the Court will, upon motion made on behalf of the Crown, set aside the proceedings (*y*).

Cognovit.

Cognovit, Warrant of Attorney, &c.]—The defendant, after appearance, may give a *cognovit*, and, if he give it after plea pleaded, he should consent to withdraw his plea (*z*). The presence and attestation, &c. of an attorney on behalf of the defendant is necessary at the time of its execution, as in other cases (*a*). The plaintiff may sign judgment in pursuance of the *cognovit*, as directed *ante*, 839 (*b*). This is a final judgment, and has the same effect as a judgment upon verdict. Where the landlord defended the action at his own expense, but in the name of his tenant, the Court, upon application, set aside a judgment entered up on a *cognovit* given by the tenant, and let in the landlord to defend the action in his own name (*c*).

(*o*) Or a judge at chambers: see *Felton* v. *Ash*, Barnes, 177.

(*p*) See *Goodricke* v. *Bishop*, 1 Y. & J. 344.

(*q*) See *Hewson* v. *Hewson*, 4 Ves. 105.

(*r*) See the following cases on this enactment: *Doe Kay* v. *Soley*, 2 W. Bl. 726: *Brigham* d. *Rethead* v. *Oakes*, Barnes, 181: *Felton* v. *Ash*, Id. 177: *Goodright* v. *Money*, Id. 176: *Archer* v. *Snatt*, 2 Str. 1107: Andr. 341. S. C.: *Anon.*, 1 Str. 413: *Hawkes* v. *Street*, 3 T. R. 326.

(*s*) *Roe* v. *Wardle*, 3 Y. & C. 70.

(*t*) *Goodricke* v. *Pope*, 7 T. R. 185. But see *Skinner* v. *Stacey*, 1 Wils. 80.

(*u*) *Dixon* v. *Wigram*, 2 C. & J. 613: *Doe Bligg* v. *Steel*, 1 Dowl. 350.

(*x*) *Archer* v. *Snatt*, 2 Str. 1107.

(*y*) *Doe Cappe* v. *Cappe*, 3 Bing. N. C. 768.

(*y*) *Doe Leigh* v. *Roe*, 8 M. & W. 579. The proper way to proceed to recover property in the possession of the Crown is by petition of right.

(*z*) See the form of *cognovit*, Chit. Forms, 362.

(*a*) *Doe Rees* v. *Howell*, 12 Ad. & E. 696. See *ante*, 847.

(*b*) See the form of *præcipe* for appearance, Chit. Forms, 361; and of the entry on roll, Id. 362.

(*c*) *Doe Locke* v. *Franklin*, 7 Taunt. 9; 1 Chit. 390, n., S. C. See *Payne* v. *Rogers*, 1 Doug. 407; 2 H. Bl. 342, *S. C.*: *Doe* v. *Dyer*, 3 Dowl. 696.

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Several defences.

Where there are several defendants to whom the plaintiff delivers declarations for the recovery of the same premises, the Court would probably now, since the 3 & 4 *W.* 4, *c.* 42, (which gives one of several defendants who is acquitted his costs), on the motion of the plaintiff, join them all in one declaration, although they are severally concerned in interest, though before that act the Court would not do so (*g*).

Death of lessor of plaintiff, effect of.

Death of Parties—Effect of.]—The death of the lessor of the plaintiff, or of one of several lessors, pending the action, does not abate it. The action may be proceeded with by the party representing the interest of the late lessor, for damages and costs, though possession of the premises cannot be obtained (*h*), and security for costs may be ordered to be given (*i*).

Death of defendant.

The death of a sole defendant in the action will abate it, as in other cases. Where the landlord was admitted to defend alone, and died before the termination of the action, having devised all his estates to B., and the Statute of Limitations prevented the lessor of the plaintiff from bringing a fresh ejectment, the Court gave him leave to sign judgment against the casual ejector and issue execution thereon, unless B. would appear and defend the action as landlord (*j*). As to allowing judgment to be entered *nunc pro tunc* in the case of the defendant's death after verdict, see *post*, *Ch.* 3, *p.* 1016 (*k*).

9. *The Issue, Notice of Trial, Jury Process, and Nisi Prius Record, &c.*

9. The issue, notice of trial, jury process, and Nisi Prius record.

The defendant or defendants having pleaded and entered into the consent rule or rules, and the plaintiff's attorney having got the latter drawn up as directed, ante, 944, *he may at once proceed to make up and deliver the issue, give notice of trial, sue out the jury process, make up and pass the Nisi Prius record, and set down the cause for trial, as in other cases* (*l*). *No fresh declaration is delivered. In making up the issue, the plaintiff's attorney should substitute the names of the real defendants for that of the casual ejector, and the notice to appear at the foot of the declaration should of course be omitted.* It also seems, that the rules of *H. T.*, 4 *W.* 4, prescribing the form of an issue, &c., do not apply to an ejectment, yet they are followed in practice as far as they can be (*m*). In actions by *original*, it is more correct to intitle the issue of the same term as the declaration (*n*); although it may be, and usually is, intitled of the term in or of which issue was, or is supposed to have been, joined, in the manner as in actions by bill. In actions by *bill*, the issue should be intitled of the term in or of which issue is, or is sup-

(*g*) See Run. Eject. 187. See *Doe Varley* v. *Roe*, 6 Jur. 931, B. C.

(*h*) See *Thrustout* v. *Grey*, 2 Stra. 1056: *Goodright* v. *Halton*, Barnes, 119: *Doe Cozens* v. *Cozens*, 1 Q. B. 426: 9 Dowl. 1040, *S. C.*: *Doe* v. *Stephens*, 2 D. & L. 995. And see *Spicer* v. *Dodd*, 1 Dowl. 306; 2 C. & J. 165, *S. C.*

(*i*) See *Doe Earl of Egremont* v. *Stephens*, 2 D. & L. 993: *Thrustout* v. *Bedwell*, 2 Wils. 7: *Doe* v. *Grundy*, 1 B. & Cres. 284; 2 D. & Ry. 437, *S. C.*; *ante*, 946.

(*j*) *Doe Grubb* v. *Grubb*, 5 B. & C. 457.

(*k*) And see *Doe Taylor* v. *Roe*, 7 Dowl. 584.

(*l*) See the various forms, Chit. Forms, 367, 368.

(*m*) See *ante*, 917.

(*n*) See *Lee* v. *Clerke*, 2 East, 333.

posed to be, joined (*o*). In actions by *original*, the issue, after stating the term, commences at once with an entry of the declaration. In actions by *bill*, the issue commences with a memorandum, prefatory to the declaration and proceedings. Entries of imparlances and continuances, being abolished, should be omitted. The award of the *venire* is as in other cases (*p*). The record of Nisi Prius should contain a transcript of the issue as delivered, and is in other respects the same in form as in ordinary cases (*q*).

Consequences of not trying pursuant to notice, &c.

If the plaintiff do not proceed to trial in pursuance of his notice, and has not countermanded it in time, the defendant shall have his costs of the day, or judgment as in case of a nonsuit, as in other cases (*r*). This judgment may be obtained, although, through the default of the lessor of the plaintiff, no consent rule has been drawn up (*s*).

10. *Proceedings at the Trial.*

10. Right of parties to be heard separately.

Where the defendant appears at the trial, and confesses lease, entry and ouster, and possession, according to the terms of the consent rule, the proceedings at the trial are the same as in other cases. There being but one plaintiff in ejectment, in case there be several lessors, they cannot be heard separately by counsel, although they are separately interested (*t*). And if a landlord and tenant defend by different attornies, and have different counsel, but it appears that the tenant claims no title but what he derives from the landlord, the judge at the trial will only allow one counsel to address the jury for the defence; but the party's counsel who does not address the jury will be at liberty to cross-examine, and also to call witnesses (*u*).

Evidence.

The plaintiff should, in general, be prepared to produce the consent rule as part of his case; but where there is no doubt as to the identity of the premises sought to be recovered with those for which the tenant defends, he is not bound to produce it (*x*), even for the purpose of entitling him to call on the defendant to confess lease, entry, and ouster (*y*). Proof of the service of the declaration on the tenant in possession is sufficient, without producing the landlord's rule to shew that the defendant comes in as landlord (*z*). The defendant may, of course, give any special matter of defence in evidence under the general issue; and he will be entitled to begin, to give evidence, and to the reply, as he would in ordinary cases, if his special matter of defence were pleaded (*a*).

Amendments at.

See as to amendments of variances at the trial, *ante*, *Vol. I*, *p.* 385, &c.

(*o*) *Wood* v. *Miller*, 3 East, 204. Issue is supposed to be joined of the term in or after which the plea is pleaded.

(*p*) *Ante*, Vol. 1, p. 367.

(*q*) See Vol. 1, p. 337. See forms, Chit. Forms. 369.

(*r*) See *post*, Part 5, Ch. 22, 23. See form, Chit. Forms, 376.

(*s*) *Doe Williams* v. *Smith*, 9 Dowl. 1011.

(*t*) *Doe Fox* v. *Bromley*, 6 D. & R. 292.

(*u*) *Doe Hogg* v. *Tindale*, 3 C. & P. 565.

(*x*) *Doe Greaves* v. *Raby*, 2 B. & Ad. 948; *Doe Fleming* v. *Armfield*, 1 Dowl., N. S., 327. But see *Doe Lamble* v. *Lamble*, 1 M. & M. 237.

(*y*) *Doe Fleming* v. *Armfield*, 1 Dowl., N. S., 327.

(*z*) *Doe Giles* v. *Warwick*, 5 M. & Sel. 493.

(*a*) Vol. 1, pp. 365, 383, &c.

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Plea *puis darrein continuance.*

If the lessor of plaintiff have entered into any part of the premises after issue joined and before trial, the defendant may plead this matter *puis darrein continuance* (*b*).

Proceedings where defendant does not appear at trial.

If the defendant do not appear, and confess lease, entry, and ouster, and that he or his tenant was in possession of the premises at the time of the service of the declaration, the defendant (and his attorney, if he be within the rule) must be called to confess the same. The associate accordingly orders the crier to call him, and, after being three times called to come forth and make the confession, if he do not appear, or if he do appear and will not make the confession, the plaintiff must be called and nonsuited; and, at the prayer of the plaintiff, this fact is entered on the *postea*, namely, that the plaintiff was nonsuit, because the defendant did not appear and confess lease, entry, and ouster, and this will entitle him, by the terms of the consent rule, to sign judgment against the casual ejector, on which he may sue out a writ of possession; and he is also entitled to his costs from the defendant (*c*). It is not necessary to produce the consent rule before making the calls. If there be several defendants, and some of them do not appear, and confess lease, entry, and ouster, a verdict must be taken for them, but with an indorsement on the *postea* that it was because they did not appear and confess (*d*); and the trial proceeds as to the defendants who have appeared (*e*). If the plaintiff has been nonsuited by reason of the defendant not confessing lease, entry, and ouster, and the defendant be desirous of obtaining a new trial, he should apply to the Court to set aside the nonsuit and grant a new trial, and not to restore the cause to the list: if he obtain a rule for the latter purpose, the Court will not, upon the plaintiff shewing cause against it, mould the rule into a proper form (*f*). Where the Court grant a new trial, it is usually upon payment of costs between party and party (*g*). It may be here stated, that, by the 1 *G.* 4, *c.* 87, *s.* 2, (*post*, 976), in all cases of ejectment by *landlord* against *tenant*, if the defendant do not appear at the trial, and confess lease, entry, and ouster, then, upon proof that such defendant or his attorney was regularly served with notice of trial, the plaintiff shall not be nonsuit; but the production of the consent rule shall in all such cases be sufficient evidence of the lease, entry, and ouster (*h*).

Nonsuit on merits.

The plaintiff may be nonsuited upon the merits, as in other cases; and the defendant will thereupon be entitled to his costs, which he will, as hereafter seen, obtain under the consent rule.

Verdict.

The plaintiff is not restricted in his proof to the number of acres, &c., or quantity of estate set forth in his declaration. Therefore, if he declare for forty acres, he may recover twenty; if he demand a moiety, he may recover a third (*i*). If the defendant succeeds as to any part of the premises, he is entitled to

(*b*) *Ante*, 941; 2 Sel. 192.

(*c*) Bull. N. P. 98: *Doe Fleming* v. *Armfield*, 1 Dowl., N. S., 327: *Doe Davies* v. *Roe*, 1 B. & C. 118. See the form of *postea* in this case, Chit Forms, 371.

(*d*) Bull. N. P. 98: *Clazmore* v. *Searle*, 1 Ld. Raym. 729. *See Greesee* v. *Rolls*, 2 Salk. 456.

(*e*) See the form of *postea* in this case, Chit. Forms, 372.

(*f*) *Doe Fish* v. *Macdonnell*, 8 Dowl. 483.

(*g*) *Doe Cooling* v. *Appleby*, 9 Dowl. 856.

(*h*) 1 G. 4, c. 87, s. 2.

(*i*) *Down Burgess* v. *Purvis*, 1 Burr. 326: *Doe* v. *Wippie*, 1 Esp. 360.

have the verdict entered for him as to that part (*j*). Where the lessors of the plaintiff had laid a demise by the party in whom a term was vested, but they were only entitled to treat such term as subsisting as to their undivided shares of the land, the Court were of opinion that the verdict should be entered on such demise, in point of form, for the whole of the land, as the term could not be divided or held to be destroyed in part, though the lessors of the plaintiff were only beneficially entitled amongst them to a moiety of the premises (*k*). If the verdict be special, it should appear upon the face of it that the lessor of the plaintiff had a right of entry at the time he commenced his ejectment (*l*).

Damages.

In ejectment, the lessor of the plaintiff may recover the damages he has sustained previous to the commencement of the action, by the detention of the property in dispute &c.; but, in this action, they are usually nominal, they being, in general, afterwards recovered in an action of trespass for *mesne* profits: which action will be hereafter considered (*m*). But in an ejectment by landlord against *tenant*, the plaintiff may, as we shall hereafter more fully see, (*post*, 976), by the 1 *G.* 4, *c.* 87, *s.* 2, recover *mesne* profits as damages. In an ejectment for the recovery of premises conveyed for the purposes of the 1 & 2 *W.* 4, *c.* 38, (the act for the building of additional churches), the jury who try the ejectment, or the jury under a writ of inquiry, are to ascertain the value of the premises, &c. (*s.* 18).

Certificate for costs.

It seems doubtful, whether, where less damages than 40*s.* are recovered, the judge must certify, under the 3 & 4 *Vict. c.* 24, to entitle the lessor of the plaintiff to costs (*n*).

Certificate for speedy execution.

After being nonsuit for not confessing lease, entry, and ouster, or on a verdict for the plaintiff, he could not, before the 11 *G.* 4 & 1 *W.* 4, *c.* 70, obtain judgment till the ensuing term; but now, by the 38th section of that act, "in all cases of trials of ejectments at Nisi Prius, when a verdict shall be given for the plaintiff, or the plaintiff shall be nonsuited for want of the defendant's appearance to confess lease, entry, or ouster, it shall be lawful for the judge before whom the cause shall be tried to certify (*o*) his opinion on the back of the record, that a writ of possession ought to issue immediately, and, upon such a certificate, a writ of possession (*p*) may be issued forthwith; and the costs may be taxed, and judgment signed and executed afterwards at the usual time, as if no such writ had issued: Provided always, that such writ, instead of reciting a recovery by judgment in the form now in use, shall recite shortly that the cause came on for trial at Nisi Prius at such a time and place, and before such a judge, (naming the time, place, and judge), and that thereupon the said judge certified

(*j*) *Doe Bowman* v. *Lewis*, 13 M. & W. 241; 2 D. & L. 667, overruling *Doe Davenport* v. *Rhodes*, 11 M. & W. 600; 1 Dowl. & L. 292, *S. C.* See *Roe* v. *Street*, 4 Nev. & M. 42; 2 Ad. & E. 329: *Doe Cavendon* v. *Cooper*, 10 Ad. & E. 197. But see *Andrews* v. *Chapman*, 9 M. & W. 498, per *Alderson*, C. B.: *Doe* v. *Errington*, 4 Dowl. 682.

(*k*) *Doe Blight* v. *Pott*, 11 Ad. & E. 326.

(*l*) See *Taylor* v. *Horde*, 1 Burr. 60, 74: *Chapman* v. *Brown*, 3 Burr. 1626: *Broughton* v. *Langley*, 3 Ld. Raym. 154: *Thornby* v. *Fleetwood*, 1 Str. 318: *Holdfast* v. *Dowsing*, 2 Str. 1253.

(*m*) See *Doe Thompson* v. *Hodgson*, 12 Ad. & E. 135, per *Littledale*, J.

(*n*) *Doe Hughes* v. *Derry*, 9 Car. & P. 494. See this statute noticed, *post*, Pt. 5, ch. 31.

(*o*) See form, Chit. Forms, 571.

(*p*) See form of writ, Chit. Forms, 380.

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his opinion that a writ of possession ought to issue immediately." If the lessor of the plaintiff be *nonsuited* for want of the defendant confessing lease, entry, and ouster, the judge has, in some instances, refused to grant a certificate under this statute without an affidavit stating the circumstances of the case being laid before him (*q*): it is now, however, usually granted without such affidavit (*r*). There does not appear to be any *discretion* in the judge under this act as to the time when the possession shall be delivered: he must either grant a certificate to enable the lessor of the plaintiff to get into *immediate* possession, or the case must take its regular course (*q*). But where the judge is of opinion that some time ought to elapse before possession is taken, he will grant the certificate on an undertaking by the lessor of the plaintiff not to enforce it before the expiration of a certain period (*s*). Indeed, it would seem that such a certificate might be granted for execution to issue at the expiration of a certain period, under the subsequent stat. of 1 *W.* 4, *c.* 7, *s.* 2, (*ante*, *Vol.* 1, *p.* 402), which is applicable to all actions, and the provisions of which may be deemed cumulative with the above statute, excepting, indeed, in the case of the plaintiff being nonsuited for not confessing lease, entry, and ouster. At all events, the judge cannot grant a certificate for speedy execution for costs, unless under the 1 *W.* 4, *c.* 7, *s.* 2.

11. *Costs.*

11. Costs. Who entitled to.

The prevailing party is entitled to costs in nearly the same cases as in personal actions. If no person appear to the ejectment, and judgment be consequently entered against the casual ejector, the plaintiff has no other remedy for his costs than by action of trespass for *mesne* profits, noticed hereafter (*t*), in which they are recoverable as consequential damages (*v*). If there be several defendants, and the plaintiff have a verdict against them, each of them is liable for the entire costs, even although they defend severally (*x*). If several defend jointly, and succeed, they shall be entitled to costs; but the plaintiff may pay the costs to which of them he pleases (*y*): if they defend severally, they are entitled to costs if they succeed, in the same manner as in other cases (*z*). So, if the plaintiff be nonsuit on the merits, the defendant is entitled to costs (*a*); but where he is nonsuit because the defendant has not confessed lease, entry, and ouster, so far from being liable to costs, he is entitled to them from the defendant, according to the terms of the consent rule (*b*). The defendant is entitled to costs on a *non pros.* for the plaintiff not replying when the lessor of the plaintiff has joined in the consent rule, or for not proceeding to trial according to notice, or on a judgment, as in

(*q*) *Doe* v. *Dawson*, 4 C. & P. 589.
(*r*) See Vol. 1, p. 403. See form of affidavit, Chit. Forms, 370
(*s*) *Doe Packer* v. *Hilliard*, 5 C. & P. 132.
(*t*) *Post*, 962.
(*v*) *Morris* v. *Barry*, 1 Wils. 1; 2 Str. 1130, *S. C.*: *Symonds* v. *Page*, 1 C. & J. 29.
(*x*) Bull. N. P. 335, 336.
(*y*) *Jordon* v. *Harper*, 1 Str. 516: *Dudley* v. *Tito*, 2 Str. 1203.
(*z*) 8 & 9 W. 3, c. 11, s. 1. See the 3 & 4 W. 4, c. 42, s. 33: *Doe* v. *Hughes*, 4 Dowl. 112; 1 Gale, 260, *S. C.*
(*a*) 4 J. 1, c. 3.
(*b*) *Ante*, 939.

case of a nonsuit (*c*). If there be several issues, some found for the plaintiff, and some for the defendant, the defendant is, by rule *H. T.*, 2 *W.* 4, *r.* 74, entitled to costs on those issues on which he succeeds. But the plaintiff is entitled in such case to the costs on the issues found for him, and to the general costs of the cause. Where the declaration contained one count only, and the property mentioned in the declaration consisted of three messuages, as to two of which the jury found for the plaintiff, and for the defendant as to the residue, the defendant was held to be entitled to his costs, so far as related to the messuage which the plaintiff failed to recover (*d*). It is entirely for the decision of the Master to refer particular costs incurred at the trial to one issue or the other; and, it being a mere question of fact, the Court will not interfere (*e*).

How recovered by plaintiff.

If the plaintiff have a verdict against the defendant, he recovers his costs by execution, or by action, as in other actions; but if entitled to costs under the consent rule, for not confessing lease, entry, and ouster, the way of recovering them is either by execution founded on the consent rule, under the 1 & 2 *Vict. c.* 110, *s.* 18, or by attachment for non-payment (*f*). As to issuing execution upon a rule of court under the above enactment, see *post*, *Pt.* 5, *ch.* 1 (*g*). The mode of proceeding by attachment is as follows:—*Give the defendant the usual one day's notice of taxation, as directed post, Pt.* 5, *ch.* 31; *then take the judgment paper, consent rule, and postea, to one of the Masters, and he will tax the costs upon the rule. Then make a copy of the rule and allocatur; serve it personally* (*h*) *on the defendant, at the same time shewing him the original rule; make a demand of the costs, and if he do not pay them, move the Court, upon an affidavit of the demand and refusal* (*i*), *for an attachment against him* (*k*). Where the lessor of the plaintiff, after obtaining a verdict and judgment, delays to tax his costs, (although apparently for the purpose of recovering the extra costs in an action for *mesne* profits), a judge has no authority to order that the defendant shall be at liberty to enter satisfaction on the record, unless the lessor of the plaintiff shall tax his costs within a limited time (*l*).

How, by defendant.

If the defendant is entitled to costs, either upon verdict or where the plaintiff is nonprossed or nonsuit, his only remedy is by attachment, or by execution founded on the consent rule under the 1 & 2 *Vict. c.* 110, *s.* 18, as the lessor of the plaintiff is not a party to the record. As to issuing execu-

(*c*) See *ante*, 944.

(*d*) *Doe* v. *Errington*, 4 Dowl. 602: *Anderson* v. *Chapman*, 5 M. & W. 483, per *Alderson*, C. B., and per *Parke*, B. See *Doe Davenport* v. *Rhodes*, 11 M. & W. 699; *ante*, 949.

(*e*) *Doe* v. *Webber*, 4 Nev. & M. 381. See further as to costs, where there are several issues, *post*, Part 5, ch. 31.

(*f*) See Runn. Ject. 415.

(*g*) See *Doe Steere* v. *Bradley*, 1 Dowl., N. S., 259: *Doe Whatley* v. *Knight*, 7 Jur. 815, B. C., May 3, 1843. And see a form of *fi. fa.* against the defendant on the consent rule for costs after nonsuit for not confessing lease, entry, and ouster, Chit. Forms, 376; *ca. sa.* for same, Id. 376.

(*h*) *Doe Steer* v. *Bradley*, 1 Dowl., N. S., 259.

(*i*) See the forms, Chit. Forms, 375.

(*k*) See the practice as to attachments in general, *post*, Part 8. Formerly, in the Exchequer, a *subpœna* against the casual ejector was necessary, but this is not now requisite. (See *Doe Fry* v. *Fry*, 2 C. & M. 234).

(*l*) *Doe Drax* v. *Fillitter*, 11 M. & W. 80, and per *Parke*, B., "I think, however, that the defendant should try the experiment of an application for a judge's order upon the lessor of the plaintiff to deliver his bill of costs, and then he may tax upon that. There ought certainly to be some mode of enabling the defendant to pay the taxed costs."

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tion upon a rule of court, see *post*, *Pt.* 6, *ch.* 1 (*m*). The mode of proceeding by attachment is as follows:—*Tax costs upon the postea, as in other cases, make copies of the rule and allocatur, and serve them personally* (*n*) *on the lessor of plaintiff, at the same time shewing him the originals, and demanding the costs; and if he do not pay them, move the Court, upon an affidavit of the demand and refusal* (*o*), *for an attachment against him* (*p*). Suing out a *ca. sa.* against the nominal plaintiff is unnecessary (*q*); and the defendant may at once proceed on the consent rule, in the manner directed *supra*, as to the plaintiff proceeding for costs upon a nonsuit (*r*). The remedy by execution is, however, preferable. It may be here mentioned that the Court has no power to compel the plaintiff to pay costs before he has joined in the consent rule (*s*).

In case of death of parties.

We have already considered how far the death of parties will affect the action (*t*). If the lessor of the plaintiff dies, even after trial and before payment of costs, the defendant in general cannot recover his costs against the lessor's executor or administrator, for the consent rule is merely personal, to make the party liable to an attachment if he refuses to pay the costs.

Where the lessor of the plaintiff died between the commission day and the trial, and the plaintiff was nonsuit on the merits, it was holden, that the executor of the lessor was not liable for the costs of the nonsuit (*u*). Where husband and wife were lessors, and the former died after entering into the rule, the wife was, notwithstanding, held liable for the costs, because they were to be paid by the lessor of the plaintiff, and both of them were such (*x*). As to compelling security for costs where the party representing the interest of the late lessor proceeds with the ejectment, see *ante*, 946, 950.

Where ordered to be paid by third parties.

The Court may, under circumstances, in ejectment, though not in any other action (*y*), compel the real defendant to pay the costs, though he is no party to the record (*z*). And if a party can be shewn to be really defending, and at the same time putting forth a pauper apparently to defend, the lessor of the plaintiff may obtain an order for setting aside the consent rule with costs, with liberty to sign judgment against the casual ejector, unless the landlord will come in and defend (*a*). And where the landlord defended an ejectment in the name of his tenant, who was a pauper, and the plaintiff had a verdict, the Court made the landlord pay the costs of the action (*b*). And in *Berkeley* v. *Dimery* (*c*), Lord *Tenterden* said, "That in an ejectment the tenant in possession must be sued; and the Court will not permit a person to put a mere pauper into pos-

(*m*) See forms of *fi. fa.* and *ca. sa.*, Chit. Forms, 377, 378.
(*n*) *Doe Steer* v. *Bradley*, 1 Dowl., N. S., 250.
(*o*) See the form, Chit. Forms, 375.
(*p*) Run. Eject. 416. See further as to the practice on attachments in general, *post*, Part 8.
(*q*) *Doe Fry* v. *Fry*, 2 Dowl. 265; 2 C. & M. 234, *S. C.*
(*r*) *Doe Prior* v. *Salter*, 3 Taunt. 485.
(*s*) *Doe Pratten* v. *Beard*, 11 M. & W. 675; 2 Dowl., N. S., 526; 12 Law J., N. S., Exch., 13; *Goodright* d. *Ward* v. *Badtitle*, 2 W. Bl. 763; *ante*, 944.
(*t*) *Ante*, 950.
(*u*) *Doe Payne* v. *Grundy*, 2 D. & R. 437; 1 B. & C. 284, *S. C.* And see *Doe* v. *Ford*, 2 Smith, 407; 2 Saund. 72, *a.*, note (*n*), 6th ed.
(*x*) Harr. L. and T. 865.
(*y*) *Hayward* v. *Gifford*, 6 Dowl. 699; 4 M. & W. 194, *S. C.*: *Evans* v. *Rees*, 2 Q. B. 334; 1 G. & D. 579; 1 Dowl., N. S., 338: *Doe Wright* v. *Smith*, 8 Dowl. 517.
(*z*) *Doe Masters* v. *Gray*, 10 B. & C. 615.
(*a*) *Thrustout* v. *Shenton*, 10 B. & Cres. 110; 5 M. & Ry. 443, *S. C.*
(*b*) Ib. And see *Doe* v. *Gray*, 10 B. & Cres. 615.
(*c*) 10 B. & C. 113, *n.*

session, merely to evade the costs." But the Court will not compel a party, who has induced the defendant to defend, to pay the costs, even though he has furnished money and employed an attorney for such purpose, if he claim no interest in the property in question (*d*). So, on the other hand, if a stranger carry on a suit in the name of another, who has title, and yet is so poor that he cannot pay the costs; in case he fail, the Court, on affidavit of the circumstances, will order the person who carried on the suit to pay costs to the defendant (*e*). But where two infants, after having entered into the consent rule, were admitted to sue by *prochein amy*, but the name of the guardian was omitted to be substituted for theirs in the consent rule, and they were nonsuited at the trial; the Court refused a rule to compel the guardian to pay the costs of the ejectment (*f*). See as to compelling security for costs in general, *ante*, 937, and *post*, *Pt.* 5, *ch.* 11.

12. *The Judgment after a Verdict or Nonsuit.*

12. The judgment.

If a verdict has been given, let the prevailing party *get the record of Nisi Prius from the associate, and, in town causes, indorse the postea on it, as directed Vol.* 1, *p.* 460. *In a country cause the associate will enter the postea before he gives you the record. If the verdict be not set aside, or the judgment arrested, within the time allowed for that purpose* (*g*), *then, if the verdict be for the plaintiff, proceed to tax costs, as directed post, Pt.* 5, *ch.* 31, *and sign final judgment, as directed Vol.* 1, *p.* 460. *If the verdict be for the defendant, or plaintiff be nonsuit, costs are taxed upon the consent rule, as mentioned ante*, 955 (*h*). As to the signing of judgment where the judge certifies for immediate execution, see *ante*, 953, 954, and *Vol.* 1, *p.* 458.

13. *Error.*

13. Error.

The proceedings upon a writ of error on a judgment in ejectment are the same (with one or two exceptions) as in other cases. Bail is required where the defendant brings a writ of error after verdict for the plaintiff (*i*); and the recognisance is taken for the amount of double the yearly value, and double the costs of the ejectment (*j*). The recognisance must be given, although the defendant has already put in and justified bail under 1 *G.* 4, *c.* 87 (*k*). Putting in and perfecting bail in error will discharge the recognisance given under *s.* 3, (not to commit waste) (*l*). It is not necessary that the plaintiff in error should join in the recognisance; or, if he do, he cannot be examined as to his sufficiency (*m*).

Bail in.

(*d*) *Doe Wright* v. *Smith*, 8 Dowl. 517.

(*e*) Run. Eject. 417.

(*f*) *Doe Glynes* v. *Glew*, 9 Jur. 829, S. C.; *aut quære*.

(*g*) See Vol. 1, p. 458.

(*h*) See the forms of *postea* and judgments, Chit. Forms, 371 to 374.

(*i*) 16 & 17 C. 2, c. 8, s. 3. *Ante*, Vol. 1, p. 462.

(*j*) *Keene Byron* v. *Dearden*, 8 East, 298; *Thomas* v. *Goodtitle*, 4 Burr. 2501.

(*k*) *Rex* v. *Moore*, 7 Bing. 124; 4 Moo. & P. 761, S. C.

(*l*) 1 G. 4, c. 87, s. 3.

(*m*) *Keene* v. *Dearden*, 8 East, 298. By the 6 G. 4, c. 96, s. 1, bail in error is now requisite in all *personal* actions, after judgment by default or on demurrer, as well as after verdict, unless the Court or a judge will by special order dispense with the same; which they will not do unless substantial ground of error be shewn. (*Wadsworth* v. *Gibson*, 4 Bing. 372; 1 Moo. & P. 501, S. C.) But an ejectment, being a *mixed* and not a *personal* action, does not, it seems, come within this enactment.

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By whom, and when brought.

As the casual ejector cannot bring error, being a mere nominal person, that writ can only be brought after the defendant has appeared and confessed lease, entry, and ouster, and in the real defendant's name (*n*); even if the landlord be permitted to defend, a writ of error cannot issue in the name of the casual ejector. But if a writ of error *coram nobis* is sued out in the name of the casual ejector, it must be taken to be sued out at the instance of a proper party, until it is set aside (*o*). And, on a writ of error from an inferior court, in the name of the casual ejector, the Court will not order a *non pros.* to be entered, though his release of errors be shewn, because inferior courts are not competent to proceed by the consent rule (*p*).

What may be assigned for error.

The death of the nominal plaintiff cannot be assigned for error (*q*); nor can a defendant in ejectment assign for error, that, being an infant, he appeared by attorney (*r*). And it seems that nothing can be assigned for error, that would make it necessary to go again into the title of the premises (*s*). The omission of the parish is not error (*t*).

Effect of, on execution.

When the plaintiff obtains judgment, and the defendant brings a writ of error, the plaintiff cannot sue out execution until the writ of error be determined (*u*); provided due notice of its allowance be given, and provided bail in error be put in and perfected, when necessary, within the time limited for that purpose (*x*). A writ of error which described a cause of *Doe* d. *F.* v. *Roe*, as a cause of *Doe* on the several demises of *F.* v. *Roe*, was held to be no stay of execution (*y*). And where the defendant below, pending a writ of error brought by him, brought a new ejectment to recover the same premises, the Court would not allow him to proceed in the new action until he quitted possession, or the tenants had attorned to the lessor of the plaintiff in the former action (*z*).

Rule not to commit waste.

Also, where a defendant brought a writ of error, the Court obliged him to enter into a rule not to commit waste pending the writ (*a*).

Remedy for *mesne* profits and damages pending error.

And, by the 16 & 17 *C.* 2, *c.* 8, *s.* 4, if upon error brought the judgment be affirmed, or the plaintiff discontinue or be nonsuit, the Court from which execution should issue shall award a writ to inquire as well of the *mesne* profits as of the damages by any waste committed after the first judgment in the ejectment; and, upon the return thereof, judgment shall be given and execution awarded for such *mesne* profits and damages, and also for costs of suit. The bail in error are also made liable for these *mesne* profits, damages, and costs; (*Id.*, *s.* 3); but no action can be brought for them against the bail, until their amount have been first ascertained upon a writ of inquiry, as above directed (*b*). See as to the lessor of the plaintiff being entitled to double costs of executing this writ of inquiry, *ante*, *Vol.* 1, *p.* 510.

(*n*) 2 Sellon, 205: *George* v. *Wisdom*, 2 Burr. 757: Bac Ab. "Error" (A.)
(*o*) *Doe Faithful* v. *Roe*, 7 Dowl. 718.
(*p*) Runn. Eject. 421.
(*q*) *Moore* v. *Goodright*, 2 Str. 899.
(*r*) *Goodright* v. *Wright*, 1 Stra. 33, *ante*, Vol. 1, p. 490. See form of assignment of error in ejectment and joinder, 10 Went. 1, 3.
(*s*) *Wilkes* v. *Jordan*, Hobart, 5.
(*t*) See *Doe* v. *Gunning*, 2 Nev. & P. 96.
(*u*) *Jones* v. *Edwards*, 3 Str. 1241.
(*x*) See as to this, *ante*, Vol. 1, pp. 487, 492, &c.
(*y*) *Doe Faithful* v. *Roe*, 7 Dowl. 718; *ante*, Vol. 1, p. 490.
(*z*) *Fenwick* v. *Greenaway*, 1 Salk. 258.
(*a*) *Wharod* v. *Smart*, 3 Burr. 1293.
(*b*) *Doe* v. *Reynolds*, 1 M. & Sel. 247.

14. *Execution.*

As to execution generally, see *Vol.* 1, pp. 527—569. Formerly, the execution could not, in any case, issue out until final judgment was obtained; but now, if the judge who tried the cause shall think fit to certify that possession should be immediately obtained, a writ may issue accordingly. This is provided for by the 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 38, and the 1 *W.* 4, *c.* 7, *s.* 3, noticed *ante*, 953. As to when writs of execution in general may be sued out, see *Vol.* 1, p. 527. When a *scire facias* is necessary after a year and a day have elapsed, after signing of judgment, see *post*, 962. If the term stated in the declaration expires pending the suit, the plaintiff cannot recover possession of the premises, because the Court cannot give the plaintiff judgment for them, where it appears on the face of the record that his title to them has expired; yet he shall have his judgment for damages, because the trespass still remains (*c*). At what time may be issued. Where term of demise expired.

After verdict and judgment, where the landlord defends, execution may be issued against him without any further order of the Court; but, when the landlord is admitted to defend, and judgment is entered against the casual ejector, with a stay of execution until further order, and the landlord does not appear at the trial, whereby the lessor of the plaintiff becomes nonsuited, and the judge does not certify under the 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 38, or 1 *W.* 4, *c.* 7, the lessor, before he takes out execution, must move the Court for leave to do so. The rule for this is a rule *nisi* in the first instance (*d*). In such a case, a writ of error brought by the landlord may be shewn for cause, and will be a sufficient reason against taking out execution; but, if the landlord omit the opportunity of shewing it for cause, the execution is regular and cannot be set aside (*e*). Leave of court, when necessary.

If the judgment be for costs as well as for the recovery of the premises (which can be only where there is a verdict), the plaintiff may have a separate writ of *fi. fa.* or *ca. sa.* for the costs (*f*); or he may have the *fi. fa.* or *ca. sa.* added to the *habere* in the same writ (*g*). For plaintiff's costs.

The defendant may now, it would seem, have a writ of execution, under the 1 & 2 *Vict. c.* 110, *s.* 18, upon the consent rule for his costs, if he have a verdict, or the plaintiff be *non-pressed* or nonsuit; or he may proceed by attachment (*h*). For defendant's costs.

It would seem that the 3 & 4 *W.* 4, *c.* 67, *s.* 2, allowing writs of execution to be tested on the day on which the same are issued, and to be made returnable immediately after the execution thereof, is not applicable to a writ of *habere*, or perhaps to any other writ of execution in an ejectment, because that act was passed to amend the Uniformity of Process Act, within Teste and return of *habere*, &c.

(*c*) Bac. Ab., Ejectment, F.; Co. Lit. 285. As to enlarging the term after verdict, see ante, 961.

(*d*) *Ante*, 943. And see the form, Chit. Forms, 374.

(*e*) See *Doe Roberts* v. *Gibbs*, 1 Chit. Rep. 67; *Doe Simons* v. *Masters*, Id. 223.

(*f*) See the form, Chit. Forms, 381.

(*g*) See forms of writ of possession and *fi. fa.* for costs, in same writ, Chit. Forms, 382; the like, with *ca. sa.*, Id. 383.

(*h*) *Ante*, 955. See forms of *fi. fa.* and *ca. sa.* for defendant's costs, Chit. Forms, 377, 378.

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which an ejectment is not included; the point, however, is not yet settled, and the practice is to make the writs of *fi. fa.* or *ca. sa.* for costs returnable immediately after the execution thereof. At all events, the 2 *W.* 4, *c.* 39, *s.* 15, which empowers a judge to order in vacation the return of writs, does not include a writ of possession.

Habere Facias, how sued out.

In order to sue out the writ of *habere facias possessionem, engross it on plain parchment; take it and the judgment paper or* postea (*i*), *and the judge's certificate for immediate execution, if any, to the Master's Office, and, on production of the judgment paper or* postea, *one of the Masters there will seal the writ. There is no occasion for any* præcipe *for the writ* (*k*), *nor need it be signed* (*l*). *Leave the writ at the sheriff's office, and get a warrant on it; give the warrant to the officer, and he will execute the writ, by putting the lessor of the plaintiff, or some person on his behalf, into possession, upon the premises being pointed out to him.*

How executed.

The officer, if necessary, may break open doors, in order to execute an *habere*, if the possession be not quietly given up; or he may take the *posse comitatus* with him, if he fear violence (*m*). And after he has got admission, he may remove all persons, goods, &c., from off the premises before he gives possession (*n*). If there be several tenements, in the possession of several tenants, the officer must give possession of each separately; the delivery of the possession of one tenement in the name of all, is not sufficient (*o*), unless, indeed, the lessor of the plaintiff can have execution for so much as the tenant who defends, or his landlord, was possessed of (*p*). If the several tenements be in possession of one tenant, and included in the same action, possession of one in the name of the whole will be sufficient. If he give possession of more than he ought, the Court or judge, on application for that purpose, will order it to be restored (*q*). Where, in ejectment by a landlord against his tenant, who had holden over, the crops upon the lands, when seized under the writ of possession, were more than sufficient to pay the arrears of rent, &c.; yet the Court of Common Pleas refused to order the landlord to pay over the surplus to the tenant (*r*).

Crops.

Alias habere where possession not completely given.

If the writ of *habere* be not executed, then, upon the return of it, you may sue out an *alias &c.* (*s*). But if possession be once completely given under it, the plaintiff cannot sue out another writ of possession, although he be disturbed in his possession by the same defendant, and although the sheriff have not yet returned the writ; otherwise the plaintiff, by omitting to call on the sheriff to return the writ, might retain the right of suing out a new writ of *habere* as a remedy for any

(*i*) R. H., 2 W. 4, r. 75; R. H., 2 & 3 G. 4. *Ante*, Vol. 1, 570, n. (*l*).
(*k*) R. H., 2 W. 4, r. 76.
(*l*) Id. r. 75.
(*m*) 5 Co. 91 b; Vol. 1, 549.
(*n*) *Upton & Wells' case*, 1 Leon. 145.
(*o*) 2 Ro. Abr. 180; 2 Sellon, 203.
(*p*) See *Fenn* d. *Blanchard* v. *Wood*, 1 B. & P. 573. It seems that the objection cannot be taken advantage of by any body who comes in to defend. But query, see Id.
(*q*) *Connor* v. *West*, 5 Burr. 2673; *Doe Saul* v. *Dawson*, 3 Wils. 49; Runn. Eject. 439.
(*r*) *Doe Upton* v. *Witherwick*, 3 Bing. 11; 10 Moore, 267, *S. C.*
(*s*) *Molineux* v. *Fulgram*, Palm. 269. See *Lessee of Massey* v. *Ejector*, 1 Jones Rep. Exch. Ir. 457; *Lessee of Lineham* v. *Antony*, Batty Rep. Q. B. Ir. 483.

trespass which the defendant might commit within twenty years next after the date of the judgment (*t*). In such a case, however, if the disturbance took place recently after the possession delivered, it is probable that the Court, upon application, would order the possession to be restored, and punish the defendant by attachment (*u*). And where a writ of *habere* had been executed, and possession had been given to the lessor of the plaintiff, but the tenant a few days afterwards forcibly dispossessed him, the writ not having been returned; *Wightman*, J., granted a rule *nisi* for a new writ, by which rule the tenant was also called upon to shew cause why he should not restore possession of the premises (*x*).

Writ should be executed within a reasonable time

The sheriff should execute the writ within a reasonable time after he receives it. But, though the sheriff has a reasonable time for executing the writ, this does not excuse him in refusing to execute it when he has the opportunity, and is required to do so, and nothing occurs to prevent him (*y*). Where judgment had been obtained against the casual ejector, and a warrant on a writ of *habere facias possessionem* was delivered to the sheriff's officer to be executed, but the sheriff having received notice that the landlord intended to apply to set aside the proceedings for irregularity, his officer did not execute the writ, and the proceedings were afterwards set aside under a judge's order, but not for irregularity, the landlord being let in to plead upon payment of costs, (the sheriff had not been ruled to return the writ), it was held, that the lessor of the plaintiff was entitled to recover, in an action against the sheriff for delaying to execute the writ, expenses incurred by him before the judgment was set aside in endeavouring to get the writ executed, which the Master had refused to allow on taxation (*z*).

Sheriff's poundage on.

If the yearly value of the premises do not exceed 100*l.*, the sheriff is entitled to a poundage of 12*d.* in every 20*s.*; but if it exceed 100*l.*, then to 6*d.* for every 20*s.* above that sum (*a*).

Attornment in lieu of execution.

The tenant or tenants in possession, however, in order to save the expense of executing a writ of possession, may attorn to the lessor of the plaintiff (*b*).

Entry without *habere facias*, or on irregular one.

It would seem that the lessor having judgment to recover his term, may, if he can do so without force, enter without suing forth a writ of possession; for, where the land recovered is certain, the recoveror may, without force, enter at his own peril; and the assistance of the sheriff is only to preserve the peace (*c*). Where, indeed, a writ of possession was set aside for irregularity after it had been executed, the Court ordered the lessor to restore possession, though the plaintiff contended, that, being entitled by the judgment to, and being actually in

(*t*) Dee Pate v. Roe, 1 Taunt. 55: overruling Rudleff v. Tutte, 1 Keb. 779: and Smith also overruling Kingsdale v. Mann, 1 Keb. 27: 1 Salk. 321, *S. C.*: and narrowing the doctrine laid down in Tidd, 9th ed. 1067.

(*u*) See Doe Williams v. Williams, 2 Ad. & E. 381: Doe ex d. Peony v. Doe, 2 W. Bl. 888. And see Doe Thompson v. Hodgkinson, 2 Dowl. 289.

(*x*) Doe Lloyd v. Roe, 2 Dowl., N. S., 407: Doe Pitcher v. Roe, 9 Dowl. 991.

(*y*) Mason v. Paynter, 1 Q. B., 974; *ante*, Vol. 1, p. 547.

(*z*) Mason v. Paynter, 1 Q. B., 974; 1 G. & D. 321, *S. C.*

(*a*) 3 G. 1, c. 15, s. 16. See *ante*, Vol. 1, 561.

(*b*) See form of attornment, Chit. Forms, 384.

(*c*) Run. Eject. 494: 2 Sellon, 121.

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possession, it was immaterial by what means he had obtaine it (*d*).

Execution on judgment of inferior Court.

A judgment in an action of ejectment in an inferior juris diction is not within the meaning of the 19 *G.* 3, *c.* 70, *s.* 1 and if, therefore, the defendant leaves the jurisdiction, th judgment cannot, under that act, be removed into a superio court for the purpose of execution (*e*).

15. *Restitution.*

When awarded or not.

A writ of restitution may be awarded when the judgmen is reversed (*f*). And where a judgment irregularly obtaine was set aside, and the possession that had been given upon th execution, ordered to be restored; but from the lessor of th plaintiff, who held the possession, having absconded, the rul became ineffectual—restitution was awarded (*g*). So, wher judgment was set aside and possession ordered to be restore as above, unless the lessor of the plaintiff proceeded to tria and established his title at the next assizes; a writ of restitu tion was awarded, the lessor of the plaintiff failing to do so although he was alone prevented by the misconduct of his own attorney, and although the title was still undetermined (*h*) But a writ of restitution does not lie to obtain re-possession o premises obtained possession of under a writ of *habere* which has been set aside; but the Court in such a case will neverthe less award possession to be restored (*i*). If the lessor take under a writ of possession, more than he has recovered, the Court or a judge will, on application for that purpose, order him to restore it (*j*).

The order should be directed to lessor of plaintiff.

The order to restore possession on setting aside judgment should be directed in the first instance to the lessor of the plaintiff. Where the defendant obtained a judge's order, set ting aside a judgment irregularly obtained, and commanding the sheriff to restore possession, the Court held, that the order should have been on the lessor of the plaintiff and not on the sheriff, and set aside writs of restitution sued out on the order (*k*), together with so much of the order as was directed to the sheriff (*l*). And where a rule of Court, in an ejectment, required possession of certain premises to be delivered up, but did not mention by whom, the Court refused to make a rule absolute for an attachment against the tenant in possession for not delivering them up; and, as he was a stranger to the ejectment, also refused to grant a rule requiring him to deliver up possession (*m*).

16. *Scire Facias.*

If writ not issued within the year.

After a year and a day from the signing of the judgment

(*d*) *Doe Stephens* v. *Lord*, 6 Dowl. 256; 2 Nev. & P. 606; 8 A. & E. 610, *S. C.*

(*e*) *Doe Stanfield* v. *Shipley*, 2 Dowl. 408. See further, *post*, Pt. 5, ch. 4.

(*f*) 2 Lil. Pr. Reg. 777. See form, Chit. Forms, 128.

(*g*) 2 Sellon, Pract. 204: Harr. L. & T. 868.

(*h*) *Doe Stratford* v. *Shaill*, 8 Jur. 538. 3 June, 1844, B. C.; 2 D. & L. 161, *Coleridge*, J.

(*i*) *Doe Stephens* v. *Lord*, 6 Dowl. 256; 2 Nev. & P. 606; 7 A. & E. 610, *S. C.*

(*j*) *Roe* v. *Dawson*, 3 Wils. 94.

(*k*) These writs were at all events bad. See *Stephens* v. *Lord*, *supra*.

(*l*) *Doe* v. *Williams*, 2 A. & E. 381; 4 Nev. & M. 259, *S. C.* See the notes in 4 Nev. & M. 259.

(*m*) *Doe Lewis* v. *Ellis*, 9 Dowl. 944. See *Doe Stratford* v. *Shaill*, *supra*.

the plaintiff cannot issue execution, without first reviving the judgment by *sci. fa.* (*n*). If he do, the Court, upon application, will set it aside, and, if executed, order the possession to be restored (*o*). Such an application, it seems, may be made at any distance of time (*p*). It may be made by a tenant in possession who has not appeared (*q*). If no consent rule has been drawn up, the Court cannot award costs against the lessor of the plaintiff (*q*).

After the death of parties.

There is no occasion for a *scire facias* after the death of the nominal plaintiff or defendant; and if the death of the plaintiff be assigned for error, it is a contempt, for which the Court will grant an attachment (*r*). If the plaintiff, where he is a real *person*—but this is rarely ever the case (*s*), die after judgment, his executors cannot take out execution without a *scire facias*, for they are not parties to the judgment; though, if execution has been regularly issued out in the lifetime of the testator, the sheriff may execute it after his death, because the authority is from the Court and not from the party (*t*). If the lessor of the plaintiff die after the *teste* of the writ of *habere*, but before it is actually sued out, it is not necessary to revive the judgment by *scire facias*; and, as he is not a party on the record, it seems no *scire facias* would be necessary if he died before the *teste* of the writ, although this appears doubtful (*u*). If a sole defendant dies after judgment and before execution, it has been doubted whether a *scire facias* is necessary before suing out a writ of *habere*, because such execution is of the land only, and no new person is charged (*x*); but the safest course is to sue out a *scire facias* (*y*). The *scire facias* in such a case must be against the terretenants of the land, and not against the executor, without naming him terretenant (*z*). And as a *scire facias* for the land must issue against the terretenants, whoever they may be, it will also be necessary to sue out another *scire facias* for the costs against the personal representative, unless he be himself the terretenant.

After marriage of parties.

If the judgment be against a *feme sole*, who marries before execution, an *habere* should be sued out in the maiden name of the defendant for the land, and a *scire facias* should be issued against the husband and wife for the costs (*a*).

On judgment against casual ejector.

A *scire facias* issues to revive a judgment in ejectment, though such judgment was obtained against the casual ejector (*b*). In such a case the terretenants must be named in the writ (*c*).

(*n*) *Withers* v. *Harris*, Lord Raym. 806: Ad. Eject. 346. See *Doe Stephens* v. *Lord*, 1 P. & D. 398.

(*o*) *Doe* v. *Lord*, 7 Ad. & Ell. 610; 2 Nev. & P. 604, S. C.

(*p*) *Goodtitle* d. *Murrell* v. *Badtitle*, 9 Dowl. 1009. In this case the execution had issued after a lapse of 10 years from the signing of the judgment.

(*q*) *Goodtitle* d. *Murrell* v. *Badtitle*, *supra*.

(*r*) *Moore* v. *Goodright*, 2 Str. 899.

(*s*) It sometimes occurs where the lessor of the plaintiff is an infant, or the like, in which case he is required to find security for costs, or else substitute a substantial for the nominal plaintiff.

(*t*) Rum. Eject. 429; Harr. L. & T., 2nd edit., 808.

(*u*) *Doe Bayer* v. *Roe*, 4 Burr. 1970.

(*x*) Per *Holt*, C. J., in *Withers* v. *Harris*, Lord Raym. 806: *sed vide Procter* v. *Johnson*, 2 Salk. 600; Lord Raym. 669, S. C.

(*y*) Ad. Eject. 346.

(*z*) 2 Sellon, 204.

(*a*) *Doe Taggart* v. *Butcher*, 3 M. & Sel. 557.

(*b*) *Doe Ramsbottom* v. *Roe*, 2 Dowl., N. S., 690.

(*c*) *Withers* v. *Harris*, Lord Raym. 806; *Doe Ramsbottom* v. *Roe*, 2 Dowl., N. S., 690; Tidd. Prac., 9th ed., 1249.

SECT. 2.

EJECTMENT UPON A VACANT POSSESSION.

Entry without action.

WE have already observed, that where a person has a right of entry, he may, if the premises be unoccupied and vacant, in a peaceable manner, and without using such force as would amount to a forcible entry, enter and take possession of them without bringing an ejectment; though, in most cases, it is best to proceed by that action (*d*).

What a vacant possession.

What a vacant Possession.]—Where there is no tenant upon the premises, a distinction must be taken between cases where the tenant has actually *abandoned* the possession, and where, although he has *discontinued to occupy* the premises, he has still retained the virtual possession of them (*e*). In the former case, the landlord must proceed in the ejectment as upon a vacant possession (*f*); in the latter case he must proceed in the ordinary way, after having effected the best service of the declaration in his power. Nice distinctions are drawn as to what is a *vacant* possession. Where the tenant of a house locked it up, and quitted it, it was held, that the landlord should treat it as a vacant possession (*g*). Where the lessee of a public-house took another, and removed his goods and family, but left beer in the cellar, it was held, that a proceeding as on a vacant possession was incorrect, because the lessee still continued in possession; and a case was mentioned, where leaving hay in a barn was held to be keeping possession: it, however, appeared in the latter case, that the attorney for the plaintiff knew whither the lessee had removed, and might have served him personally, which could not be done on the premises. In the case of land, to which there is no house or barn, being rented, if it be known where the tenant lives, he must be served (*h*). Where a servant of the deceased tenant remains in possession, the plaintiff ought to endeavour to get possession; and if he resists, such servant may be treated as tenant, and the declaration may be served on him as such; and, if he does not resist, it seems that the lessor may treat it as a vacant possession (*i*). Service on the executors of the late tenant in possession is bad, if it does not appear that they were the tenants in possession (*j*). A labourer who does not pay rent, has been held to be an occupier on whom service of an ejectment is good (*k*). Where the premises consisted of several cottages, the tenants of all of which, except one, had been duly served, as to which it appeared that there was no one upon it, and that a copy of the notice and declaration had been affixed upon the door; a

(*d*) *Ante*, 915.

(*e*) Mr. Harrison's edition of Woodfall's Law of Landlord and Tenant, 827. See *Doe Hindle* v. *Roe*, 6 Dowl. 393: *Doe Burrowe* v. *Roe*, 7 Dowl. 326.

(*f*) See *Doe Schovell* v. *Roe*, 3 Dowl. 691; 2 C., M., & R. 49, S. C., nom. *Doe Shovell* v. *Roe*: *Doe Norman* v. *Roe*, 2 Dowl. 399, 423: *Doe* v. *Roe*, 4 Dowl. 173.

(*g*) *Doe Darlington (Lord)* v. *Cock*, 4 B. & C. 259; Harr. L. & T. 827.

(*h*) *Savage* v. *Dent*, 2 Str. 1064.

(*i*) *Doe Atkins* v. *Roe*, 2 Chit. 179.

(*j*) *Doe Paul* v. *Hurst*, 1 Chit. 162.

(*k*) *Gulliver* v. *Smith*, Ken. Rep. 511.

rule nisi for judgment against the casual ejector was granted (*l*). And where the premises consisted of a mansion, and four small houses in a yard, surrounded by a wall, through which was a door to them, forming the only means of access, in one of which small houses resided a man, who was permitted to live there merely to take care of them and the mansion-house, the rest of the messuages being vacant, the Court refused a motion to make service on him good, and recommended the plaintiff to affix a declaration on the empty houses, and then to move that it should be deemed good service (*m*).

The plaintiff in an ejectment on a vacant possession should, in general, be more strict in his proceedings than in a contested possession (*n*).

Entry, lease, ouster, &c.

Entry, Lease, Ouster, &c.]—In order to maintain ejectment on a *vacant* possession (*o*), an actual entry must first be made upon some part of the premises in question. This must be done either by the lessor of the plaintiff himself, or by some person authorised by him for that purpose by a letter of attorney (*p*). A subsequent authority, by a letter of attorney, would, it seems, suffice (*q*).

By whom.

When the lessor, or his agent authorised by power of attorney, goes for the purpose of making the entry, he should be accompanied by two friends; and, having made the entry upon the premises, let him or his agent there execute a lease of them (previously prepared) for any short term, at a peppercorn rent, to one of his friends, and put him immediately in possession; the other friend is then to enter upon the premises, and thrust the lessee out; whereupon this second lessee, the ejector, is immediately served with a declaration in ejectment, in which he is made defendant and the other friend plaintiff, with a notice to appear, signed by the plaintiff or his attorney, requiring the defendant to appear within the first four days of the following term, if it be a town cause, and if it be a country cause, within the first eight days (*r*). All this should be done before the first day of the term, otherwise you cannot move for judgment during that term (*s*). An attorney cannot be lessee in this case (*t*).

How.

If the premises in question be a house merely, and the door be locked, in such a case, getting upon the threshold of the door, and putting his finger into the key-hole, will be a sufficient entry upon the part of the lessor or his attorney, if none better can be made without force. Where there was no key-

What a sufficient entry

(*l*) *Doe Timothy* v. *Roe*, 8 Scott, 126: *Doe Hindle* v. *Roe*, 3 M. & W. 279. But see *Doe Lord Darlington* v. *Cork*, 4 B. & C. 229. See *Doe Hanson* v. *Roe*, 1 Dowl. & L. 657; *ante*, 923.

(*m*) 1 Tidd's Prac. 443. See the above cases collected in Harr. L. & T. 827.

(*n*) See *Anon.*, 2 Chit. Rep. 128. In that case, the plaintiff, having obtained judgment, neglected to take away the rule until after two days after the term in which the judgment was obtained; and the court refused to assist him in the next term.

(*o*) As to what is, see *ante*, 964.

(*p*) See form of letter of attorney, Chit. Forms, 384; and of affidavit of execution of, Id. 385.

(*q*) See Co. Lit. 245. a., 258. a.: *Fitchet* v. *Adams*, 2 Str. 1128, where it was held, that a subsequent assent before the day of the demise was sufficient, *without deed or writing*, to take advantage of a condition. (*Maclean* v. *Dunn*, 1 Moo. & P. 770; 4 Bing. 722. S. C.)

(*r*) 2 Tidd, 9th ed., 1202; Ad. Eject. 201.

(*s*) See form of lease, Chit. Forms, 385; of declaration and notice to appear, Id. 386.

(*t*) R. M. 1654, s. 1: *Hesekias* v. *Magnall*, 2 Doug. 466; Vol. 1, p. 63.

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Subsequent proceedings.

Subsequent Proceedings.]—In this action no person claiming title can be let in to defend, but he that can first seal a lease upon the premises must obtain possession (*x*); and persons having any claim or title to them must have recourse to their action. Consequently, the lessor of the plaintiff may, *on or after the first day of term in which the defendant is required to appear*, proceed to judgment against him. For this purpose, *make an affidavit of the entry, lease, and ouster, and of the service of the declaration and notice* (*y*); *annex to it the letter of attorney, the lease, and a copy of the declaration and notice; and let the affidavit be sworn before a judge or a commissioner. Indorse it "to move for judgment against the defendant," and get it signed by counsel, or in the Common Pleas, by a serjeant. Draw up the rule, and proceed to sign judgment, as directed* ante, 935; *then sue out execution* (*y*). *If the lease were executed by power of attorney, there must also be an affidavit of the execution of such power* (*y*). *In the Common Pleas, the affidavit of the entry, lease, and ouster, &c., is unnecessary; and in that court the practice is for the plaintiff, at first, to enter a rule to plead with the proper clerk at the Master's Office, as in ordinary cases, and at the expiration of this rule, as the defendant, of course, never pleads, you may sign judgment and sue out execution.*

Magistrates giving possession of deserted premises.

See stat. 11 *G.* 2, *c.* 19, *s.* 16, and 57 *G.* 3, *c.* 52, which give power to two justices of peace, when premises are deserted by a tenant, and no sufficient distress is to be found upon them to answer the arrears of rent, to give possession of them to the landlord (*z*).

SECT. 3.

EJECTMENT BY LANDLORD FOR FORFEITURE BY NON-PAYMENT OF RENT (*a*).

1. *Where there is a sufficient Distress upon the Premises*, 966.

2. *Where there is not a sufficient Distress upon the Premises*, 968.

1. *Where there is a sufficient Distress upon the Premises.*

1. Where there is a sufficient distress upon the premises.

IF the tenant forfeit his term by the non-payment of rent or otherwise, the landlord may proceed to recover possession of

(*u*) *Doe Frith* v. *Roe*, 2 Dowl. 431.

(*x*) Bull. N. P. 95.

(*y*) See the forms of proceedings, Chit. Forms, 396.

(*z*) See *Ex p. Pilton*, 1 B. & Ald. 369: *Baston* v. *Carew*, 5 D. & R. 558; 3 B. & C. 612, 641, *S. C.*: *Lister* v. *Brown*, 3 D. & R. 501; 1 C. & P. 121, *S. C.*; *R.* v. *Traill*, 12 Ad. & E. 761; 4 P. & D. 325, *S. C.* See 3 & 4 Vict. *c.* 84, *s.* 13. See also 1 & 2 Vict. c. 74.

(*a*) It is unnecessary to notice particularly the cases in which a right of re-entry is reserved to the landlord, where the tenant is guilty of a breach of covenant, by not repairing, &c. In such cases, an actual entry is not necessary to enable the landlord to take advantage of the forfeiture. (*Ouster* v. *Brydges*, 3 Burr. 1887). The proceedings are the same as in ordinary cases.

the premises by ejectment. The mode of proceeding, however, varies, according as there is or is not a sufficient distress upon the premises to answer the amount of the rent due: if there be not a sufficient distress upon the premises, the proceeding may be under the stat. 4 *G.* 2, *c.* 28, *s.* 2; if there be a sufficient distress, the proceeding must be at common law (*c*). The proceeding at common law shall be first considered.

Demand of rent at common law.

Before you commence the action, and, indeed, before the forfeiture can be incurred, a demand must have been made of the rent (*d*); unless there be an express stipulation or agreement between the parties dispensing with such demand (*e*). There is a great strictness required in this respect; for the common law does not favour forfeitures. The demand must be made, in fact, although no person be present on the part of the tenant to answer (*f*). The landlord must go in person, or execute a formal power to another, who must go in person (*g*). If the lease do not specify where the rent is to be paid, the demand must be made upon the land, and at the most notorious place of it; and, therefore, if there be a dwelling-house upon the land, the demand must be made at the front door of it; but it is not necessary to enter the house. Yet, if the tenant were to meet the lessor on or off the land, at any time on the last day given him to pay the rent, and then tender him the rent, it would be sufficient to save the forfeiture (*h*). If the lease, however, specify a place for the payment of the rent, the demand must be made at that and no other (*i*). Also, the demand must be made precisely on the last day on which it can be paid to save the forfeiture; as, where the proviso in the lease is, that, if the rent be behind and unpaid for the space of twenty days, the lessor may re-enter, the demand must be made on the twentieth day, at some convenient time before sunset (*k*); or, according to a dictum of Lord *Tenterden*, C. J., at sunset (*l*); a demand at one o'clock in the day will not do (*l*). And, lastly, the demand must be made of the precise sum due, and not a penny more or less (*m*). Where the rent was payable quarterly, and more than one quarter was due, it was held, that only a quarter's rent should have been demanded (*n*). If the rent be not paid when thus demanded, the tenant forfeits his term, and the landlord may re-enter for the forfeiture; that is, he may bring an ejectment to recover the possession of the premises; for an actual entry is not necessary in this case (*o*).

Other proceedings.

The proceedings in this ejectment are the same as in ordinary cases, as described in the preceding two sections, according as the tenant is in possession, or the possession is vacant.

(*c*) *Doe Forster* v. *Wandlass*, 7 T. R. 117: *Doe Chandless* v. *Robson*, 2 C. & P. 245.

(*d*) Bro. Abr., Demaunde, pl. 19.

(*e*) *Doe Harris* v. *Masters*, 2 B. & C. 490; 4 D. & R. 45, *S. C.*: *Goodright* v. *Cator*, 2 Doug. 466.

(*f*) *Kidwelly* v. *Brand*, Plowd. 70 a. b.

(*g*) *Doe West* v. *Davis*, 7 East, 363.

(*h*) Co. Lit. 201. b., 202. a.: *Doe Forster* v. *Wandlass*, 7 T. R. 117: *Duppa* v. *Mayo*, 1 Saund. 287.

(*i*) Co. Lit. 202. a.

(*k*) Co. Lit. 202. a., and note 3: *Hill* v. *Grange*, Plowd. 172 b: *Duppa* v. *Mayo*, 1 Saund. 287.

(*l*) *Doe Wheeldon* v. *Paul*, 3 C. & P. 613.

(*m*) *Fabian & Windsor's case*, 1 Leon. 305: *Fabian* v. *Winston*, Cro. El. 209: *Doe Wheeldon* v. *Paul*, 3 C. & P. 613.

(*n*) *Doe Wheeldon* v. *Paul*, 3 C. & P. 613.

(*o*) *Anon.*, 1 Vent. 248: *Little* v. *Heaton*, 2 L. Raym. 750; 1 Salk. 259, *S. C.*: *Clarke* v. *Pycroft*, 1 Saund. 319: *Duppa* v. *Mayo*, Id. 287.

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Observations.

This mode of proceeding upon a forfeiture for non-payment of rent, when there is a sufficient distress upon the premises, is seldom, however, adopted in practice, when there is any other ground for supporting the ejectment; first, on account of the great nicety to be observed in the previous demand of the rent; and, secondly, because the tenant, by filing a bill in equity, may obtain an injunction and stay the proceeding, upon payment of the rent in arrear; and this might, before the 4 *G.* 2, *c.* 28, have been done at any period, even after the lessee had been evicted by the ejectment; but the application is by the second section of that act, as will be seen *post*, 971, limited to six months after execution (*p*). It also seems the tenant might, upon application to the Court or a judge, have the proceedings stayed at any time before the trial, upon payment of the rent and costs, and this independently of that act (*q*).

2. *Where there is not a sufficient Distress upon the Premises.*

2. Where not a sufficient distress on premises.

Statute as to.]—If a term be forfeited by the non-payment of rent, and there be not a sufficient distress upon the premises (*r*), the proceedings in an ejectment by the landlord for the recovery of the possession in such a case are regulated by stat. 4 *G.* 2, *c.* 28; by which it is enacted, that in all cases between landlord and tenant, as often as it shall happen that one half-year's rent shall be in arrear, and the landlord or lessor, to whom the same is due, hath right by law to re-enter for the non-payment thereof, (*i. e.* where, by the express terms of the lease, a right of re-entry has been reserved (*s*)), such landlord or lessor shall and may, without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the demised premises, and recover therein, provided no sufficient distress was to be found on the premises to countervail the arrears of rent; and unless the tenant pay the rent and costs within six calendar months, he is to be deprived of all relief at law or equity, and the tenancy is absolutely determined (*s.* 2). Although the lease expressly requires a lawful demand, no demand is necessary to proceed under this act; the service of the declaration is substituted for such demand (*t*).

Statute 4 G. 2, c. 28.

Search for distress.

Search for Distress.]—Before proceeding under this act, you must make diligent search over the premises, after the expiration of the time limited for payment of the rent, to ascertain the insufficiency of the property there to answer the distress, and you will have to prove such search at the trial (*u*). It is sufficient *primâ facie* to prove that there was no sufficient distress on the premises on a certain day, between the day when the rent became due and the service of the declaration (*x*). It must

(*p*) See *Wadman* v. *Calcraft*, 10 Ves. 67: *Davis* v. *Best*, 12 Id. 475: *Hill* v. *Barclay*, 16 Id. 405; 18 Id. 58: *Levet* v. *Lord Ranelagh*, 3 V. & B. 28.

(*q*) See *Doonee* v. *Turner*, 2 Salk. 597: *Smith* v. *Parks*, 10 Mod. 283: *Roe* v. *Davis*, 7 East, 366; *post*, 970.

(*r*) *Doe Forster* v. *Wandlass*, 7 T. R. 117: *Doe Chandless* v. *Robson*, 2 C. & P. 245.

(*s*) Woodf. L. & T., 2nd ed., 583: Chit. Col. Stat. 673, n. (*k*).

(*t*) *Doe Schofield* v. *Alexander*, 2 M. & Sel. 525: *Doe* v. *Wilson*, 5 B. & Ald. 363.

(*u*) See *Doe Forster* v. *Wandlass*, 7 T. R. 117.

(*x*) *Doe* v. *Fuchau*, 15 East, 286.

appear that every part of the premises have been searched (*y*), unless the tenant has prevented the search, as by locking the door; for a distress which cannot be made without a trespass, is no available distress within the act (*z*).

Declaration, and service of.

Declaration, and Service of.]—The declaration is the same as in ordinary cases. The demise must be laid on a day when the forfeiture was complete, and on or after a day when it is certain there was not sufficient property to distrain upon (*a*). If the possession be vacant, the notice is signed by the plaintiff's attorney, and directed to the tenant late in possession (*b*). If the tenant be in the occupation of the premises, the declaration and notice are served as in an ordinary case. But if "the same cannot be legally served, or no tenant be in actual possession of the premises, then the same may be affixed upon the door of any demised messuage; or in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments comprised in such declaration in ejectment, and such affixing shall be deemed legal service thereof; which service, on affixing such declaration, shall stand in the place and stead of a demand and re-entry" (*c*). When the tenant is in actual possession, the Court must be well satisfied that there is no probability that he can be personally served before they will deem such affixing to be legal service (*d*).

Judgment against casual ejector.

Judgment against casual Ejector.]—If the tenant does not appear or enter into the consent rule (*e*), the plaintiff may then proceed to obtain judgment against the casual ejector, as in ordinary cases. In order to do this—*Let an affidavit be made of the service or affixing of the declaration and notice, and also stating that* "half a year's rent was due before the declaration was served, and that no sufficient distress was to be found on the demised premises, countervailing such arrears, and that the lessor or lessors had power to re-enter" (*f*). *Annex this affidavit to the declaration, move upon it for judgment against the casual ejector, draw up the rule, and sign judgment, as in ordinary cases* (*g*); which judgment shall have the same effect, and the plaintiff may thereon sue out execution in the same manner, "as if the rent had been legally demanded, and a re-entry made" (*f*). The act requires the above affidavit. After judgment and execution, it will be presumed that the affidavit was made (*h*). It may be made by a third party (*i*). It must be positive as to there being no sufficient distress; swearing to the fact from mere information and belief will not do (*k*). If more than half a year's rent be sworn to be due, the affidavit should swear to there not being a sufficient distress to countervail the

(*y*) *Doe* v. *King*, cited 2 B. & B. 514, & C., Forrest, 19.

(*z*) *Doe Chippendale* v. *Dyson*, 1 M. & M. 77.

(*a*) *Doe* v. *Fuchau*, 15 East, 286: *Doe* v. *Stonerose*, 3 B. & C. 752; 5 D. & R. 711, S. C.

(*b*) See as to form of declaration and notice where the premises are tenanted, Chit. Forms, 387; and of affidavit of service thereof, Id., of declaration and notice upon a vacant possession, Id., and of affidavit of service thereof, Id. 388.

(*c*) 4 G. 2, c. 28, s. 2.

(*d*) *Doe Pugh* v. *Roe*, 1 Scott, 464; 1 Hodges, 6, S. C.

(*e*) See *Doe* v. *Payne*, 14 Law J., N. S., 346, Q. B.

(*f*) 4 G. 2, c. 28, s. 2.

(*g*) *Ante*, 934.

(*h*) See *Doe* v. *Lewis*, 1 Burr. 614.

(*i*) *Doe Charles* v. *Roe*, 3 Moo. & Scott, 751; 2 Dowl. 752, S. C.

(*k*) *Doe* v. *Roe*, 2 Dowl. 413: *Doe Hicks* v. *Roe*, 1 Dowl., N. S., 180.

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half a year's rent. Merely swearing to the insufficiency of the distress to countervail the whole arrears would be bad (*l*).

Appearance and subsequent proceedings.

Appearance and subsequent Proceedings.]—The appearance, plea, and other proceedings to trial, &c., are the same as in ordinary cases, and as already mentioned. At the trial, however, the plaintiff, in addition to what in other cases he would have to give in evidence, must prove "that half a year's rent was due before the declaration was served, and that no sufficient distress was to be found on the demised premises countervailing such arrears, and that the lessor had power to re-enter" (*m*). As to the proof of the insufficiency of the distress, see *ante*, 968, 969. It is essential to prove the date, and also the service of declaration (*n*). The record in the action is not sufficient evidence of the time of such service (*n*).

Mesne profits.

We have seen that, at the trial, the plaintiff, on proving the *mesne* profits, may recover them as damages (*o*).

Tender of rent—bill in equity, &c.

Tender of Rent—Bill in Equity, &c.]—By the 4 *G.* 2, *c.* 28, *s.* 4 (*p*), if the tenant or his assignee shall, at any time before the trial (*q*), pay or tender to the landlord, his executors or administrators, or to the attorney in the cause, or pay into court, all rent and arrears, together with costs, then all further proceedings shall cease, and be discontinued. A sublessee of the original tenant, or his assignee, is within the act (*r*). So is a mortgagee (*s*). The application to stay the proceedings may be to the Court in term time, or to a judge in vacation (*t*). The application may be made though the ejectment be not wholly brought under the act; and in such case the Court will grant it, reserving, however, to the lessor of the plaintiff, the liberty of proceeding on any other title (*u*). Where the lessors of the plaintiff were both devisees and executors, and in each capacity rent was due to them; and the defendant moved to stay the proceedings, on payment of the rent due to the lessors of the plaintiff as devisees, they not being entitled to bring an ejectment as executors; and there appearing to be a mutual debt due to the defendant by simple contract, the defendant offered to go into the whole account, taking in demands both as devisees and executors, saving just allowances; which the lessors of the plaintiff refused: the rule was made absolute to stay the proceedings, on payment of the rent due to the lessors as devisees, and costs (*x*). Where the rent was tendered before notice of the action, the proceedings were set aside for irregularity; and the landlord having given directions respecting the matter to his attorney, it was held to amount to nothing (*y*). The rent to be paid must, it seems, be cal-

(*l*) *Doe Powell* v. *Roe*, 9 Dowl. 548.

(*m*) 4 G. 2, *c.* 28, *s.* 2; see *Doe* v. *Lewis*, 1 Burr. 614; *Doe* v. *Payne*, 14 Law J., N. S., Q. B., 246.

(*n*) *Doe Gooth* or *Gouch* v. *Knowles*, 1 Dowl. & L. 198; 12 Law J., N. S., 332, B. C., *S. C.*

(*o*) *Ante*, 953; *post*, 980.

(*p*) As to the power of the Court to interpose at common law, see the arguments of counsel in *Doe* v. *Byron*, 14 Law J., N. S., 207, C. P.

(*q*) See *Roe West* v. *Davis*, 7 East, 363: *Goodtitle* v. *Holdfast*, 2 Str. 900: *Doe Harris* v. *Masters*, 4 D. & R. 45; 2 B. & C. 490, *S.C.*: *Doe Lambert* v. *Roe*, 3 Dowl. 557.

(*r*) *Doe* v. *Byron*, 14 Law J., N. S., 207, C. P.; 3 D. & L. 31, *S. C.*; 1 C. B. 623.

(*s*) *Doe Whitfield* v. *Roe*, 3 Taunt. 402; Ad. Eject. 214, *S. C.*: *ante*, 946.

(*t*) Ca. Pr. C. B. 6: 2 Sellon, 127. See forms, Chit. Forms, 365.

(*u*) *Pure* v. *Sturely*, Bull. N. P. 97.

(*x*) 2 Sel. Prac. 211: *Duckworth* d. *Tubley* v. *Tunstall*, Barnes, 194.

(*y*) *Goodright Stevenson* v. *Nevright*, 2 W. Bl. 747.

culated only to the last rent-day, and not to the day of computing (*s*).

Relief in equity.

Or the defendant may apply to a court of equity for relief, either before or after trial. But in case the lessee, his assignee, or other person claiming or deriving under the said lease, shall suffer judgment to be recovered on such ejectment, and execution to be executed thereon, without paying the rent in arrear, together with full costs, and without filing any bill for relief in equity within six calendar months after such execution executed; then and in such case the said lessee, &c., shall be barred or foreclosed from all relief in law and equity, (other than by writ of error, if the judgment be erroneous), and the landlord or lessor shall thenceforth hold the said demised premises discharged from such lease (*a*).

SECT. 4.

EJECTMENT BY LANDLORD, UNDER STAT. 1 G. 4, c. 87, UPON THE DETERMINATION OF A TENANCY (*b*).

To what cases the statute applies.

To what Cases the Statute applies.]—By stat. 1 *G.* 4, *c.* 87, *s.* 1, "where the term or interest of any tenant, holding, under a lease or agreement in writing, any lands, tenements, or hereditaments, for any term or number of years certain, or from year to year, shall have expired, or been determined, either by the landlord or tenant by regular notice to quit; and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing made and signed by the landlord or his agent, and served personally upon, or left at the dwelling house or usual place of abode of such tenant or person, and the landlord shall thereupon proceed by action of ejectment for the recovery of possession, it shall be lawful for him, at the foot of the declaration, to address a notice to such tenant or person, requiring him to appear in the court in which the action shall have been commenced, on the first day of the term then next following, or, if the action shall be brought in Wales, or in the counties Palatine of Chester, Lancaster, or Durham respectively, then on the first day of the next session or assizes, or at the court day, or other usual period for appearance to process then next following (as the case may be), there to be made defendant, and to find such bail, if ordered by the court, and for such purposes as are hereinafter next specified." To bring a case within the act the holding must have been under a lease or agreement in writing; and a holding under a letting by

(*a*) *Doe Harcourt* v. *Roe*, 4 Taunt. 883.
(*b*) 4 G. 2, c. 28, s. 2. See *Doe Hitchins* v. *Lewis*, 1 Barr. 614; 2 Ld. Ken. 320, 3 C.
(*b*) See as to obtaining possession by summary proceedings before justices, where the term does not exceed seven years, or the rent 20*l*., and no fine has been reserved, 1 & 2 Vict. c. 74; Burn's J., title "Landlord and Tenant," 29th ed.

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parol, will not suffice (*c*). An agreement in writing for a holding of apartments for three months certain, is a tenancy for a term within the meaning of the act (*d*). So is a mere agreement in writing for a lease for a term certain, and a holding over beyond that term (*e*). But a tenancy for years determinable on lives is not (*f*). And the act only applies where there was a term certain, and the lease has expired by effluxion of time, or a tenancy from year to year, determined by regular notice to quit, and not to the middle case of a term for fourteen years, determinable by notice at the end of the first seven, and determined by such notice accordingly (*g*). It does not extend to a holding over after a term has been surrendered (*h*); nor to the case of a tenant for a term of years who has been allowed to remain in possession for more than a year after his term expired, and a new tenancy from year to year created (*i*); nor to the case of a tenant holding premises from quarter to quarter, on the terms of quitting possession at the end of any three calendar months, upon receiving notice in writing, and, in the event of losing his beer license, of quitting when requested by his landlord, and without notice (*k*). In the case of lessee and under-lessee, the latter is a landlord within the act (*l*). A tenant in common may proceed under the act for the recovery of his undivided moiety (*m*). It does not, it seems, extend to cases where the tenant *bonâ fide* disputes the landlord's title; as if the tenant claim the premises as heir-at-law, or the like (*n*).

Statute not compulsory.

A landlord, however, is not confined to the mode of proceeding given by this statute; but he may adopt it, or have recourse to the ordinary mode of proceeding laid down in the first section of this chapter, at his option (*o*). And the landlord should be cautious in adopting this course of proceeding under the act, and requiring bail; for if he fail in the action, the defendant will be entitled to recover against him all the reasonable costs he has been put to in and about the action, and not merely costs as in other cases (*p*).

Demand of possession.

Demand of Possession.]—This demand must be in writing, and "made and signed by the landlord or his agent, and served personally upon, or left at the dwelling-house or usual place of abode of such tenant, or person" holding or claiming by or under him (*q*). And if such tenant or person thereupon refuse to deliver up possession, the landlord may commence his ejectment (*r*).

Declaration and notice.

Declaration and Notice.]—The declaration is in the usual form (*s*); but at the foot thereof the landlord is to address a

(*c*) *Doe Bradford* v. *Roe*, 5 B. & Ald. 770: *Rose* v. *Thruscout*, M'Clel. 492: *Doe Thomas* v. *Field*, 2 Dowl. 542.
(*d*) *Doe Phillips* v. *Roe*, 5 B. & Ald. 765; 1 D. & R. 433, *S. C.*
(*e*) See *Doe Marquis of Anglesey* v. *Roe*, 2 D. & R. 565.
(*f*) *Doe Pemberton* v. *Roe*, 7 B. & C. 2.
(*g*) *Doe Cardigan* v. *Roe*, 1 D. & R. 540.
(*h*) *Doe Tindal* v. *Roe*, 1 Dowl. 143; 2 B. & Ad. 922, *S. C.*
(*i*) *Doe Field* v. *Roe*, 2 Dowl. 242.
(*k*) *Doe Carter* v. *Roe*, 10 M. & W. 670: 2 Dowl., N. S., 449, *S. C.*
(*l*) *Doe Watts* v. *Roe*, 5 Dowl. 513.
(*m*) *Doe* v. *Rotherham*, 3 Dowl. 698.
(*n*) *Doe Saunders* v. *Roe*, 1 Dowl. 4.
(*o*) See 1 G. 4, c. 87, s. 7.
(*p*) 1 G. 4, c. 87, s. 6, *post*, 989; 5 & 6 Vict. c. 97, s. 2.
(*q*) 1 Geo. 4, c. 87, s. 1. See *Doe Marquis of Anglesey* v. *Roe*, 2 D. & R. 565. See form, Chit. Forms, 388.
(*r*) See 1 G. 4, c. 87, s. 1.
(*s*) See *ante*, 909. See the form, Chit. Forms, 389.

notice to such tenant or person, requiring him to appear in the court in which the action shall have been commenced on the first day of the term (*t*) then next following, [or if the action shall be brought in the counties palatine of Lancaster or Durham respectively, then on the first day of the next session or assizes, or at the court day or other usual period for appearance, then next following, as the case may be], there to be made defendant, and to enter into a recognisance, by himself and two sufficient sureties, in such sum as to the Court shall seem reasonable, conditioned to pay the costs and damages which shall be recovered in the action, if the Court shall so order (*u*). It must be signed by the landlord or his agent, and not in the name of Richard Roe, as in the notice in ordinary cases (*v*). A notice, signed "A. B., agent for the *plaintiff*," instead of agent for the landlord, and calling upon the tenant to appear and be made defendant, and find such bail, &c., "and for such purposes as are specified in the act of parliament," without detailing them, has been held sufficient (*x*). Even if the notice be signed in a wrong name, it will be no objection to the landlord obtaining judgment against the casual ejector (*y*). A notice "to appear in Trinity term next following" is bad; it should require an appearance on the first day of term (*z*). In practice, it is usually added after the notice by the casual ejector; but there seems to be no necessity for both notices, as this notice comprises the whole of the substance of the other (*a*). The declaration is served as in ordinary cases, see Service of. *ante*, 921 *to* 930.

Bail.]—"Upon the appearance of the party at the day pre- Bail.
scribed, or, in case of non-appearance, on making the usual affidavit of the service of the declaration and notice, it shall be lawful for the landlord (producing the lease or agreement, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit, and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired, or been determined by regular notice to quit, as the case may be, and that possession has been lawfully demanded in manner aforesaid) to move the Court for a rule for such tenant or person to shew cause, within a time to be fixed by the Court, on a consideration of the situation of the premises, why such tenant or person, upon being admitted defendant, besides entering into the common rule, and giving the common undertaking, should not undertake, in case a verdict shall pass for the plaintiff, to give the plaintiff a judgment, to be entered up against the real defendant, of the term next preceding the time of trial, [or, if the action shall be brought in the counties palatine respectively, then of the session, assizes, or court day, as the case may be, at which the trial shall be had], and also why he should not enter into a recognisance, by himself and two sufficient

(*t*) See *Doe Holder* v. *Rushworth*, 4 M. & W. 74; 6 Dowl. 712, *S. C.*

(*u*) 1 G. 4. c. 87, s. 1. See form of notice, Chit. Forms, 389.

(*v*) *Anon.*, 1 D. & R. 435, n.

(*x*) *Doe Beard* v. *Roe*, 1 M. & W. 360. See form, Chit. Forms, 389.

(*y*) *Goodtitle* v. *Nettitle*, 5 B. & Ald. 849; 6 Moore, 56 a.

(*z*) *Doe Holder* v. *Rushworth*, 4 M. & W. 74; 6 Dowl. 712, *S. C.*; *Doe Anson* v. *Roe*, 9 Jur. 640, B. C.

(*a*) *Sed vide* per *Bayley*, J., in *Anon.*, 1 D. & Ry. 435, n., shewing that the notice should be in addition to the ordinary one.

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sureties, in a reasonable sum, conditioned to pay the costs and damages which shall be recovered by the plaintiff in the action; and it shall be lawful for the Court, upon cause shewn, or upon affidavit of the service of the rule in case no cause shall be shewn, to make the same absolute in whole or in part, and to order such tenant or person, within a time to be fixed, upon a consideration of all the circumstances, to give such undertakings, and find such bail, with such conditions and in such manner as shall be specified in the said rule, or such part of the same so made absolute; and in case the party shall neglect or refuse so to do, and shall lay no ground to induce the Court to enlarge the time for obeying the same, then, upon affidavit of the service of such order, an absolute rule shall be made for entering up judgment for the plaintiff" (*b*).

The motion, by whom and how made.

In order to proceed under this act, make a motion to the Court for a rule to shew cause why the tenant should not give the undertaking and enter into the recognisance above mentioned, and why, in default thereof, the plaintiff should not be at liberty to sign judgment against the casual ejector (*c*). *The motion must be made on production of the original or a counterpart or duplicate of the lease or agreement properly stamped; and it is not sufficient to move on a copy, or an instrument unstamped at the time of the motion, though it be stamped after the rule* nisi *and before cause shewn* (*d*). It may be made by one of several tenants in common (*e*).

The affidavit.

The motion should be founded upon the affidavit described by the act (*f*). The christian and surnames of all the lessors of the plaintiff should be stated in the title of the affidavit (*g*). It is advisable that it should state the annual value of the premises, so that the Court may be enabled to fix the sum for which the security should be given (*h*). It should shew that the tenancy, if from year to year, has been determined by a "regular" notice to quit (*i*). It seems not to be necessary that the attesting witness should depose to the execution of the lease, if it be sufficiently proved by other witnesses (*k*). Where an attorney, who was the attesting witness to the counterpart, afterwards became the attorney of the tenant, the Court, notwithstanding, compelled him to prove the execution of the counterpart in support of the application; on the ground that, if a person becomes willingly a party to the execution of an instrument, he ought not, because he subsequently becomes the partisan of another, by being his attorney, or because he is out of humour, to be allowed to frustrate the remedy which a third person has on the instrument (*l*). If the affidavit be sworn before the person who appears on the face of the declaration to be the attorney for the plaintiff, the Court will not receive it, upon the ground that it has been sworn contrary to *H. T.*, 2 *W.* 4, *c.* 6 (*m*).

(*b*) 1 G. 4, c. 87, s. 1.
(*c*) Chit. Sum. Pract. 230.
(*d*) See *Doe* v. *Roe*, 2 Dowl. 180.
(*e*) *Doe Caulfield* v. *Roe*, 3 Bing. N. C. 337; 5 Dowl. 365, S. C. See *Doe Holder* v. *Rushworth*, 4 M. & W. 74. But see *Doe* v. *Roe*, 1 D. & R. 433, *cont.*
(*f*) Chit. Sum. Pract. 230.
(*g*) *Doe Pryme and another* v. *Roe*, 8 Dowl. 340.
(*h*) See forms of affidavit, Chit. Forms, 389, 390; and of rule *nisi* thereon, Id. 392. And see Chapman's Pract. 210.
(*i*) *Doe Topping* v. *Boast*, 7 Dowl. 467: *Doe Platter* v. *Bell*, 8 Jur. 1100, B. C.
(*k*) *Doe Morgan* v. *Rotherham*, 3 Dowl. 690: *Doe Gowland* v. *Roe*, 6 Dowl. 35. But see per *Williams*, J., in *Doe Avery* v. *Roe*, 6 Dowl. 521.
(*l*) *Doe Avery* v. *Roe*, 6 Dowl. 518.
(*m*) *Doe Pryme* v. *Roe*, 8 Dowl. 340. See *post*, Pt. 6, ch. 3.

The rule.

It is not necessary to express in the rule the amount of the security required (*n*). *Draw up the rule, and serve a copy of it upon the tenant in possession, either personally or by leaving it for him at his most usual place of abode. On the day appointed for shewing cause, move to make the rule absolute on an affidavit of service* (*o*). The time within which the undertaking is to be given, and the recognisance entered into, as required by the act, is fixed by the Court in this rule absolute (*p*). In one case the Court of Common Pleas, on making a rule absolute (no cause being shewn) for the tenant's undertaking to give the plaintiff judgment, to be entered up against the real defendant, and to enter into a recognisance in a *reasonable* sum conditioned to pay the costs and damages which should be recovered by the plaintiff in the action;—ordered the tenant to appear in the next succeeding term to find such bail as were specified in the former rule; and, on no cause being shewn to that order, they directed the rule for entering up judgment for the plaintiff to be made absolute (*q*). Usually, bail is required for a sum sufficient to cover a year's value, and 40*l.* for costs (*r*). *Draw up the rule, and serve it in the same manner as the rule* nisi.

Bail, how put in.

Bail is put in, and the recognisance taken, in nearly the same manner as in ordinary cases (*s*); except that the tenant himself must join in the recognisance (*t*); but he cannot be examined as to his sufficiency (*u*). The recognisance should be intitled in the cause against the real defendant (*x*). The officer of the Court with whom the recognisance is filed, is to file it on payment of 2*s.* 6*d.* It must be put in suit in six months after the landlord has obtained possession (*y*).

Undertaking.

The undertaking mentioned in the statute is included in the consent rule (*z*).

Judgment against the casual ejector.

Judgment against the casual Ejector.]—If the tenant put in bail, except to them or not (*a*), as in ordinary cases, in order to compel a justification (*b*). And if he fail to justify his bail, or if no bail be put in, or the defendant have not entered into the consent rule, with the undertaking above mentioned, within the time given by the Court for that purpose, then, *if it was part of the rule for the required bail, that, in default of their being put in, &c., the plaintiff might sign judgment, &c., sign it accordingly, and sue out the writ of possession as usual, and as directed* ante, 959; *or, if the rule does not give the plaintiff this liberty to sign judgment, then, upon affidavit of that fact, and of the service of the rule absolute above mentioned, you may move for judgment against the casual ejector; and the rule granted*

(*n*) *Doe Phillips* v. *Roe*, 5 B. & Ald. 766; 1 D. & R. 433, S. C.; *Doe Goosland* v. *Roe*, 6 Dowl. 25.

(*o*) See form of the affidavit of service, Chit. Forms, 392; and see the form of the rule absolute, Id. 393.

(*p*) See *Doe Anglesea* v. *Brown*, 2 D. & R. 688; 3 D. & R. 236, *S. C.*: *Anon.*, 4 Jur. 1236, Exch.

(*q*) *Doe Simpson* v. *Roe*, 6 Moore, 54.

(*r*) *Quære* as to *mesne* profits. See Id.

(*s*) See 1 G. 4, c. 87, s. 4.

(*t*) Id. s. 1.

(*u*) *Semb.* see *Keane* v. *Deardon*, 8 East, 298. See the forms, Chit. Forms, 396; see also the form of the notice of filing the recognisance, Id. 395.

(*x*) *Doe Durant* v. *Moore*, 6 Bing. 656; 4 Moo. & P. 531, *S. C.*

(*y*) 1 G. 4, c. 87, s. 7.

(*z*) See form, Chit. Forms, 396.

(*a*) See form of notice of exception, Chit. Forms, 396.

(*b*) *Ante*, Vol. 1, 747, &c.

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Appearance and plea.

Appearance and Plea.]—Putting in and perfecting bail are not in this case an appearance of the tenant, but the tenant must also enter an appearance, and enter into the consent rule, as in ordinary cases. For this purpose—*Get a blank consent rule containing the undertaking above mentioned, at the rule office, and fill it up* (*d*); *and let the tenant's attorney sign the rule, leaving room above his signature for that of the attorney for the plaintiff. Take this rule to one of the Masters, and enter an appearance for the tenant, as directed* ante, 939, *and the Master will thereupon mark the consent rule* (*e*). *Next engross the general issue upon plain paper* (*f*), *annex the rule to it, and deliver both to the opposite attorney* (*g*). All this should be done before the expiration of the time limited for that purpose by the Court. So, care must be taken to put in bail (and such bail seemingly as are required in error, *see Vol.* 1, 493) within the same time; and, if excepted to, they must be justified within the time limited for that purpose by the practice of the Court, unless the Court grant a further time to justify; otherwise the appearance and plea may be treated as a nullity, and the plaintiff may move for judgment against the casual ejector, as above directed.

Issue, &c.

Issue, &c.]—When the time given to the tenant to put in bail, &c., has expired—*Let the plaintiff's attorney, after separating the plea from the rule, sign the latter, and take it to one of the Masters, who will thereupon draw up the rule. Then make up the issue on plain paper, as directed* ante, 950 (*h*); *indorse upon it the notice of trial* (*i*); *annex a copy of the consent rule to it, and deliver it to the defendant's attorney.*

Make up your Nisi Prius record (*k*); *issue out jury process* (*k*), *enter your cause for trial, and deliver your briefs to counsel, as directed* ante, 950.

Trial, &c.

Trial, &c.]—If the defendant do not appear at the trial, and confess lease, entry, and ouster, the plaintiff is not to be nonsuit, as in ordinary cases of ejectment. But, by stat. 1 *G.* 4, *c.* 87, *s.* 2, "wherever hereafter it shall appear on the trial of any ejectment at the suit of a landlord against a tenant, that such tenant, or his attorney, hath been served with due notice of trial, the plaintiff shall not be nonsuited for default of the defendant's appearance, or of lease, entry, and ouster, but the production of the consent rule and undertaking of the defendant shall, in all such cases, be sufficient evidence of lease, entry, and ouster."

Where defendant does not appear.

The damages.

Nor are the damages in this case, as in the ordinary cases of ejectment, merely nominal; for, by 1 *G.* 4, *c.* 87, *s.* 2, "the judge before whom such cause shall come on to be tried shall,

(*c*) See the form of the affidavit and rule, Chit. Forms, 394.
(*d*) See the form, Chit. Forms, 396.
(*e*) See as to the form of *præcipe* for appearance, Chit. Forms, 361.
(*f*) See form, Chit. Forms, 361.
(*g*) R. G. H. 1838, Q. B.
(*h*) See forms, Chit. Forms, 396.
(*i*) See Chit. Forms, 399.
(*k*) See form, Chit. Forms, 399.

whether the defendant shall appear upon such trial or not, permit the plaintiff, on the trial, after proof of his right to recover possession of the whole or of any part of the premises mentioned in the declaration, to go into evidence of the *mesne* profits thereof, which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same, down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein; and the jury on the trial finding for the plaintiff, shall, in such case, give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such *mesne* profits: provided always, that nothing hereinbefore contained shall be construed to bar any such landlord from bringing an action of trespass for the *mesne* profits which shall accrue from the verdict, or the day so specified therein, down to the day of the delivery of possession of the premises recovered in the ejectment." It is not necessary for the lessor of the plaintiff to prove on the trial that notice of trial has been duly given, in order to enable him to recover these *mesne* profits (*l*). On the other hand, by sect. 6, "in cases wherein the landlord shall elect to proceed in ejectment, under the provisions hereinbefore contained, and the tenant shall have found bail, as ordered by the Court, then, if the landlord, upon the trial of the cause, shall be nonsuited, or a verdict pass against him on the merits of the case, there shall be judgment against him, with double costs." This enactment, however, so far as it relates to the double costs, is repealed by the 5 & 6 *Vict. c.* 97, s. 2, and, instead of double costs, the defendant is to have only such an amount of costs as will fully and reasonably indemnify him against all the costs and expenses incurred by him in and about the action.

Mesne profits.

Double costs in case landlord is defeated.

Staying Execution, &c.]—By 1 *G.* 4, *c.* 87, *s.* 8, "in all cases in which such undertaking shall have been given, and security entered as aforesaid, if, upon the trial, a verdict shall pass for the plaintiff, but it shall appear to the judge before whom the same shall have been had, that the finding of the jury was contrary to the evidence, or that the damages given were excessive, it shall be lawful for the judge to order the execution of the judgment to be stayed absolutely till the fifth day of the term then next following, or till the next session, assizes, or court day (as the case may be); which order the judge shall in all other cases make, upon the requisition of the defendant, in case he shall forthwith undertake (*m*) to find, and on condition that within four days from the day of the trial he shall actually find security, by the recognisance of himself and two sufficient sureties, in such reasonable sum as the judge shall direct, conditioned not to commit any waste, act in the nature of waste, or other wilful damage, and not to sell or carry off any standing crops, hay, straw, or manure produced or made (if any) upon the premises, and which may

Staying execution, &c.

(*l*) *Doe* Thompson v. *Hodson*, 12 Ad. & E. 135; 4 P. & D. 142; 2 M. & Rob. 283, 1 C. See forms of *postea*, Chit. Forms, 387.

(*m*) See form of recognisance, Chit. Forms, 396. See form of *fi. fa.*, Id. 397.

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happen to be thereupon, from the day on which the verdict shall have been given, to the day on which execution shall finally be made upon the judgment, or the same be set aside, as the case may be." Under this section the defendant must give two *additional* sureties on bringing a writ of error, although he has already given the two sureties on his appearance, under the first section of the act (*n*). But, in such case, putting in and perfecting bail in error will discharge the intermediate recognisance (not to commit waste) given under section 3. Where the landlord had obtained possession under an *habere*, the Court refused to compel him on motion to pay over to the tenant the value of the crops deducting the rent (*o*).

SECT. 5.

EJECTMENT BY LANDLORD, UNDER 11 G. 4 & 1 W. 4, c. 70, ss. 36, 37, WHERE RIGHT OF ENTRY ACCRUES OR TENANCY EXPIRES IN OR AFTER HILARY OR TRINITY TERMS.

The statute.

The 11 *G.* 4 *&* 1 *W.* 4, *c.* 70, *s.* 36, after reciting that "*landlords*, to whom a right of entry into or upon any lands or hereditaments may accrue during or immediately after Hilary and Trinity terms respectively, are at present unable to prosecute ejectments against their tenants so as to try the same at the assizes immediately ensuing, whereby much delay is occasioned in the recovery of the possession of lands and tenements wrongfully withheld by tenants against their landlords;" enacts, that "in all actions of ejectment hereafter to be brought in any of his Majesty's courts at Westminster, by any *landlord* against his tenant, or against any person claiming through or under such tenant, for the recovery of any lands or hereditaments where the tenancy shall expire, or the right of entry into or upon such lands or hereditaments shall accrue to such landlord in or after Hilary or Trinity terms respectively, it shall be lawful for the lessor of the plaintiff in any such action, *at any time within ten days after such tenancy shall expire or right of entry accrue as aforesaid, to serve a declaration in ejectment, intitled of the day next after the day of the demise in such declaration*, whether the same shall be in term or vacation, with a notice thereunto subscribed, requiring the tenant or tenants in possession to *appear* and *plead* thereto *within ten days* in the court in which such action may be brought; and proceedings shall be had on such declaration, and *rules* to plead (*p*) entered and given, *in such and the same manner, as nearly as may be*, as if such declaration had been duly served before the preceding term: provided always, that no judgment shall be signed against the casual ejector until *default of appearance and*

(*n*) *Doe Durant* v. *Moore*, 6 Bing. 656; 4 Moo. & P. 531; 7 Bing. 194; 4 Moo. & P. 761; 1 Dowl. 203, *S. C.*

(*o*) *Doe* v. *Witherwick*, 10 Moore, 267; 3 Bing. 11, *S. C.*

(*p*) It seems a rule to plead is not necessary. (See 2 Adams, Eject. 2nd ed. 222: *ante*, 934).

plea within such ten days, and that at least *six clear days' notice of trial* shall be given to the defendant before the commission day of the assizes at which such ejectment is intended to be tried; provided also, that any defendant in any such action may, at any time before the trial thereof, apply to a judge of either of his majesty's superior courts at Westminster, by summons in the usual manner, for time to plead, or for staying or setting aside the proceedings, or for postponing the trial until the next assizes; and that it shall be lawful for the judge, in his discretion, to make such order in the said cause as to him shall seem expedient."

Cases within the act.

It will be observed, that this statute is applicable only to ejectments by *landlords;* also that the tenancy must expire, or the right of entry accrue, in or after *Hilary* or *Trinity* (*q*) terms; and, therefore, if the tenancy expired, or the right of entry accrued, before the first day of either of those terms, the case would not fall within the statute (*r*). It also extends only to a country ejectment triable at the *assizes*, and not to an ejectment, and the *venue* in which is laid in Middlesex or London (*s*).

Declaration and notice.

The declaration is in the usual form (*t*), except that it must be *intituled* of the day next after the day of the demise laid in such declaration, and this whether in term or vacation (*u*). At the foot of the declaration a notice should be added, requiring the defendant, within *ten* days, to appear and plead to it (*u*). In other respects this notice is the same as the usual one, *ante*, 919.

How served.

The declaration is served as in ordinary cases, *ante*, 921 *to* 930, except that the service must take place *within ten days* after the tenancy expired or the right of entry accrued. An

Objection to service too late at trial.

objection to the service, on account of its not having taken place within these ten days, cannot be taken at the trial (*x*); it is merely matter of irregularity.

Judgment against the casual ejector.

If the tenant makes default in not appearing and pleading within ten days after the service of the declaration, (one day inclusive and the other exclusive), the plaintiff will be entitled to judgment against the casual ejector, and he should proceed in nearly the same manner as in other cases noticed *ante*, 932, *&c.* The practice as to the mode of obtaining such judgment is there noticed. The only main difference appears to be as

Affidavit for.

regards the affidavit for that purpose, which is the same as usual, except that it states when the tenancy expired or right of entry accrued, and when the declaration was served, in order that the Court may see that the proceedings are in accordance with the act (*y*).

Appearance and plea, &c

The practice as to the appearance and plea is the same as in ordinary cases, *mutatis mutandis* (*z*).

Notice of trial.

The plaintiff must give to the defendant six clear days' notice of trial (exclusive of the day it is given and the com-

(*q*) *Doe* v. *Roe*, 2 C. & J. 123; 1 Dowl. 304, *S. C.*

(*r*) *Doe Somerville* v. *Roe*, 4 Moo. & Sc. 747.

(*s*) *Doe Norris* v. *Roe*, 1 Dowl. 547.

(*t*) See *ante*, 912.

(*u*) 11 G. 4 & 1 W. 4, c. 70, s. 37. See the form, Chit. Forms, 399.

(*x*) *Roe Rankin* v. *Brindley*, 4 B. & Ad. 84; 1 Nev. & M. 1, *S. C.*

(*y*) See a form, Chit. Forms, 399.

(*z*) See *ante*, 937.

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mission day) before the commission day of the assizes. It is not necessary to prove at the trial that this notice was given (*a*); and if not duly given, the defendant, by defending the action at the trial, will cure any objection on account of it (*a*).

Staying proceedings.

The Court or a judge, on summons, may, in their discretion, stay or set aside the proceedings, or postpone the trial until the next assizes. In support of the application, an affidavit of facts should be produced to induce the Court or judge to grant it.

Declaration may be intitled specially in record.

In making up the record of the proceedings, the declaration may be intitled specially of the day next after the day of the demise laid in the declaration, and the judgment will not be avoided or reversed by reason only of such special title (*b*).

Other proceedings.

The rest of the proceedings are the same as in ordinary cases, *mutatis mutandis*.

SECT. 6.

ACTION FOR MESNE PROFITS.

Action for *mesne* profits.

After judgment has been obtained in the action of ejectment, the lessor of the plaintiff usually brings an action against the defendant, for the purpose of recovering the damages he has sustained by reason of the defendant having detained from him his property; which action is called an action of trespass for *mesne* profits. The plaintiff should make an entry into the premises before bringing the action, as it seems doubtful whether trespass with a *continuando* lies after disseisin and before re-entry; but, for the first trespass and disseisin, trespass lies before re-entry (*c*).

By whom to be brought.

The action may be brought either in the name of the lessor of the plaintiff, or in the name of the nominal plaintiff in the ejectment; but, in either shape, it is equally the former's action (*d*). But if it be sought to recover profits antecedent to the day of the demise in the declaration of the ejectment, the action should be brought in the name of the lessor (*e*). A tenant in common, who has recovered in ejectment, may maintain an action for *mesne* profits against his companion (*f*). A joint action for *mesne* profits may be maintained by several lessors of the plaintiff in ejectment after recovery therein, although the declaration in ejectment contained only a separate demise by each (*g*).

Against whom.

The action is, in general, brought against the person against whom the judgment in ejectment is given (*h*); but it may be

(*a*) *Doe Antrobus* v. *Jephson*, 3 B. & Ad. 402: *Doe Rankin* v. *Roe*, 1 Nev. & M. 1; 4 B. & Ad. 84, *S. C.*

(*b*) See the statute, *ante*, 978.

(*c*) *Doe* v. *Wright*, 10 Ad. & El. 780; Co. Litt. 257. a.; 2 Roll. Abr. 550, 553, 554.

(*d*) Chit. on Pl., 6th ed., 194.

(*e*) See Bull. N. P. 87.

(*f*) *Goodtitle* v. *Tombs*, 3 Wils. 118: *Catting* v. *Derby*, 2 Bl. Rep. 1077.

(*g*) *Chemier* v. *Clinge*, 5 M. & Sel. 64; 2 Chit. Rep. 410, *S. C.*

(*h*) 1 Chit. Pl., 6th ed., 196.

brought against any person found in possession prior to the judgment (*k*). The defendant, however, in such a case, will only be liable for the *mesne* profits for the time he was in possession (*l*). It seems that a tenant is liable for *mesne* profits, if his under-tenant hold over after his interest has determined, if the former has in any way acquiesced in the overholding of his under-tenant; as, for instance, if he has received rent from his under-tenant for the period during which possession was improperly detained, or the like (*m*). The action cannot be maintained against executors or administrators for the profits during the lifetime of the testator or intestate, and received by him (*n*); except, indeed, for the profits received within six calendar months before the death of the testator or intestate, and then only if the action for them be brought against the executor or administrator within six months after they have taken upon themselves the administration of his estate (*o*).

Arrest for.

Previously to 1 & 2 *Vict. c.* 110, the defendant might have been holden to bail on a judge's order, which was seldom refused. But, since that act, he cannot be holden to bail, unless it be shewn to the satisfaction of the judge that the *mesne* profits amount to twenty pounds or upwards, and that there is probable cause for believing that the defendant is about to quit England (*p*).

What a defence.

The defendant may plead the Statute of Limitations as to all the profits, excepting those which may have accrued within the last six years (*q*). But he cannot, it seems, plead a discharge under the Insolvent Act (*r*): nor his bankruptcy, the demand being for unliquidated damages, which could not be proved under the fiat (*s*). He was not, previously to the statute 3 & 4 *W.* 4, *c.* 42, *s.* 21, allowed to pay money into court (*t*). He cannot, under the general issue, give in evidence an acceptance by the plaintiff of the rent, and an agreement to waive the costs of the ejectment (*u*). Also, if the defendant, by his plea, seek to raise any point decided by the judgment in ejectment; as, for instance, if he deny, by his plea, that the plaintiff was possessed during the time he is alleged to have so been in the declaration of ejectment (*x*), he may reply the judgment in ejectment by way of estoppel (*x*); but, unless he so reply, the defendant will not be estopped by the judgment (*y*). Where, in an action of trespass brought in the name of the nominal plaintiff for *mesne* profits, from the day of the first demise in the declaration of ejectment until the

(*k*) See 1 Chit. Pl., 6th ed., 195: *Doe* v. *Harvey*, 8 Bing. 242: *Doe* v. *Whitcombe*, 8 Bing. 45.

(*l*) 1 Woodf. L. & T., 7th ed., 419: Ad. Eject. 331: *Astin* v. *Parkin*, 2 Burr. 668: Smith's Leading Cases, 264, *S. C.*: *Doe* Jones v *Steenton*, 1 Chit. Rep. 121; 2 B. & Ald. 373, 3 *C.*

(*m*) 1 Chit. Pl., 6th ed., 195. And see per Mansfield, C. J., in *Burne* v. *Richardson*, 4 Taunt. 720: *Roe* v. *Wiggs*, 2 New Rep. 339: *Ris* v. *Richardson*, 9 Ad. & E. 849; 1 Per. & D. 618: *Harding* v. *Crithorn*, 1 Exp. 87: *Doe* v. *Harlow*, 12 Ad. & E. 40. See *Christy* v. *Tunstead*, 7 M. & W. 127; 9 M. & W. 488; 12 M. & W. 316, as to one co-tenant being liable for the holding over of another.

(*n*) See 1 Chit. Pl., 6th ed., 196.

(*o*) 3 & 4 W. 4, c. 42, s. 2.

(*p*) 1 & 2 Vict. c. 110, s. 3: *Hunt* v. *Hudson*, Barnes, 85. See Vol. 1, 651.

(*q*) Bull. N. P. 88.

(*r*) *Lloyd* v. *Peel*, 3 B. & Ald. 407.

(*s*) *Goodtitle* v. *North*, 2 Doug. 584.

(*t*) *Holdfast* v. *Morris*, 2 Wils. 115. See as to payment of money into Court generally, *post*, Pt. 5, ch. 8.

(*u*) *Doe* v. *Lee*, 4 Taunt. 469.

(*x*) *Doe* v. *Wright*, 10 Ad & Ell. 763.

(*y*) *Doe* v. *Huddart*, 2 C., M., & R. 16. And see *Vaught* v. *Winch*, 2 B. & Ald. 662.

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commencement of the action, the defendant, who was a party to the judgment in ejectment, pleaded not possessed, and *liberum tenementum*, to which the plaintiff replied, by way of estoppel, the proceedings in ejectment, but did not state in his replication that he had entered since the judgment (*a*); it was held, that the first plea was sufficiently answered, as it was pleaded to the whole declaration, and it was sufficient for the plaintiff to shew that it could not be pleaded to that; and that the last was also answered, as the replication shewed that it had been decided between the parties, that the plaintiff was a termor under one whose title was paramount to the defendant's; that the plaintiff's possession was, therefore, a rightful one; and that the defendant had no right to immediate possession; which was inconsistent with the limited admission of the plea, and the title set up by it, taken together (*b*). The plaintiff may plead the judgment in ejectment, by way of estoppel, as above, though a writ of error be pending on it (*b*).

Where a landlord defended an action of ejectment, and the action of trespass for *mesne* profits was brought against him, his tenant, and the tenant's under-tenant, the Court held, that the record in the action of ejectment was admissible in evidence, as against the tenant, to prove that he was a joint trespasser with the landlord, as it appeared that they were privy in estate (*c*).

Security for costs.

If the action be brought in the name of the nominal plaintiff, the Court, upon application, will stay the proceedings until security be given for costs (*d*).

Amount of damages.

The jury are not, in estimating the damages, confined to give the mere rent or annual value of the premises; but may give such extra damages as they may think fit, as a compensation for plaintiff's trouble, &c. (*e*). The plaintiff may also recover, as damages, the costs of the action of ejectment; but if that action were defended and the costs taxed, he cannot recover more than such taxed costs (*f*); though, if judgment went by default in the action, he may recover the actual costs of the judgment (*g*). The plaintiff may also recover, by way of damages, the costs incurred by him in a court of error, by reversing the judgment in ejectment erroneously obtained by the defendant (*h*). And the plaintiff is not restricted to the time stated in his demise in the declaration in ejectment, but may also recover the profits which accrued previously, if he had title to the premises at the time, and the defendant were in possession (*i*). The jury, however, are to give damages only for the time the defendant is proved to have been in possession (*k*), and since the plaintiff's title accrued. And where an actual entry has been made, to avoid a fine, the jury can give

(*a*) See *ante*, 980.
(*b*) *Doe* v. *Wright*, 10 Ad. & Ell. 763.
(*c*) *Doe* v. *Harlow*, 12 Ad. & E. 42, n. (*d*).
(*d*) Bull. N. P. 89: *Pike* v. *Corbin*, Say. 78.
(*e*) *Goodtitle* v. *Tombs*, 3 Wils. 121: *Doe* v. *Here*, 2 C. & M. 145; 4 Tyr. 29, *S. C.*
(*f*) *Doe* v. *Fillitar*, 13 M. & W. 47. The defendant procuring the taxation makes no difference. *S. C.*
(*g*) *Gulliver* v. *Drinkwater*, 2 T. R. 261: *Doe* v. *Davis*, 2 Esp. 358; 6 T. R. 503, *S. C.*: *Doe* v. *Huddart*, 2 C., M., & R. 316: *Symonds* v. *Page*, 1 C. & J. 29: *Goodtitle* v. *Tombs*, 3 Wils. 121; Bull. N. P. 88, 89. And see *Hunter* v. *Britts*, 3 Camp. 455: *Brooks* v. *Bridges*, 7 Moore, 471: *Doe* v. *Here*, 2 Dowl. 245.
(*h*) *Nowell* v. *Roake*, 7 B. & C. 404; 1 M. & R. 170, *S. C.*
(*i*) Bull. N. P. 87.
(*k*) *Stanynought* v. *Cooke*, Barnes, 456: *ante*, 981.

damages only as to the profits accruing since the time of the entry (*l*).

If the defendant suffer judgment by default, the plaintiff should, upon executing a writ of inquiry, prove the length of time the defendant has been in possession; as the defendant, by suffering judgment by default, does not admit that he has been in possession during the time he is alleged to have been in the declaration, although such time is not stated under a *videlicet* (*m*).

Mitigation of damages.

Ground-rent necessarily paid by the defendant while in possession should be deducted by the jury from the damages (*n*). And where an action for *mesne* profits was brought against a party who had a cross claim against the plaintiff at law, for money expended on the land, the Court of Equity Exchequer granted an injunction to stay the proceedings at law (*o*).

Action pending error.

If the action is brought pending a writ of error on the judgment in ejectment, the plaintiff may proceed to judgment; but the Court will stay execution until the writ of error is determined (*p*).

Costs.

If the plaintiff recover less than 40*s*., he shall, in general, have no more costs than damages, unless the judge certify under the 3 & 4 *Vict. c.* 24, *s.* 2 (*q*).

Other proceedings.

In all other respects, the proceedings in this action are the same as in ordinary cases.

(*l*) See *Compere* v. *Hicks*, 7 T. R. 727. And see *Barrington* v. *Parkhurst*, 2 Str. 1265; 4 Brown, P. C. 353.

(*m*) *Ive* v. *Scott*, 9 Dowl. 993.

(*n*) *Doe* v. *Hare*, 2 C. & M. 145; 4 Tyr. 29, & C.

(*o*) *Earl Cawdor* v. *Lewis*, 1 Y. & Col. 427.

(*p*) Ca. Pr. C. B. 46. And see *Doe* v. *Wright*, 10 Ad. & E. 763.

(*q*) *Doe* v. *Davis*, 1 Esp. 358; 6 T. R. 593, S. C.

CHAPTER II.

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1. *What, and in what Cases it lies, and by whom, &c.*

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1. What.

REPLEVIN is a re-delivery by the sheriff to the owner of his chattels taken upon any cause, upon surety that he will pursue the action against him that distrained (*b*).

In what cases.

It is a remedy that may be adopted in all cases where chattels are unlawfully taken (*c*); except where the taking was in execution under a judgment of a superior court (*d*), or in order to a condemnation under the revenue laws (*e*), or for a duty due to the Crown (*f*).

For what.

Whatever may be distrained may be replevied (*g*). It lies for beasts *feræ naturæ* when reclaimed (*h*), or for the young of animals distrained, born since the distress (*i*). It does not lie

(*a*) The proceedings in replevin, or suits removed from inferior courts, are not, in general, affected by the 2 W. 4, c. 39, the Law Amendment Act.
(*b*) Bac. Ab., Repl., A.
(*c*) Com. Dig., Repl., 2 Roll. Ab. 430; Bull. N. P. 52: *George* v. *Chambers*, 11 M. & W. 149; 2 Dowl., N. S., 783, *S. C.*
(*d*) *George* v. *Chambers*, *supra*.
(*e*) *Cawthorne* v. *Camp*, 1 Anst. 212.
(*f*) *Rex* v. *Oliver*, Bunb. 14.
(*g*) 1 Swanst. R. 296; Cowp. 414.
(*h*) *Davies* v. *Powell*, Willes, 46; 2 Roll. Ab. 430.
(*i*) Gilb. Repl. 156; Sid. 82.

for money generally (*k*); nor for title-deeds (*k*); nor for things annexed to the freehold (*l*). But it lies for growing corn, &c., taken under a distress under the 11 *G.* 2, *c.* 19, *s.* 8.

By whom.

It lies at the suit of any person having an absolute or qualified property in the chattels taken (*m*). If the goods of a *feme sole* be taken, and she marries, her husband alone may sue the replevin (*n*), or they may both join (*o*). Executors may have replevin for the goods of the testator taken in his lifetime (*p*). Several persons cannot join in one replevin for several goods, where the property is several (*q*).

Against whom.

It lies against the party who actually took the chattels, or who directed or ordered the taking. If goods are taken by A. by the command of B., the replevin may be against both, or either (*r*).

2. *Proceedings to obtain the Replevin.*

2. Replevin, when and how obtained, and bond given.

The proceeding by original writ of *replegiari facias* out of Chancery, which was formerly necessary, being extremely tedious, and the cattle or other goods being, in the meantime, detained from the owner to his great loss and damage, it was directed and enacted by the statute of Marlbridge (*s*), that the sheriff (*t*), without any writ being sued out of Chancery, shall proceed to replevy the goods, immediately upon complaint being made to him; and by the 1 & 2 *P.* & *M. c.* 12, the sheriff of every county (*u*) shall appoint four deputies (*x*), at least, dwelling not above twelve miles distant from each other, for the purpose of making replevies (*y*).

Replevin bond.

Before the sheriff or his deputy, however, can replevy, he must, by 13 *E.* 1, *c.* 2, take pledges from the plaintiff, not only to prosecute his suit, but also to return the cattle or goods, if return should be adjudged; and, if he take pledges in any other manner, he shall be answerable to the defendant for the price or value of the cattle or goods replevied. The security taken by the sheriff, in pursuance of this act, is usually a bond, conditioned as is above mentioned (*z*). Also, by the 11 *G.* 2, *c.* 19, *s.* 23, in every replevin of a distress for rent (*a*), the sheriff or his deputy shall take from the plaintiff, and two responsible persons as sureties, a bond in double the value of the goods distrained (to be ascertained on the oath of one witness), conditioned for appearing at the next county court, and pro-

(*k*) Bac. Ab., Repl., F.
(*l*) *Wilder* v. *Smith*, 4 T. R. 504. Gilb. Repl. 151; Winch. 26.
(*m*) Gilb. Repl. 156.
(*n*) See Cas. T. Hardw. 119.
(*o*) Gilb. Repl. 156.
(*p*) Id. 153; Bro. Ab., Repl., Pl. 12. Gilb. Repl. 152; 2 Roll. Ab. 431.
(*q*) 2 H. 3, c. 21; 2 Inst. 139.
(*r*) One of the city of London may grant replevins. (*Thompson* v. *Forden*, 1 Scott, N. R., 275; 1 Man. & G. 333. 8 Dowl. 793. *S. C.* See *post*, Ch. c.) Bailiffs of liberties, and other persons, have, in some cases, power to grant replevins. (Bac. Ab., tit. Replevin, per *Thompson* v. *Forden*, 1 Scott, N. R., per *Tindal*, C. J., and per *Maule*, J.) Where the lord of the franchise has the prescriptive right to grant replevins in the same manner as the sheriff had before the statute of Marlbridge, the sheriff has no concurrent jurisdiction with him. (*Mounsey* v. *Dawson*, 1 Nev. & P. 763).
(*s*) *Thompson* v. *Forden*, 1 Scott, N. R., 285; 8 Dowl. 263, *S. C.*, per *Maule*, J.
(*t*) Evidence of a party acting as the deputy of the sheriff, is *prima facie* evidence of his appointment. *Faulkner* v. *Johnson*, 11 M. & W. 581; 1 Dowl. & L. 346, *S. C.*)
(*u*) See *Bowden* v. *Hall*, 4 Q. B. 840.
(*x*) *Blackett* v. *Crissop*, 1 L. Raym. 278.
(*a*) A distress for a rent-charge is within the act. (*Short* v. *Hubbard*, 2 Bing. 349; 9 Moore, 667, *S. C.*)

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secuting the suit with effect (*b*) and without delay, and for a return of the goods, if a return should be awarded (*c*). This statute gives the power to take the replevin bond to the officer who grants the replevin (*d*). The bond may be taken by one of the sheriffs of London in his own name only (*e*). The bond should pursue the terms of the statute. It should not be taken in a penalty beyond the amount specified by the act (*f*), nor should it contain a condition for the sheriff's indemnity (*f*). It has been held, however, that a bond conditioned to prosecute the action with effect, and to indemnify the sheriff, is good; and may be assigned and proceeded on in the name of the assignee, under the statute, although it do not require, by the condition, that the suit shall be prosecuted without delay (*g*). It should be conditioned for the plaintiff to appear at the next county court, and prosecute his suit with effect and without delay, and not for his *then and there* prosecuting his suit &c. (*h*) And although the statute directs the bond to be taken with two sureties, yet a bond by one surety only is not void (*i*). As to the proceedings on this bond, and the liability of the sheriff and sureties, see *post*, 1003, 1006. Where one of the sureties was a material witness for the plaintiff, the Court of Common Pleas allowed another to be substituted for him (*k*).

Practical directions how to obtain the replevin.

The mode of replevying the goods is thus:—*Let the party intending to replevy, having obtained the consent of two sufficient housekeepers of the city or county where the goods were taken to join in the replevin bond, give their names to the sheriff's officer whom he intends to employ, and who (after satisfying himself as to their sufficiency) will give him a certificate to the sheriff to that effect. Take this certificate to the office of the sheriff of that city or county, or to the office of his deputy, or replevin clerk; and upon the sheriff or his deputy being satisfied with the sufficiency of the sureties, and the bond which he will immediately prepare being filled up, let it be executed by the intended plaintiff and his two sureties. A precept or warrant is then made out, commanding the sheriff's officer to replevy the goods, and deliver them to the plaintiff; and also to summon the defendant to appear at the next county court, to answer the plaintiff for the taking, &c.* (*l*) Upon this precept, the officer will replevy the goods, if found within the county, &c., the plaintiff, or some person in his behalf, accompanying him in order to identify them; and in doing this, the officer may use force if the distrainer make resistance, and may break

(*b*) That is to say, to a not unsuccessful termination. (*Jackson* v. *Hanson*, 8 M. & W. 477; 1 Dowl., N. S., 69. *S. C.*)

(*c*) See form, Chit. Forms, 403.

(*d*) *Thompson* v. *Farden*, 1 Scott, N. R., 275; 8 Dowl. 813. *S. C.*

(*e*) *Thompson* v. *Farden*, *supra*. And it would seem that one of two sheriffs of any other place may also take the bond, provided each be a separate and distinct officer. See Id.

(*f*) *Miers* v. *Lockwood*, 9 Dowl. 975, *Coleridge*, J. But where a bond so taken was executed in September, and assigned in February, *Coleridge*, J., refused an application, made in the next E. T, to set it aside, for such reasons, upon account of the frequency of the practice to take the bond in such a way, and the lateness of the application. *S. C.*

(*g*) *Dunbary* v. *Dun*, 10 Price, 54. And see *Short* v. *Hubbard*, 2 Bing. 349; 9 Moore, 667, *S. C.*

(*h*) *Jackson* v. *Hanson*, 8 M. & W. 477. See *Morris* v. *Matthews*, 2 Q. B. 293; 1 G. & D. 677, *S. C.*

(*i*) *Austen* v. *Howard*, 7 Taunt. 28. And see Id. 327; 1 Moore, 68; 2 Marsh. 332. *S. C.* And see *Hacker* v. *Gordon*, 1 C. & M. 58.

(*k*) *Bailey* v. *Bailey*, 1 Bing. 92; 7 Moore, 439, *S. C.*

(*l*) See forms of warrant and summons, Chit. Forms, 404, 405.

open even the outer door of his dwelling-house, if the goods be there, having first signified the cause of his coming, and desired admittance (*m*). Care should be taken, in cases of distress for rent, to replevy before the expiration of five days inclusive after the distress made; otherwise the distrainer may sell the goods: though, indeed, they may be replevied at any time before they have been actually sold; and this, although after the five days (*n*). In all other cases of distress at common law, no time is limited for replevying, because the distrainer cannot sell the distress.

Capias in withernam.

If the goods have been carried out of the county, or eloigned, or removed to places unknown, so that the sheriff cannot replevy them, and the officer returns an eloignment, the sheriff issues a precept in the nature of an alias writ of replevin, and if that should fail, another precept in the nature of a pluries replevin, and then, on the return that the goods are eloigned, a precept in the nature of a *capias in withernam* (*o*), commanding his officer to take goods or cattle of the defendant, to the value of those taken by him, and deliver them to the plaintiff: or, instead of this course of proceeding, if the goods be withheld, the plaintiff may proceed in the cause, and recover damages to the full value of his goods, as well as for the detention. The plaintiff may keep the goods taken in *withernam* in pledge and use (*p*). But if the defendant comes in and pleads *non cepit*, or property in the goodsdistrained, he shall have his own back again (*q*).

3. *Proceedings in the Inferior Court.*

3. Proceedings in the inferior court.

The plaintiff should appear either in person or by attorney at the county court next after the giving of the bond, and levy his plaint (*r*). This is usually done by lodging the plaint at the office of the under-sheriff. Upon this the defendant is summoned, and, if the cause is not removed to one of the superior courts, which is usually the case, the action proceeds to issue and trial in the ordinary way in the inferior court. The plaint is usually removed as soon as it is levied, and before any proceedings are had on it. If the plaintiff make default in any part of the proceedings, or do not prosecute the suit with success, either in the county court or in the court above, after the removal of the cause (*s*), the defendant may take an assignment of the replevin-bond, and may proceed thereon against the plaintiff and his pledges, in the same manner as a plaintiff proceeds upon a bail-bond (*t*). The plaint is the act of the party, but the entry of it is the act of the sheriff (*u*). Until it is entered, there is no commencement of the suit, of which a superior court can take notice (*x*). The Court will not, on motion, compel the sheriff to enter the plaint, though

(*m*) 2 Inst. 193, 140. See 2 Ro. Abr. 182; 29 H. 6, 28.
(*n*) See *Jacob* v. *King*, 1 Marsh. 135; 5 Taunt. 451, *S. C.*
(*o*) See form, Chit. Forms, 405. See Wilk. Repl. 99; 3 Bl. Com. 179.
(*p*) Fitz. N. B. 74 B.
(*q*) 1 Ld. Raym. 614.
(*r*) See form of plaint, Chit. Forms, 405.
(*s*) *Turner* v. *Turner*, 2 B. & B. 112; 4 Moore, 616, *S. C.*
(*t*) See *ante*, 986; and Vol. 1, 721.
(*u*) *Ex p. Boyle*, 2 D. & R. 13.
(*x*) *Tessyman* v. *Gildart*, 1 New Rep. 292.

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4. *Proceedings in the Superior Court.*

4. In what cases plaint removed.

In what Cases Plaint removed.]—The suit may be prosecuted in the county court, however considerable the value of the goods may be (*z*). But if any right of freehold come in question in the course of the proceedings in the county court, or ancient demesne be pleaded (*a*); or if the Queen be a party, or the taking be in right of the Crown (*b*), the sheriff cannot proceed in the cause. So, if the defendant claim property in the goods, and on a writ *de proprietate probandâ* (*c*) they be found to be his, the sheriff can proceed no further, but must return the proceedings to one of the superior courts, to be there, if thought advisable, finally determined (*d*). It is usual in practice, in all cases of the least importance, to remove the plaint as soon as it is levied, and before any proceedings are taken on it, into one of the courts at Westminster, in the first instance.

Plaint, how removed.

Plaint, how removed.]—The plaint may be removed by writ of *pone*, *recordari facias loquelam*, or *accedas ad curiam*, according to circumstances. It may be removed either by the plaintiff or defendant:—by the plaintiff, at pleasure; by the defendant, upon reasonable cause (*e*). This assignment of cause by the defendant, however, is at present but matter of form; it is assigned in the writ of *recordari*, &c., and cannot be denied or traversed by the sheriff or plaintiff (*f*). Where the action of replevin is commenced in a court baron, cause must be assigned for removing it, whether removed by the plaintiff or defendant (*g*).

By *pone*.

If the goods have been replevied by virtue of a *replegiari facias*, (which is now rarely, if ever, the case), the plaint in the county court is removed by writ of *pone* (*h*). This is an original writ, obtained from the cursitor, bearing *teste* after the entry of the plaint in the county court, and returnable on a general return-day in term, wheresoever, &c.; but, if it happen to bear *teste* before the entry of the plaint, it is not material (*i*). The writ of *pone* is also the proper writ to remove all suits, which are before the sheriff by writ of *justicies*. In other respects, it does not differ from the writ of *recordari facias loquelam* (*k*).

By *re. fa. lo.*

If the goods have been replevied upon mere application to the sheriff, (as is now usually the case), without writ, the plaint is removed by writ of *recordari facias loquelam*. This

(*y*) *Ex p. Boyle*, 2 D. & Ry. 13.
(*z*) 25 H. 3, c. 21; 2 H. 7, 5 b.; 2 Inst. 139.
(*a*) Finch, L. 317; 4 H. 6, 30; 2 H. 7, 6; Co. Litt. 145.
(*b*) Bro. Abr., Replevin, 3.
(*c*) See form, Chit. Forms, 406.
(*d*) See Har. L. & T. 739; Bac. Abr., Replevin, (E. 4). The proceedings are not usually removed into the Court. See Edmonds, 6, 7.
(*e*) F. N. B. 69 M., 70 B.
(*f*) *Talbot* v. *Binns*, 8 Bing. 71; 1 M. & Scott, 148, *S. C.*: *Parkes* v. *Renton*, 3 B. & Ad. 105. See form, Chit. Forms, 408.
(*g*) Reg. 85 b.; F. N. B. 70 A; 2 Inst. 339; 27 H. 6, 3 b, 4 a; Doct. Pl. 386.
(*h*) F. N. B. 69 M.
(*i*) F. N. B. 71 D.
(*k*) Greenw. 22; Wats. Sheriff, 283. See form, Chit. Forms, 407.

is also an original writ, to be obtained from the cursitor, tested and returnable like the *pone* (*l*).

By *accedas ad curiam.*

If the plaint be levied in a court baron, it is removed by writ of *accedas ad curiam*. This is also an original writ, in every respect the same as the *recordari*, excepting that it directs the sheriff to go to the lord's court, and there cause the plaint to be recorded, and so to return it to the court above. This writ must, it seems, bear *teste* after the entry of the plaint, otherwise it will be bad (*m*).

By *certiorari.*

In no instance where the plaint is in an inferior court, not of record, should the plaint be removed by *certiorari*; for, if so removed, as the plaintiff, in such case, is not bound to follow the suit, the defendant could never *nonpros* him in the superior court for not declaring (*n*), though the defendant might, in such a case, move to quash the *certiorari* and sue out a *re. fa. lo.* (*o*). But, where the replevin suit is in an inferior court of record, it is removed by *certiorari* (*p*).

Writ, how sued out and returned.

These writs (except the *certiorari* in some cases) are sued out of the Court of Chancery. In order to sue out any of them, *make out a præcipe* (*q*); *take it to the cursitor, and upon telling him when the next county court will be holden, he will make out the writ. Then take it to the office of the under-sheriff of the county, &c., or the sheriff's agent in town, who will allow and return it* (*r*).

Form of return.

The sheriff's return should be positive, and not argumentative (*s*). He may return to a *re. fa. lo.* that there has not been a county court between the *teste* and the return (*t*). If the sheriff return the writ *tarde*, the party may sue out an *alias*, &c. (*u*) If, to a writ of *accedas ad curiam*, the sheriff return that the lord refused to hold his court, a *distringas* then issues, commanding the sheriff to distrain the lord to hold his court; and after that, a *sicut alias*, &c. (*x*). If the sheriff do not return the *recordari*, &c., so as to enable you to file it, you should rule him to return it, in the manner directed, *Vol.* 1, 553. The sheriff or other officer of the inferior court is bound, under peril of an attachment, to obey the writ and make a return; and he cannot refuse to obey it under the pretence of his fees not being paid (*y*).

When and how returned and filed.

When you have got the writ returned, file it with one of the Masters. It should be returned and filed within two terms at least after the writ is returnable; otherwise the opposite party may obtain a certificate from one of the Masters that no such writ and return are filed, and the cursitor will thereupon issue a writ of procedendo, by which the cause may be removed back to, and proceeded with in the inferior court (*z*). Or if either party, having sued out a *re. fa. lo.*, neglect to file it, *the other party, for the sake of expedition, may, without waiting till the end of the*

Procedendo, &c.

(*l*) See the form, Chit. Forms, 408.
(*m*) F. N. B. 71 D: *and vide* Gilb. Rep. 159. See the form, Chit. Forms, 412.
(*n*) Clerk v. *Mayor of Berwick*, 4 B. & C. 164; 7 D. & R. 194. *S. C.*: *Edwards* v. *Evans*, 5 B. & C. 258; 7 D. & R. 769, *S. C.*
(*o*) *Stafford* v. *Thornewell*, 7 Dowl. 613.
(*p*) Wilk. Replevin, 26.
(*q*) See the form, Chit. Forms, 407.
(*r*) See the form of the return, Chit. Forms, 408; and of the schedule to be annexed to the writ and return, Id. See form of entry on roll, Id. 409.
(*s*) *Wright* v. *Lewis*, 8 Dowl. 514.
(*t*) 3 Moore, 642.
(*u*) F. N. B. 70 B.
(*x*) F. N. B. 18 E.
(*y*) *Bevan* v. *Protheak*, 2 Burr. 1151.
(*z*) 2 Sellon, 162; 1 Tidd, 410. See forms of *procedendo*, Chit. Forms, 410.

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second term, sue out another writ of the same nature, and get it returned and filed, for removing the proceedings into the Court above (*a*). If the return, however, be filed, a writ of *procedendo* cannot, it seems, afterwards be had, unless, perhaps, where the cause was removed from a court of ancient demesne (*b*). If the cause be removed by the defendant, and the return be not filed on the return-day, a notice of its being filed should be given to the plaintiff (*c*).

Effect of the writ.

The delivery of the writ to the sheriff, or his deputy, instantly suspends the sheriff's power and stays all further proceedings in the suit in the county court, even although delivered after interlocutory, provided it be before final, judgment (*d*). If the sheriff proceed further, such subsequent proceedings are void and *coram non judice*, and the sheriff is liable to an attachment (*e*). The writ, however, removes the plaint only, and not any of the subsequent proceedings, and the plaint only is returned by the sheriff (*f*). The plaint is removed by it, although the plea in the court below may have been discontinued (*f*).

Appearance.

Appearance.]—The defendant must enter his appearance upon the *recordari*, &c., before the plaintiff can declare in the superior court, or before the defendant can rule him to do so. This regularly should be done on or before the *quarto die post* of the return of the *recordari*, &c. *Make out a præcipe for the appearance on parchment, and take it to the proper clerk in the Master's Office, who will thereupon enter the appearance* (*g*).

Appearance, how compelled by plaintiff.

If the plaintiff wish to expedite the cause, and for that purpose to procure the defendant's appearance, *he should, it seems, obtain a rule to appear from one of the Masters* (*h*); *enter it with him, and serve a copy of it upon the defendant.* This is usually done where the plaintiff's attorney files the *re. fa. lo. This rule expires in four days; and if the defendant have not entered his appearance within that time, then*, if the plaint have been removed by the plaintiff by *pone* or *recordari*, *sue out a* pone per vadios, *which may be obtained from one of the Masters* (*i*); *upon which the sheriff will summon the defendant* (*k*). *On the quarto die post of the return-day of the pone, search at the Master's Office if the defendant have entered an appearance; and if not, sue out a distringas, which may be obtained from one of the Masters* (*l*), *upon your furnishing him with a præcipe.* This is a judicial writ, commanding the sheriff to distrain the defendant by all his goods and chattels, so that he be before the Queen on a general return-day, wheresoever &c., or in the Common Pleas, before the Queen's justices at Westminster, or in the Exchequer, before the barons of the Exchequer at Westminster, to answer the plaintiff of a plea of

Pone per vadios.

Distringas.

(*a*) See form, Chit. Forms, 407, 408.
(*b*) F. N. B. 69 M (*a*). Gilb. Replevin, 10, 11; *sed quære.*
(*c*) See form, Chit. Forms, 409.
(*d*) *Bevan* v. *Prothesk*, 2 Burr. 1151: *Wright* v. *Lewis*, 9 Dowl. 183.
(*e*) F. N. B. 4 E; Tidd, 9th ed., 415.
(*f*) F. N. B. 71 A.
(*g*) See Vol. 1, 167. See form of the *præcipe* for appearance, Chit. Forms, 411.
(*h*) Tidd, 9th ed., 416; Pr. Reg. 371. See Chit. Forms, 411.
(*i*) See the form, Chit. Forms, 411.
(*k*) See the form of the summons, Chit. Forms, 411.
(*l*) See the form, Chit. Forms, 411.

&c. (*m*) It must bear *teste* in term time, be returnable on a general return-day, in the same or in the next term (*n*), and have fifteen days between the *teste* and return. Care must be taken that the defendant be correctly named in the writ, otherwise the sheriff will not be justified in executing it (*o*). *Take this writ to the sheriff's office, and obtain a warrant thereon; give the same to your officer, who will thereupon levy the sum of 40s.* (*p*) If the defendant have not entered an appearance on the *quarto die post* of the return of the *distringas*, get the writ returned, and sue out an *alias*, and after that a *pluries*; or, if the sheriff return *nulla bona*, you may sue out a *testatum distringas* into a different county (*p*). Upon suing out the *alias, move the Court to increase the issues, who will thereupon grant a rule absolute in the first instance; draw up the rule with one of the Masters* (*q*), *annex a copy of it to the alias distringas, and leave it with the sheriff to be executed, as above directed.* If, upon the *quarto die post* of the return of this writ, the defendant have not entered an appearance, *sue out a pluries distringas, and again move the Court to increase the issues, which they will now order to the amount of the debt and costs; draw up the rule, and get the writ executed, as above directed.* If, on the *quarto die post* of this writ, the defendant have not appeared, then, in pursuance of stat. 10 *G.* 3, *c.* 50, *move for a rule to shew cause "why the issues returned upon the several writs of distringas should not be sold, and the monies arising from the sale thereof should not be forthwith brought into court; and why it should not be referred to one of the Masters to tax the plaintiff his costs, occasioned by his issuing out the said several writs; and why such costs, when taxed, should not be paid out of the monies so brought into court; and why the surplus of the said monies, after payment of the said costs, should not be retained in court until the purpose of the said writs be answered." Move this upon an affidavit, stating the issuing and returns of the writs of distringas, and that the defendant has not appeared. Draw up the rule, and serve a copy of it upon the sheriff. Afterwards, move to make the rule absolute; draw up the rule and serve a copy on the sheriff, at the same time shewing the original; and if he do not pay the money into court, move for an attachment. If the money be paid in, make out a bill of costs, and get it taxed; then take the rule and allocatur to one of the Masters, and he will pay you the amount of the costs* (*r*). *You may afterwards proceed by distringas thus ad infinitum, applying from time to time to sell the issues for payment of costs, until the defendant appear* (*s*); *but if nulla bona be returned to the distringas, then sue out a capias, and so proceed to outlawry* (*t*). If the plaint, however, have been removed by the defendant (*u*), or by the plaintiff by writ of *accedas ad curiam* (*x*), *the first process after the rule to appear is the distringas, omitting the* pone per vadios.

Issues.

Outlawry.

The Declaration.]—If the defendant come in upon any of

(*m*) See the form, Chit. Forms, 411.
(*n*) *Wright* v. *Lewis*, 9 Dowl. 183.
(*o*) Cole v. *Hindson*, 6 T. R. 234: *Hoye* v. *Bush*, 2 Scott, N. R., 86.
(*p*) See *Bloxam* v. *Sartiaux*, 4 East, 162.
(*q*) See the forms, Chit. Forms, 25.
(*r*) See *Martin* v. *Townsend*, 5 Burr. 2725.
(*s*) See form of *alias* and *pluries*, Chit. Forms, 412.
(*t*) F. N. B. 70 A (*a*). See form of *capias*, Chit. Forms, 412.
(*u*) F. N. B. 70 A (*a*).
(*x*) *Thompson* v. *Jordan*, 2 B. & P. 137.

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The declaration.

these writs, and enter his appearance, the plaintiff may then deliver his declaration, as in ordinary cases (*z*). The declaration, where the suit is removed by *re. fa. lo.*, must, before the rule of *H. T.*, 4 *W.* 4, *r.* 1, *Vol.* 1, 193, have been intitled either of the term in which the writ was returnable, or of that in which it was delivered. If it was intitled of an intermediate term, judgment for want of a plea might, it seems, have been set aside (*a*). Since that rule, however, it is usual, in practice, to date the declaration of the day it is filed or delivered. The venue is local. The declaration may be amended as in other cases (*b*).

Compelling plaintiff to declare.

If the defendant wish to expedite a cause, *then, on or after the quarto die post of the return-day of the recordari, &c., having first entered an appearance, enter a rule to declare with the proper clerk at the Master's Office, and serve a copy of it upon the plaintiff's attorney or agent* (*c*). *He should also demand a declaration in writing of the plaintiff's attorney or agent; and if, at the expiration of four days after the service of a copy of the rule,* (*a four-day one*), *and at the expiration of four days after the demand so made, the plaintiff have not declared, the defendant may sign judgment of nonpros* (*d*). *The judgment is signed as in ordinary cases.* (*See post, Pt.* 5, *Ch.* 17). This rule to declare may be given within four days after the end of the term in which the writ is returned (*e*), but not afterwards, till the following term. The plaintiff may, as in other cases, obtain a rule or order for further time to declare (*f*), and the Court will not compel him to declare sooner in this form of action than in another (*g*). It may be observed that the plaintiff is bound, as of course, to declare within a year next after the return-day of the *re. fa. lo.*, or writ by which the replevin suit is removed, otherwise he will be deemed out of court (*h*). Where a replevin suit was removed from an inferior jurisdiction into the Queen's Bench by *certiorari*, and the defendant signed judgment of *nonpros* for not declaring, the Court held the judgment irregular, and refused to refer it to the Master to tax the defendant his costs, on the ground of the distinction between a *re. fa. lo.* and a *certiorari*, the former giving a day to the parties to appear in court, the latter not (*i*).

Nonpros.

Order for further time.

Plaintiff must declare in a year.

Judgment of *nonpros*, and proceedings on it.

Nonpros for want of a Declaration, and Proceedings thereon.] —We have just pointed out when the defendant may sign this judgment of *nonpros*. This judgment, at common law, is, that

(*z*) See form of declaration, Chit. Forms, 421.

(*a*) *Topping* v. *Fage*, 5 Taunt. 771; 1 Marsh. 341, *S. C.*

(*b*) See Vol. 1, 203. See *Busbank* v. *Owen*, 5 A. & Ell. 296, where an order to amend, by inserting the husband's name in the declaration as a plaintiff, was set aside.

(*c*) See Tidd, 9th ed., 417; and *Ward* v. *Cressy*, 2 Moore, 642. By R. H., 2 W. 4, r. 36, "it shall not be necessary for a defendant, in any case, to give a rule to declare, except upon removals from inferior courts;" but the plaintiff may have a rule for time to declare in the Court of Exchequer, as well as in other courts. (See the form of rule, Chit. Forms, 413).

(*d*) See R. T., 1 W. 4, r. 8; F. N. B. 70 A: *Edwards* v. *Dench*, 11 East, 188.

(*e*) R. H., 2 W. 4, r. 37. Formerly, in Q. B., the rule might have been given in fourteen days after the end of the term. (*Edwards* v. *Dench*, 11 East, 183).

(*f*) See *ante*, Vol. 1, 185.

(*g*) *Craven* v. *Vaucasour*, 5 Taunt. 36.

(*h*) See *ante*, Vol. 1, 184; *Norrish* v. *Richards*, 5 Nev. & M. 268; 1 H. & W. 437, *S. C.*

(*i*) *Clark* v. *Mayor of Berwick*, 4 B. & C. 649.

the defendant shall have a return of the goods (*k*), and is final (*l*). But if the distress were for rent, customs, services, or *damage feasant*, the defendant shall have judgment for his damages and costs (*m*). These damages and costs must be assessed by a jury, under a writ of inquiry (*n*); consequently, the judgment in those cases is not final until such damages and costs have been ascertained (*n*); and after the entry of the judgment of *nonpros* on the roll, follow the award of a writ of inquiry, (in the same manner as in ordinary cases on a judgment by default), the sheriff's return of the inquest, and final judgment (*o*).

Writ of second deliverance.

The plaintiff, however, is not prevented by judgment of *nonpros* from proceeding, for he may sue out a writ of second deliverance (*p*); in execution of which, the sheriff must again take the goods from the defendant, and deliver them to the plaintiff; or the writ will operate in the sheriff's hands as a *supersedeas* of the writ *de retorno habendo*, if the latter writ have not as yet been executed (*q*), but not of the writ of inquiry of damages (*q*). If the plaintiff intend to proceed thus, *let an award of the writ of second deliverance be entered upon the roll after the judgment of nonpros* (*r*); *then sue out the writ with the cursitor* (*s*). The proceedings upon this writ are the same as in ordinary cases of replevin, where the action is commenced by writ, as already mentioned; and if the defendant have judgment, either upon verdict, demurrer, or of *nonpros*, it is for a return irreplevisable, and he shall have a writ *de retorno habendo* (*t*); which being executed, the plaintiff cannot have any further writ of deliverance. But, if the plaintiff do not sue out a writ of second deliverance, and to the writ *de retorno habendo* the sheriff should return that the goods &c. are eloigned (*u*), the defendant shall then have a *capias in withernam* (*x*), and after that an *alias* and *pluries*, until it is executed. The *capias in withernam*, however, in this case, is but mesne process, to compel the plaintiff to declare (*y*); and as soon as he has declared, he may, it seems, obtain a restitution of the goods taken under it, upon motion (*z*).

Suggestion and writ of inquiry under 17 C. 2, c. 7, s. 2, after *nonpros* for want of declaration.

In cases where the replevin is of goods distrained for rent, if the plaintiff be *nonpressed*, the defendant, after entering the judgment for a return, (and which must still be entered, although it is never executed) (*a*), may, by 17 *C.* 2, *c.* 7, *s.* 2, make a suggestion on the roll, in the nature of an avowry or cognisance, and pray a writ of inquiry to be directed to the sheriff of the county where the distress was taken, to inquire of the rent in arrear at the time of the distress, and also of the value of the distress. Then follows on the roll the award of the

(*k*) See the form, Chit. Forms, 414; and see form of writ *de retorno habendo* thereto, Id.; and of *fi. fa.* or *ca. sa.* for the costs, Id. 415.

(*l*) See *Wright* v. *Lewis*, 9 Dowl. 183.

(*m*) 7 H. 8, c. 4, s. 3, and 21 H. 8, c. 19, s. 3.

(*n*) *Wright* v. *Lewis*, *supra*.

(*o*) See the forms, Chit. Forms, 417—420.

(*p*) 2 Inst. 340; Stat. Westm. 2, c. 2.

(*q*) *Anon.*, Latch. 72: *Argoll* v. *Cheney*, Palm. 403: *Pratt* v. *Rutledge*, 1 Salk. 98.

(*r*) See form of it, Chit. Forms, 415.

(*s*) See the form and return thereto, Id. 415, 416.

(*t*) 2 Inst. 341.

(*u*) See the form, Chit. Forms, 415.

(*x*) Id. 416.

(*y*) *Moor* v. *Watts*, 1 Ld. Raym. 614; 12 Mod. 423, *S. C.*

(*z*) *Webb* v. *Hinde*, Noy, 50. And see *De la Bastide* v. *Raynal*, Comb. 201: *Moor* v. *Watts*, 2 Salk. 562.

(*a*) See *Cooper* v. *Sherbrooke*, 2 Will 117; Barnes, 127, *S. C.*: *Baker* v. *Lade* Carth. 253.

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writ of inquiry (of the execution of which fifteen days' notice must be given to the plaintiff or his attorney) (*c*); then the sheriff's return of the finding of the inquest; and, lastly, follows an entry of the final judgment. If the inquest find the value of the distress to be as much or more than the amount of the arrears of rent, then the final judgment shall be, that the defendant recover the amount of such arrears, and full costs of suit; but if the distress be less than the arrears, then the judgment shall be for the sum at which the distress is valued by the inquest, together with full costs of suit (*d*). The defendant may have execution of this judgment by *fieri facias*, *ca. sa.*, or *elegit* (*e*); but cannot, of course, have a writ *de retorno habendo* (*f*). This statute does not take away or alter the judgment at common law; it only gives a further remedy to the avowant: and it is always at the election of the defendant, whether he will proceed under the statute or not (*g*). This mode of proceeding by writ of inquiry under the statute is in many cases advisable, as a writ of second deliverance after it would be inoperative, the goods still remaining with the plaintiff (*h*). The Court, in some cases, under particular circumstances, will set aside this judgment of *nonpros*, &c., and let in the plaintiff to declare upon payment of costs (*i*).

Proceeding on the replevin bond.

Or, instead of executing a writ of inquiry, under this statute, the defendant, having signed judgment of *nonpros*, in cases where the replevin is of a distress for rent, may take an assignment of the replevin bond, and proceed upon it against the plaintiff and his pledges (*k*).

Avowry, &c.

Avowry, &c.]—When the plaintiff has declared, *he should give a notice to plead, and enter a rule to plead, and demand a plea, as in ordinary cases, and as pointed out in Vol.* 1, *p.* 212, 214, 215; *and if the defendant do not deliver his avowry, &c., within the time limited for that purpose, the plaintiff may sign judgment by default, and execute a writ of inquiry, as directed, ante*, 262 (*l*). *As to the time for pleading, see Vol.* 1, *p.* 210. It is doubtful whether an imparlance is not now abolished in replevin as well as in other suits; it is the practice to consider it so (*m*). But, as the point has not been decided, we will state the law upon the subject of imparlances.

Imparlance.

An imparlance, or *licentia loquendi*, is a leave given by the Court to the defendant to speak with the plaintiff, to see if they can end the matter in dispute amicably, without suit, if possible (*n*). But, in effect, it is time given to the defendant to plead. As regards the time given by this imparlance, be-

Time given by.

(*c*) 17 C. 2, c. 7, s. 2. See *Burton* v. *Hickey*, 6 Taunt. 57; 1 Marsh. 444, *S. C.*

(*d*) 17 C. 2, c. 7, s. 2. See the forms of suggestion, &c., and judgment, Chit. Forms, 417; of writ of inquiry, Id. 418; of notice of inquiry, Id. 419; of inquisition thereon, Id. 420; and of entry thereof upon the roll, Id. 419.

(*e*) 17 C. 2, c. 7, s. 2.

(*f*) See the forms of *fi. fa.* and *ca. sa.*, Chit. Forms, 420, 421.

(*g*) *Rees* v. *Morgan*, 3 T. R. 350.

(*h*) *Playters* v. *Shearing*, 1 Vent. 64; Bull. N. P. 58: *Cooper* v. *Sherbrooke*, Barnes, 427; 2 Wils. 116, *S. C.*

(*i*) *Playters* v. *Shearing*, 1 Vent. 64.

(*k*) See *post*, 1004. And see *Turner* v. *Turner*, 2 B. & B. 107; 4 Moore, 606, *S. C.*: *sed vide* 2 Tidd, 1056.

(*l*) See as to the forms of the judgment, &c., Chit. Forms, 422.

(*m*) According to the decision of *Taunton*, J., (in *Fream* v. *Chaplin*, 2 Dowl. 523), it would seem that the right to an imparlance still exists in all cases, and is not confined to an action of replevin or suits removed from inferior courts, &c.: but that decision was overruled in *Wigley* v. *Thomas*, 3 Dowl. 8.

(*n*) 3 Bl. Com. 298.

fore the rules of *T. T.*, 1 *W.* 4, and *H. T.*, 2 *W* 4, *r.* 3, if the process were returnable on or after the last general return of the term (*o*), or if the plaintiff had neglected to deliver his declaration, or to file it and give notice thereof, four days exclusive before the end of the term in which the process was returnable (*p*), the defendant was entitled to an imparlance over to the next term after that in which the declaration was delivered or filed, and must have pleaded within the first four days thereof (*q*). But now, by the rule of *T. T.*, 1 *W.* 4, it is ordered, that, upon every declaration delivered or filed on or before the *last* day of the term (*r*), the defendant, whether in or out of any prison, shall be compellable to plead as of such term without being entitled to any imparlance. And, by the more recent rule of *H. T.*, 2 *W.* 4, *r.* 3, in Hilary and Trinity terms, the plaintiff in a *country* cause may declare *de bene esse within four days after the end* of the term, as of such term. If not delivered or filed within this time, then it must be delivered or filed before the *first* day (*s*) of the subsequent term, or the defendant will be allowed to imparl to the third or subsequent term, and shall plead within the first four days thereof (*t*). But where the defendant does not appear on or before the last day of a term, he is not entitled to an imparlance over to the third term, although the plaintiff do not declare before the first day of the second term; for the plaintiff cannot in replevin, nor is he obliged in any case to declare until the defendant is fully in court; and no *laches* can consequently be imputed to him for not declaring until after that time (*u*). For the same reason, if a joint writ issue against two defendants, and they appear in different terms, neither can claim an imparlance upon the ground of the plaintiff not having declared in the term in which the first defendant appeared; for he could not, in fact, have declared until both the defendants were before the court (*x*). Also, for the same reason, where the plaintiff is prevented from declaring the same term the writ is returnable, by his being obliged to proceed to outlawry against some of the defendants, the others who have been served or arrested are not entitled to an imparlance (*y*). So, if by any other act of the defendant the plaintiff is prevented from declaring in time, the defendant shall not be entitled to an imparlance (*z*). If the defendant plead without *imparlance*, and his plea be a nullity, so that the plaintiff signs judgment for want of a plea, the Court will not set aside the judgment for being signed too soon; for, by pleading, the defendant waived his right to an *imparlance* (*a*). Taking out a summons for time to plead, upon which the plaintiff indorses his con-

Waived by pleading.

(*o*) See R. T., 5 & 6 G. 2; R. T., 22 G. 3.

(*p*) See R. T., 5 & 6 G. 2, b.; R. T., 22 G. 3.

(*q*) 2 Saund. 2.

(*r*) See *Elsmore* v. *Hoffman*, 2 C. & J. 148.

(*s*) Before the 11 G. 4 & 1 W. 4, c. 70, it must have been so filed or delivered before the essoign day; but that act, it seems, has done away with that day for all purposes, as part of the term. (See *Price* v. *Hughes*, 1 Dowl. 448).

(*t*) 2 Saund. 2. See *Whalley* v. *Barnet*, 1 Dowl. 607.

(*u*) *Smith* v. *James*, 6 T. R. 752: *Wood* v. *Wenman*, 1 Wils. 154: *Winter* v. *Barnes*, 9 D. & R. 18: *Rolleston* v. *Scott*, 5 T. R. 362: *Cook* v. *Allen*, 1 C. & M. 350.

(*x*) Tidd, 9th ed., 467: *R.* v. *Staffs. of London*, in *Day* v. *Morley*, 1 Chit. Rep. 359.

(*y*) *Martin* v. *Bradley*, E., 18 G. 3: *Codwin* v. *Seaman*, M. 1797; MS., B. 1211.

(*z*) *Page* v. *Vogel*, 2 B. & Ald. 300; 1 Chit. Rep. 230. *S. C.*: *Rooke* v. *Leicester* (*Earl of*), 2 T. R. 16.

(*a*) *Lockhart* v. *Mackreth*, 5 T. R. 661.

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sent, or obtaining an order thereon, is a waiver of the right to an *imparlance* (*b*). The imparlance thus obtained is a *general* imparlance; but the defendant may have a *special* imparlance, when necessary, by leave of the Court, obtained by a side-bar rule for that purpose (*c*), or a *general special* imparlance, under particular circumstances, by moving the Court for it within the first four days of the next term (*d*). The *general imparlance* is a leave to imparl generally to the next term, without any saving of exceptions; and may be entered as of course, in all cases where the defendant is entitled to it (*e*). After a general imparlance, the defendant can plead only in bar, and not in abatement (*f*); or to the jurisdiction, or any other dilatory plea; nor can he claim cognizance or demand *oyer* (*g*). Formerly, it was holden that he could not plead a tender, although latterly the law has been considered to be otherwise (*h*); still, however, it seems, a rule of court or a judge's order must be obtained for leave to plead it as of the preceding term (*i*); so that, upon the face of it, it may not appear to be pleaded after an imparlance. But if a declaration be filed or delivered so late that the defendant is not bound to plead until the next term, the defendant *may plead as of the preceding term*, within the first four days of the next term, any plea to the jurisdiction or in abatement, or a tender, or any other similar plea (*k*). The *special imparlance* contains a saving of all exceptions to the writ, bill, or count (*l*); and is necessary where the defendant intends to plead in abatement, of a term subsequent to the declaration (*m*). It cannot be had without leave of the Court (*n*), obtained by a side-bar rule for that purpose (*o*). After a special imparlance, the defendant cannot plead to the jurisdiction, or a plea of privilege; but he must obtain a *general special imparlance* to enable him to do so (*p*). The *general special imparlance* contains a saving of all advantages and exceptions whatsoever. The entry of it is the same as that of the special imparlance, excepting that, instead of the saving in the latter, you insert the words "saving to himself all advantages and exceptions whatsoever." This kind of imparlance is necessary, where the defendant intends to plead to the jurisdiction (*q*), or to plead his privilege (*r*), of a term subsequent to the declaration. It is obtained by application to the Court within the first four days of the next term. It is in the discretion of the Court, however, governed by the particular circumstances of the case, to grant it or not (*s*); they will not grant it, for instance, if the defendant have appeared by attorney, because a plea to the jurisdiction

General imparlance, what, and effect of.

Special imparlance, what, and effect of.

General special imparlance.

(*b*) *Edenser* v. *Hoffman*, 2 C. & J. 140.
(*c*) R. E., 5 A.; 2 Saund. 2 a.
(*d*) 2 Saund. 2 a, b; Tidd, 9th ed., 467.
(*e*) See the form of entering it, Arch. Forms, 91.
(*f*) *Lloyd* v. *Williams*, 2 M. & Sel. 484: *Buddle* v. *Wilson*, 6 T. R. 369.
(*g*) 2 Saund. 2.
(*h*) 1 Saund. 33 b; 2 Saund. 2.
(*i*) *King* v. *Nichols*, Barnes, 343, 347, 349. And see *Kilwick* v. *Maidman*, 1 Burr. 39.
(*k*) R. H., 2 W. 4, r. 45; 1 Salk. 347.
(*l*) See the form of entering it, Arch. Forms, 288, 289.
(*m*) 2 Saund. 2: *Doughty* v. *Lascelles*, 4 T. R. 520: *Blackmore* v. *Flamgang*, 7 Id. 477, n.
(*n*) R. E., 5 A.
(*o*) See the form of the rule, Arch. Forms, 297.
(*p*) 2 Saund. 2 b: *Godfrey* v. *Jay*, 6 Bing. 616; 1 Moo. & P. 440, *S. C.* The Court, in the last case, thought the plaintiff ought to have demurred, and not signed judgment for want of a plea.
(*q*) 2 Saund. 2 b.
(*r*) Hardr. 365; 1 Lut. 46; 12 Mod. 329 Gilb. C. B. 210, 211.
(*s*) 2 Saund. 2 b.

What may be pleaded after.

must be pleaded in person (*t*). If the defendant plead in abatement after the general imparlance, or to the jurisdiction after a special imparlance, the plaintiff may either sign judgment (*u*), (except in a questionable case (*v*)), or apply to the Court to set aside the plea (*x*), or may demur generally (*y*), or may allege the imparlance in his replication, by way of *estoppel* (*z*); but if, instead of doing so, the plaintiff reply to the plea, the fault is cured (*a*). Or, if the imparlance be obtained irregularly,—as, if a special imparlance be entered without a side-bar rule first obtained for that purpose, or a general special imparlance without leave first obtained of the Court upon motion,—it should seem that the plaintiff may sign judgment (*b*).

Days between 10th Aug. and 24th Oct.

It is not altogether free from doubt whether the enactment of 2 *W.* 4, *c.* 39, *s.* 11, as to pleading between the 10th August and 24th October, and the rule of *M. T.*, 3 *W.* 4, *r.* 12, framed to meet it (*c*), apply to a replevin suit. It is the practice to treat them as applicable.

Avowry, &c., how framed and delivered.

If the defendant plead, avow, or make cognizance, *let the plea or avowry, &c., when necessary, be signed by counsel, or in the Common Pleas by a serjeant, and delivered to the plaintiff's attorney or agent* (*d*). *If he plead or avow double, first obtain a judge's order for that purpose, as directed, Vol.* 1, 260. The pleading a double plea, avowry, or *conusance*, without a rule for that purpose, would entitle the plaintiff to sign judgment (*e*). As to what avowries, &c. will be allowed, see *Vol.* 1, 250; as to what double ones will be allowed, see *id.* 254. The plea of *cepit in alio loco* is not a plea in abatement, but a plea in bar; and therefore an affidavit to verify it is not required (*f*). The defendant may pay money into court as to part of the distress, and avow as to the residue (*g*).

Amendment.

Avowries, &c. may be amended in the same way as pleadings in other actions (*h*).

Pleas in bar.

Pleas in Bar.]—As soon as the defendant has avowed, &c., he may rule the plaintiff to reply, in the same manner as in other actions, and as directed *ante, Vol.* 1, 276; and if the plaintiff do not reply or plead bar within the time limited by the rule, and four days after demand of replication, the defendant may sign judgment of *nonpros.*

How framed and delivered.

If the plaintiff plead to the avowry or conuzance, *let the plea, if it conclude with a verification, be signed by counsel, or in the Common Pleas by a serjeant; ingross it on paper, and deliver it to the opposite attorney or agent* (*i*). If the plaintiff plead double, (which he may do, 4 *A. c.* 16, *s.* 4), a judge's order must first be obtained for that purpose, as directed, *Vol.* 1, 260;

(*t*) *Grant* v. *Sandon*, 2 W. Bl. 1094; 2 Saund. 2 b. See *ante*, 878.
(*u*) *Doughty* v. *Lascelles*, 4 T. R. 590: *Blackmore* v. *Flemyng*, 7 T. R. 447, n.
(*v*) *Godefroy* v. *Jay*, 4 Moo. & P. 440; 6 Bing. 618, S. C.
(*x*) 2 Saund. 3: *Buddle* v. *Wilson*, 6 T. R. 373.
(*y*) *Lloyd* v. *Williams*, 2 M. & Sel. 494: *Buddle* v. *Wilson*, 6 T. R. 369.
(*z*) Cliff. 18, pl. 46; 19, pl. 50; 20, pl. 53, *Bartlett* v. *Barton*, 1 Lutw. 23.
(*a*) *Dacres* v. *Dancombe*, 1 Vent. 226.
(*b*) See 2 Saund. 2 b.
(*c*) Vol. 1, 269.
(*d*) See forms, Chit. Forms, 494.
(*e*) R. H., 2 W. 4, r. 1, s. 34, *ante*, Vol. 1, 260.
(*f*) *Bullythorpe* v. *Turner*, Willes, 475.
(*g*) *Lambert* v. *Heywerth*, 2 Gale & D. 112; 2 Q. B. 729; *post*, Pt. 5, Ch. 8.
(*h*) *Prior* v. *Buckingham*, 2 Moore, 584. As to amending pleas in general, see Vol. 1, 272.
(*i*) See forms, Chit. Forms, 490.

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and, if he plead double without a rule for that purpose, defendant may sign judgment of *nonpros* (*k*).

Tender.

If the grantee of a rent-charge avow upon several undertenants for the same rent, the Court will, upon a tender pleaded by the under-tenants, make an order, that the payment of the rent into court in one action shall serve for all (*l*). Although a party cannot proceed for damages on a plea of tender, after taking the money out of court, yet, on a plea of tender to an avowry for rent, the plaintiff need not bring the money into court (*m*).

Amendment of pleas in bar.

Pleas in bar in replevin may be amended in the same way as pleadings in other actions (*n*).

Nonpros for want of.

Nonpros for want of Plea in Bar.]—If the plaintiff has not replied or pleaded in bar at the expiration of the rule to reply, and of four days from the demand of replication, the defendant may sign judgment of *nonpros*. As to this judgment, see *ante*, 277 (*o*).

Suggestion and inquiry.

If the replevin were of a distress for rent, the defendant may enter his judgment, and execute a writ of inquiry, under stat. 17 *C.* 2, *c.* 7, *s.* 2, in the manner directed *ante*, 993, for want of a declaration, excepting that the entry of a suggestion, in nature of an avowry, must, of course, be omitted: and you therefore enter the prayer for the writ of inquiry, &c., immediately after the judgment for a return (*p*).

Proceedings on bond.

Or the defendant, instead of executing a writ of inquiry, may, after signing judgment of *nonpros*, take an assignment of the replevin bond, and proceed thereon (*q*).

Payment into court, &c.

Payment into Court, &c.]—If the defendant avow or make conuzance for rent, the plaintiff may obtain an order for staying proceedings on payment of the rent admitted to be due, and costs (*r*); or, if the amount be disputed, and the defendant refuses to accept the sum offered, then an order for payment into court of the sum which plaintiff admits to be due; and that, in case defendant shall not recover a greater sum, or shall accept the sum paid in in satisfaction, he shall pay all costs incurred by the plaintiff subsequent to the date of the order (*s*). An order of this kind could not be granted before the 3 & 4 *W.* 4, *c.* 42, *s.* 21, where the damages were unliquidated,—as, where the defendant avowed &c. for *damage feasant* (*t*): but perhaps it might since that act.

Upon the application of the defendant, also, even before

(*k*) Id. R. H., 2 W. 4, r. 1, s. 34, *ante*, Vol. 1, 260.

(*l*) *Anon.*, Ld. Raym. 429.

(*m*) Bull. N. P. 60; Woodf. L. & T. by Harrison, 769.

(*n*) *Maltravers* v. *Fosslitt*, 3 Wils. 295. As to the amendment of pleas in general, see *ante*, 272.

(*o*) See the form, Chit. Forms, 426; and of writ *de retorno habendo* thereon, Id. 426; and of *fi. fa.* or *ca. sa.* for costs, Id. 426. See the form of the judgment on 21 Hen. 8, c. 19, Chit. Forms, 426, 428; of writ of inquiry thereon, Id. 427; of notice of inquiry, Id.; of inquisition, Id.; of entry thereof upon the roll, Id. 428; of writ *de retorno habendo* thereon, Id.; and of *fi. fa.* or *ca. sa.* for damages and costs, Id.

(*p*) See the form of the entry, Chit. Forms, 429; and of writ of inquiry, Id.; of notice of inquiry, Id. 430; of the inquisition, Id.; of entry thereof upon the roll, Id.; and of *fi. fa.* or *ca. sa.* thereon, Id. And see *Turner* v. *Turner*, 2 B. & B. 107; 4 Moore, 606, S. C.

(*q*) *Waterman* v. *Yea*, 2 Wils. 41: *Turner* v. *Turner*, 2 B. & B. 107; 4 Moore, 606, S. C.; *post*, 1004.

(*r*) *Gregg's case*, 2 Salk. 597; *Vernon* v. *Wynne*, 1 H. Bl. 94: *Hopkins* v. *Shrole*, 1 B. & P. 382. And see *Davis* v. *Prince*, Barnes, 429.

(*s*) *Gaylor* v. *Cleeve*, 28 June, 1837, *cur. Coltman*, J., after taking time to consider the point.

(*t*) *Anon.*, 8 Mod. 379.

the 3 & 4 *W.* 4, *c.* 42, *s.* 21, the Court have stayed the proceedings, upon payment of the costs of the action and of the costs of replevying, and upon giving up the replevin bond, where no special damage was laid in the declaration (*u*); and since that act, money may be paid into court as in other cases (*v*).

Discontinuing—withdrawing plea in bar, &c.

Discontinuing.]—The plaintiff may discontinue the action, as in other cases. The defendant cannot have a rule to discontinue, &c.; for though he be an actor in the suit, yet still it is the plaintiff's suit (*x*). See further as to discontinuing, *post, Pt. 5, Ch.* 18.

Judgment as in case of a nonsuit, &c.

Judgment as in case of a Nonsuit, &c.]—The defendant in replevin cannot have judgment as in case of a nonsuit, inasmuch as both parties are deemed actors (*y*). If either plaintiff or defendant do not proceed to trial according to his notice, or countermand the notice in time, the opposite party will be entitled to the costs of the day, as in other cases (*z*).

Proceedings on demurrer.

Proceedings on Demurrer.]—The proceedings upon demurrer in replevin are the same as in ordinary cases; the only thing necessary to be mentioned here is the judgment. At common law, the judgment for the defendant is, that he have a return of the goods irreplevisable (*a*). But, if the distress were for rent, customs, services, or *damage feasant* (*b*), an inquiry of damages and costs is awarded (*c*). The defendant thereupon sues out a *retorno habendo*, and an inquiry of damages, either in the same writ (*d*) or in separate writs (*e*); and upon the return of the writ of inquiry, final judgment is entered to recover, as well the damages and costs assessed by the jury, as the costs assessed by the Court (*f*). No writ of second deliverance lies after judgment upon demurrer.

Inquiry as to arrears of rent after judgment for defendant.

Or, if the distress were for *rent*, then, after judgment given for the avowant, or person making conuzance, the Court may award a writ of inquiry, to inquire of the value of the distress (of the execution of which writ of inquiry fifteen days' notice must be given to the plaintiff's attorney or agent (*g*)); and, upon the return thereof, if the value of the distress be greater than the amount of the rent in arrear, the defendant shall have judgment to recover the arrears, and full costs; but, if the value of the distress be less than the arrears, then he shall have judgment to recover the value of the distress, and full costs (*h*). The stat. 17 *C.* 2, *c.* 7, *s.* 3, does not require, in this case, that the inquiry shall be as to the arrears of rent (*i*). In this case, no writ *de retorno habendo* issues.

(*u*) *Banks* v. *Brund*, 3 M. & Sel. 525. See Haightmore v. *Snelson*, 3 B. & P. 503, cont.

(*v*) See *post*, Pt. 5, Ch. 8: *Lambert* v. *Hepworth*, 2 Q. B. 729.

(*x*) *Long* v. *Buckeridge*, 1 Str. 112.

(*y*) *Jones* v. *Concannon*, 3 T. R. 661: *Burridge* v. *Hiern*, 5 T. R. 400: *Eggleton* v. *Smart*, 1 W. Bl. 375.

(*z*) See Pt. 5, Ch. 23.

(*a*) 14 H. 7, 9 b; 2 Inst. 340; Co. Ent. 234 a. And see the forms, Chit. Forms, 429.

(*b*) 21 H. 8, c. 19.

(*c*) See as to the form, Chit. Forms, 431.

(*d*) See the form, Thes. Brev. 290.

(*e*) See the forms, Lil. Ent. 600; Chit. Forms, 432.

(*f*) 1 Saund. 195 n.

(*g*) *Burton* v. *Hickey*, 1 Marsh. 444; 6 Taunt. 57, *S. C.*

(*h*) 17 C. 2, c. 7, s. 3. See the forms, Chit. Forms, 433. And see 1 Saund. 196; 2 Id. 286.

(*i*) See 2 Saund. 286.

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Judgment for plaintiff.

The judgment for plaintiff, on demurrer, is the same as in the action of trespass (*k*).

Issue.

Issue, Trial, &c.]—The issue is drawn up and delivered as in ordinary cases, *Vol.* 1, 281, &c. (*l*) Either plaintiff or defendant may make it up, and give notice of trial, both parties in replevin being deemed actors (*m*).

Trial, &c.

After giving notice of trial, the plaintiff (or, if he neglect to do it, the defendant) may make up the Nisi Prius *record, and sue out jury process, enter the cause for trial, and proceed to verdict or nonsuit, as in ordinary cases* (*n*). Inasmuch as both parties in replevin are deemed actors, when the record is carried down for trial by the defendant, it is not necessary to have the proviso in the *distringas*, as in cases of trial by proviso (*o*), although, in practice, it is usually inserted (*p*). For the same reason, the defendant, in replevin, cannot have judgment as in case of a nonsuit (*q*). If either plaintiff or defendant give notice of trial, and afterwards do not proceed to try the cause, or countermand his notice in time, the opposite party will be entitled to the costs of the day, as in ordinary cases (*r*).

Verdict for plaintiff.

If a verdict be found for the plaintiff, the jury assess the damages (*s*), as in a verdict for plaintiff in trespass, &c. (*t*)

For defendant.

If it be found for the defendant, the jury, at common law, find the issues specially for the defendant, and the judgment is that he have a return of the goods irreplevisable (*u*). But, if the defendant avow or make cognizance under a distress for rent, customs, services, or *damage feasant*, and the avowry or cognizance be found for him, then the jury may assess damages and costs (*x*) for him under the stats. 21 *H.* 8, *c.* 19, *s.* 3, and 7 *H.* 8, *c.* 4, *s.* 3; and the judgment then is, not only for a return of the goods, but for the damages and costs also (*y*). Or, if the distress were for rent, and the defendant wish that the finding should be according to the 17 *C.* 2, *c.* 7, *s.* 2, the jury find the amount of the rent in arrear, and the value of the things distrained; and the defendant shall have judgment for such arrears, or so much thereof as the value of the goods or cattle distrained amount to, together with full costs, and shall have execution thereupon (*z*). If the jury, in finding a verdict generally for defendant, omit to assess damages according to the statutes of *H.* 8, the omission may be supplied by a writ of inquiry (*a*). But, if the jury find according to stat. 17 *C.* 2, *c.* 7, *s.* 2, an

(*k*) See *ante*, 835, 880.
(*l*) See the form, Chit. Forms, 435.
(*m*) See Vol. 1, 281.
(*n*) See as to the form of *Nisi Prius* record, Chit. Forms, 435; and of jury process, Id.
(*o*) *Reg.* v. *Banks*, 2 Salk. 652.
(*p*) *Jones* v. *Concannon*, 3 T. R. 661: *Eggleton* v. *Smart*, 1 W. Bl. 375.
(*q*) *Ante*, 999.
(*r*) See *post*, Pt. 5, Ch. 22.
(*s*) Usually, no more than the costs of the replevin bond are given as damages. These, in London, Middlesex, and York, and some other places, are generally 2*l.* 2*s.*, and elsewhere 2*l.* 10*s.* But special damages, if alleged in the declaration, may, it should seem, be recovered.
(*t*) See form of the *postea*, Chit. Forms, 435; of the judgment and execution, Id. 436.
(*u*) See the forms of *postea*, &c., on this verdict, Chit. Forms, 436.
(*x*) *Wright* v. *Lewis*, 9 Dowl. 183.
(*y*) See form of *postea*, Chit. Forms, 437; judgment, Id.; writ *de retorno habendo*, Id.; *fi. fa.* or *ca. sa.* for damages and costs, Id. 439.
(*z*) See form of *postea*, Chit. Forms, 439; judgment, Id.; and execution, Id. 440. See *Turner* v. *Turner*, 2 B. & B. 167; 4 Moore, 606, S. C.
(*a*) *Herbert* v. *Waters*, Carth. 368; 1 Salk. 205, S. C.: *Pratt* v. *Rutlidge*, Id. 95; *Harcourt* v. *Weeks*, 5 Mod. 77; *Dacell* v. *Marshall*, 2 W. Bl. 981; 3 Wils. 442, S. C.

omission in their verdict cannot be supplied by such writ (*b*); although, in such a case, the Court would probably allow the defendant to enter his judgment for a return at common law, or allow him to amend it, if already entered (*c*); or, if the jury have assessed damages, but not the amount of the rent, the defendant may have leave to enter his judgment, as a judgment under stat. 21 *H.* 8, *c.* 19 (*d*).

Nonsuit.

If the plaintiff be nonsuit, the defendant, at common law, has judgment to have a return of the goods (*e*). But, if the defendant avow or make cognizance under a distress for rent, customs, services, or *damage feasant*, then the jury may inquire of the defendant's damages and costs (*f*); and the judgment is then not only for a return of the goods, but for the damages and costs also (*g*). Or, if the distress were taken for rent, then, at the prayer of the defendant, the jury shall inquire of the amount of the arrears, and the value of the distress (*h*), in the same manner as where a verdict is given for the defendant; and he shall have judgment to recover the arrears and his costs, if the value of the distress be found to equal or exceed such arrears; but, if the value of such distress do not equal the arrears, then he shall have judgment to recover the value of the distress, and his costs (*h*).

Second deliverance after.

As the judgment at common law in this case is not for a return of the goods irreplevisable, the plaintiff may sue out a writ of second deliverance, and proceed upon it, as mentioned *ante*, 993. This writ will be a *supersedeas* of the writ *de retorno habendo*; but the defendant is not precluded by it from levying the damages and costs awarded to him by the judgment.

New trial.

New Trial.]—In replevin, where the verdict is for the plaintiff, the Court will not, in general, grant a new trial, even on payment of costs, without very clear grounds; for the landlord has other remedies for his rent, and a new trial would renew the liability of the sureties, and the plaintiff's risk of paying double costs (*i*). See further as to new trials, *post*, *Pt.* 5, *Ch.* 26.

Costs.

Costs.]—If the plaintiff have a verdict, he is entitled to costs of increase by the Statute of Gloucester, (6 *Edw.* 1, *c.* 1, *s.* 2), in the same manner as in all other actions in which a plaintiff recovers damages (*k*).

If the defendant, in replevin, or second deliverance, making avowry, cognizance, or justification for rents, customs, or services, or for *damage feasant*, have a verdict, or the plaintiff be nonsuit or otherwise barred, he is entitled to costs by 7 *H.* 8,

(*b*) *Sheape* v. *Culpeper*, 1 Lev. 255; 1 Sid. 330; T. Raym. 170; 1 Vent. 40, *S. C.*: *Herbert* v. *Waters*, Carth. 362; 1 Salk. 205, *S. C.*; *Kinaston* v. *Mayor of Shrewsbury*, Hardw. 297; 2 Str. 1052, *S. C.*: *Rees* v. *Morgan*, 3 T. R. 349. See *Freeman* v. *Alder*, 2 W. Bl. 765.

(*c*) *Rees* v. *Morgan*, 3 T. R. 349: *Herbert* v. *Waters*, Carth. 362: *Sheape* v. *Culpeper*, *supra*.

(*d*) *Gamon* v. *Jones*, 4 T. R. 509.

(*e*) See form of the *postea*, judgment, and writ de *retorno habendo*, Chit. Forms, 440.

(*f*) 21 H. 8, c. 19, s. 3. See as to the costs, *Wright* v. *Lewis*, 9 Dowl. 183.

(*g*) See form of *postea*, Chit. Forms, 440; judgment, Id. 441; and execution, Id. And see *Turner* v. *Turner*, 2 B. & B. 107; 4 Moore, 666, 616, *S. C.*

(*h*) 17 C. 2, c. 7, s. 2. See the forms, Chit. Forms, 441.

(*i*) *Parry* v. *Duncan*, 7 Bing. 243; 5 Moo. & P. 19, *S. C.*

(*k*) See *Butterton* v. *Furber*, 1 B. & B. 517; 4 Moore, 296, *S. C.*

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c. 4, *s.* 3, and 21 *H.* 8, *c.* 19, *s.* 3 (*l*). After a *nonpros*, the defendant must, in order to obtain costs under these statutes, execute a writ of inquiry to assess his damages and costs, the latter being as consequential on the damages, which the jury alone can ascertain (*m*). And by 17 *C.* 2, *c.* 7, *s.* 2, in replevin of a distress for rent, if the defendant have judgment upon this act, he shall have full costs of suit. And, lastly, by 11 *G.* 2, *c.* 9, *s.* 22, where the distress is for rent, relief, heriot, or other service, (not a rent-charge) (*n*), the defendant avowing or making cognizance shall have *double* (*o*) costs of suit, if the plaintiff be nonsuit, discontinue his action, or have judgment given against him (*p*). But by 5 & 6 *Vict. c.* 97, *s.* 2, all provisions in public acts giving double or treble costs are repealed, and instead thereof the party entitled to the same shall receive such full and reasonable indemnity, as to all costs, charges, and expenses incurred in and about any action, suit, or other legal proceeding, as shall be taxed by the proper officers in that behalf, subject to be reviewed in like manner, and by the same authority, as any other taxation of costs by such officer (*q*). No suggestion is, it seems, requisite to entitle the defendant to these costs (*r*).

As to costs generally, see *post*, *Pt.* 5, *Ch.* 31. It does not appear that there is any difference as to the mode of taxation between a replevin and any other suit (*s*).

Execution.

For plaintiff.

Execution.]—The execution for the plaintiff is the same as in ordinary cases, where a plaintiff has a judgment for damages and costs, namely, by *fieri facias*, *ca. sa.*, or *elegit* (*t*). It may be questionable whether these writs can be made returnable *immediately after the execution* thereof, as the Uniformity of Process Act, and the statute 3 & 4 *W.* 4, *c.* 67, *s.* 2, passed to amend it, do not, perhaps, extend to a replevin suit. The practice, however, is to make them so returnable.

For defendant.

So, if the defendant have judgment under stat. 17 *C.* 2, *c.* 7, to recover the arrears of rent, or value of the distress, he shall have execution by *fieri facias*, *ca. sa.*, or *elegit* (*u*). But when the defendant has judgment at common law, he shall have execution by a writ *de retorno habendo*, to have a return of the things distrained, and a *fieri facias* or *ca. sa.* for his costs (*x*). Or, if the defendant have judgment, under stat. 21 *H.* 8, *c.* 19, he shall have a writ *de retorno habendo* for a return of the goods; and also a *fi. fa.* or *ca. sa.* for his damages or

(*l*) See *Turner* v. *Gallilee*, Hardr. 153: *Smith* v. *Walker*, 2 L. Raym. 788: Com. 122, *S. C.*: *Haselop* v. *Chaplin*, Cro. El. 330: *Davies* v. *James*, 1 T. R. 371: *Butterton* v. *Furbor*, 1 B. & B. 517.

(*m*) *Wright* v. *Lewis*, 9 Dowl. 183. See *ante*, 1001.

(*n*) *Leominster Canal Company* v. *Cowell*, 1 B. & P. 213; 7 T. R. 500, *S. C.*

(*o*) As to estimating such costs, see *Staniland* v. *Ludlam*, 4 B. & C. 889; 7 D. & R. 484, *S. C.*

(*p*) See *Lloyd* v. *Winton*, Barnes, 148: 2 Wils. 28, *S. C.*: *Lindon* v. *Collins*, Willes, 429: *Gurney* v. *Buller*, 1 B. & Ald. 670: *Johnson* v. *Lawson*, 2 Bing. 341; 9 Moore, 642, *S. C.* And as to costs upon double pleadings, see *Dodd* v. *Jodrell*, 29 T. R. 325. And see Pt. 5, Ch. 31.

(*q*) See this enactment, *post*, Pt. 5, ch. 31.

(*r*) See *Wells* v. *Ody*, 3 Dowl. 860; 2 C., M., & R. 128, *S. C.* And see *Moberly* v. *Titterton*, 7 M. & W. 540; 9 Dowl. 234, *S. C.*

(*s*) See *Spencer* v. *Hamerton*, 4 A. & E. 413.

(*t*) See the forms, Chit. Forms, 130 to 197. See generally, Vol. 1, 627 to 632.

(*u*) See the forms, Chit. Forms, 434.

(*x*) See the forms, Chit. Forms, 436, 437.

costs (*y*). It seems the writ *de retorno habendo*, and a *fi. fa.* or *ca. sa.* for the damages and costs, may be included in one writ. The sheriff is not bound to execute a writ *de retorno habendo*, unless some person attend on behalf of the defendant, to shew him the goods; and it will be a good return to the writ, to say that no person did attend (*z*).

Proceedings on return of *elongata*.

If, to the *retorno habendo*, the sheriff return that the goods, &c., are eloigned, (that is, conveyed to places unknown to him, so that he cannot execute the writ), the defendant may then sue out a *capias in withernam* (*a*), requiring the sheriff to take other cattle &c. of the plaintiff, to the value of the cattle &c. eloigned, and deliver them to the defendant, to be kept by him until the plaintiff should deliver to him the cattle &c. originally replevied. If this writ be returned *nihil*, the defendant may sue out an *alias*, and after that a *pluries;* and if the *pluries* be returned *nihil*, the defendant may then, it seems, sue out a *scire facias* against the plaintiff's pledges, to shew cause why the price of cattle &c. eloigned should not be made of their lands and goods, and rendered to the defendant. If no cause be shewn to this *scire facias*, a writ issues to take the cattle &c. of the pledges. But if they have none, and the sheriff return *nihil* to the writ, the defendant may then have a *scire facias* against the sheriff himself, requiring him to shew cause why he shall not render to the defendant cattle &c. to the value of those eloigned (*b*). Or the defendant may, it should seem, proceed against the pledges by default, upon the *scire facias* above mentioned. Or, which is much the best and least circuitous method, if the sheriff have not taken pledges, or the pledges be insufficient, the defendant, upon the return of the *elongata*, may bring an action on the case against the sheriff, and recover damages, whether a *scire facias* have issued against the pledges or not (*c*).

5. *Proceedings against the Sureties in Replevin Bond.*

5. Proceedings against the sureties in the replevin bond.

We have seen, *ante*, 985, that the sheriff in every replevin for a distress for rent is bound to take from the party replevying, a bond, with sureties, to prosecute the replevin suit with effect and without delay, and for returning the goods distrained, if a return be awarded. We shall now proceed to consider how that bond may be forfeited, and what proceedings may be taken thereon, against the sureties, by the defendant in the replevin suit.

Replevin bond, when and how forfeited.

Replevin Bond, when and how forfeited.]—The replevin bond is forfeited by not prosecuting the replevin suit with success, as well as by making default in the prosecuting of it: therefore, you may sue the pledges on their bond, or the sheriff for not taking pledges, or not taking sufficient pledges, without

(*y*) See the form, Chit. Forms, 437, 438.

(*z*) 2 Saund. 74 b. c.

(*a*) *Anon.*, 2 Leon. 174. See the form, Chit Forms, 441.

(*b*) *Treseare* v. *Michelborne*, Hutt. 77; 1 Saund. 195, n. (3).

(*c*) 16 Vin. Abr. 399, 400: *Richards* v. *Acton*, 2 W. Bl. 1220: *Tesseyman* v. *Gildart*, 1 New Rep. 292: *Page* v. *Eamer*, 1 B. & P. 378. And see *Turnor* v. *Turner*, 2 B. & B. 107; 4 Moore, 606, 616, *S. C.*

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suing out a *retorno habendo* (*d*); unless in the case of a distress *damage feasant* (*e*). The plaintiff, by not appearing in the county court immediately succeeding the execution of the replevin bond, and then entering his plaint there, creates a forfeiture of the bond (*f*). So, the bond will be forfeited if he delay, or does not use diligence in prosecuting the suit; as, if he delay proceeding for two years (*g*), or even for a less time, and though the suit be not determined (*h*). The bond may be forfeited notwithstanding the removal of the cause into the superior court (*i*). But it is not forfeited by the plaintiff not prosecuting the suit with effect at the same county court at which he is bound to appear (*k*), or not declaring in the county court, if the defendant has not appeared therein to the summons (*l*). And if the plaintiff enter his plaint, and afterwards be restrained by injunction till his death, whereby the plaint abates, the bond will not be forfeited (*m*). So, if he dies before the termination of the suit, it will abate, and the bond will not be forfeited (*m*).

Assignment of, and action on the bond.

Assignment, how and when made.

Assignment of, and Action on the Bond.]—The sheriff is directed, by the statute 11 *G.* 2, *c.* 19, *s.* 23, to assign the bond to the avowant, or person making cognizance (*n*), in the same manner as a bail bond is assigned; and the party afterwards may bring an action on the bond, if forfeited, in his own name; and the Court may, by rule, give such relief to the parties as may be agreeable to justice and reason. The sheriff is liable to an action on the case if he refuse to assign the bond; and this liability extends, it seems, to a bond in a replevin of cattle taken *damage feasant* (*o*). It may be assigned four days exclusive after the time limited therein for the plaintiff to prosecute his suit (*p*). If the bond has been taken by one of the sheriffs of London, in his own name only, it may be assigned by him only (*q*).

To whom.

The bond may be assigned to, and the action brought by the avowant only, or by all the defendants, as well those avowing as those making cognizance (*r*). Where the avowant was the person really interested, and the person making cognizance a mere man of straw, the Court held that it might be assigned to the avowant only (*s*). If there be no avowant, it may be as-

(*d*) *Parreau* v. *Bevan*, 8 D. & Ry. 72: *Morgan* v. *Griffith*, 7 Mod. 381.

(*e*) *Hucker* v. *Gordon*, 1 C. & M. 58.

(*f*) *Dias* v. *Freeman*, 5 T. R. 195: *Ex parte Boyle*, 2 D. & R. 13. Though, perhaps, it is otherwise, if his appearance there is not necessary to the due prosecution of the suit. See *Rider* v. *Edwards*, 3 Scott, N. R., 456. And see *Jackson* v. *Hanson*, 8 M. & W. 485; 1 Dowl., N. S., 74, per *Parke*, B. And see also the pleadings in these cases, and *ante*, 990.

(*g*) *Axford* v. *Perrett*, 1 Moo. & P. 470; 4 Bing. 586, *S. C.* And see *Dias* v. *Freeman*, 5 T. R. 195.

(*h*) *Harrison* v. *Wardle*, 5 B. & Ad. 146; 2 N. & M. 703, *S. C.* And see *Rider* v. *Edwards*, 3 Scott, N. R., 463; 3 M. & G. 202, *S. C.*, per *Tindal*, C. J.

(*i*) *Goodhue* v. *Holbrook*, 1 B. & P. 410: *Waterman* v. *Yea*, 2 Wils. 41.

(*k*) *Jackson* v. *Hanson*, 8 M. & W. 476; *ante*, 986.

(*l*) *Seal* v. *Phillips*, 3 Price, 17.

(*m*) *Ormond* (*Duke of*) v. *Brierley*, Carth. 519; 12 Mod. 389, *S. C.* See 2 Q. B. 287, n. (*d*): *Morris* v. *Matthews*, 2 Q. B. 283; 1 G. & D. 677, where the plaintiff died after the suit had been removed by a *re. fa. lo.* And see *Jackson* v. *Hanson*, 8 M. & W. 497; 1 Dowl., N. S., 69, *S. C.*, *per Cur.*

(*n*) See *Dias* v. *Freeman*, 5 T. R. 195: *Middleton* v. *Sandford*, 4 Camp. 36: *Page* v. *Ramar*, 1 B. & P. 378. See the form of assignment, Chit. Forms, 404. And see Vol 1, 722.

(*o*) See per *Holroyd*, J., in *Parreau* v. *Bryan*, 5 B. & C. 305, in commenting on *Coombes* v. *Cole*, Rep. Temp. Hardw. 332.

(*p*) 2 Sel. Prac. 266.

(*q*) *Thompson* v. *Farden*, 1 Scott, N. R., 275; 8 Dowl. 813, *S. C.*

(*r*) *Phillips* v. *Price*, 3 M. & Sel. 180.

(*s*) *Archer* v. *Dudley*, 1 B. & P. 361, n.

signed to the person making cognizance (*t*); or, where the plaintiff neglects to prosecute his suit in the court below, the defendant is entitled to an assignment of the bond, though he has not avowed or made cognizance (*u*). An action cannot be brought by any party but the defendant in the replevin, or the sheriff (*x*).

Action, when and in what court brought.

The action may be commenced by the assignee immediately on the assignment and forfeiture of the bond. This remedy is not affected by the 17 *C.* 2, *c.* 7, notwithstanding defendant proceeds under that act (*y*). The action may be brought in any of the superior courts of law, though the replevin suit did not proceed further than in the county court (*z*). And when removed by *re. fa. lo.*, it may be brought in any of the superior courts, and it is not confined to the court in which the *re. fa. lo.* was returnable (*a*).

Staying proceedings on payment of value of goods or rent due, &c.

The Court or a judge will order the proceedings in an action on the replevin bond to be stayed on payment into court of the value of the goods distrained, and costs (*b*); or, if the value of the goods exceed the amount of the rent due at the time of the distress, then, it would seem, on payment of the rent due and costs (*c*). And if, in such a case, the amount of rent due be disputed, then the Court or a judge would, perhaps, as in other cases of liquidated claims (*d*), allow the defendants to pay into court the sum admitted by them to be due, and order that the plaintiff should proceed at the peril of costs if he do not prove a greater sum due. And in all cases the proceedings may be stayed on payment of the penalty and costs, and this though the plaintiff's costs in the replevin suit much exceed the penalty (*e*). If separate actions be brought against the sureties without sufficient reason, the Court will in general stay proceedings upon payment of the sum recoverable, and the costs in one action (*f*). Where three actions were brought against the principal and sureties on a replevin bond, the Court stayed the proceedings in two of them, the defendants therein undertaking to be bound by the decision in the other action (*g*). The Court will not in general stay the proceedings, unless it clearly appears that the application is made on behalf of the sureties, and not of the principal (*h*).

Setting aside irregular proceedings.

The proceedings may, if irregular or defective, be set aside, as in other cases. (See *post*, *Part* 5, *Chap.* 16). The Court will not, it seems, set the proceedings aside because the action is commenced before the forfeiture of the bond, for that may

(*t*) See *Page* v. *Eamer*, 1 Bos. & Pul. 378.

(*u*) See *Dias* v. *Freeman*, 5 T. R. 195: *Middleton* v. *Langford*, 4 Camp. 36.

(*x*) See *Page* v. *Eamer*, 1 Bos. & Pul. 378.

(*y*) Gilb. Replevin, 225: *Waterman* v. *Yea*, 2 Wils. 41: *Turner* v. *Turner*, 2 B. & B. 167; 4 Moore, 606, *S. C.*: *Parsons* v. *Bann*, 8 D. & Ry. 72.

(*z*) *Dias* v. *Freeman*, 5 T. R. 195: *Bankesbury* v. *Pell*, 12 East, 585.

(*a*) *Mann* v. *Hartley*, 7 Dowl. 461.

(*b*) *Gingell* v. *Turnbull*, 3 Bing. N. C. 881. The value was, in that case, ordered to be ascertained by the prothonotary.

(*c*) See *Hunt* v. *Round*, 2 Dowl. 558: *Miers* v. *Lockwood*, 9 Dowl. 975.

(*d*) See *Gower* v. *Elkins*, 6 Dowl. 335: *Parsons* v. *Pitcher*, 6 Dowl. 432.

(*e*) *Branscombe* v. *Scarbrough*, 6 Q. B. 13.

(*f*) See *Bartlett* v. *Bartlett*, 4 Scott, N. R., 779; 4 Mann. & G. 969, *S. C.*: *Warton* v. *Blacknell*, 1 Dowl. & L. 650. See as to bail, *ante*, Vol. 1, 725.

(*g*) *Bartlett* v. *Bartlett*, 4 Scott, N. R., 779; 4 Mann. & G. 969, *S. C.*

(*h*) *Warton* v. *Blacknell*, 1 Dowl. & L. 650; 12 M. & W. 556; 13 Law J., N. S., Exch., 112, *S. C.*

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be pleaded (*i*). Nor will they set aside an execution thereon upon an objection which might have been taken before judgment (*k*). And where it appeared that a greater sum had been indorsed on the writ of execution, and levied, than that to which the plaintiff was entitled, and that that amount had been paid over to him, the Court would not, at the instance of the sheriff, or a second execution-creditor, compel the plaintiff to refund the overplus (*l*).

Sureties, how far liable.

The plaintiff may, in general, recover to the extent of the penalty, but not beyond it (*m*). Where separate actions were brought against each of the pledges, it was holden that the plaintiff could recover, from both, damages only to the amount of the penalty, and from each the costs in the separate action against him individually (*n*). If the distress were for rent, they are not, either jointly or separately, liable beyond the amount of the rent in arrear at the time of the distress, and costs (*o*); and they are only liable for the value of the goods seized, and double costs; and if that exceeds the amount of rent due, they will be liable only for the rent (*p*). Where a sheriff took a replevin bond with one surety only, and was sued for taking insufficient pledges, in which action the plaintiff recovered damages and costs, it was held that the sheriff could not recover against the surety the costs of defending such action, nor more than a moiety of the damages awarded, the surety being deprived of calling on a co-surety for contribution (*q*).

How discharged.

The pledges in replevin cannot *plead* to an action on the replevin bond, that they are discharged by a reference to arbitration (*r*), or by time having been given to the plaintiff in replevin (*s*). But though they cannot so *plead*, nevertheless the Court or a judge might, on application, relieve them: and where the plaintiff and defendant, without the privity of the pledges, agreed to refer the replevin cause to arbitration, and that the replevin bond should stand as a security for the performance of the award, the Court relieved the pledges (*t*). They are not discharged by the defendant taking a verdict and judgment for the arrears of rent, &c., under the 17 *C.* 2, *c.* 19, *ss.* 2, 3 (*u*).

6. *Proceedings against the Sheriff for taking insufficient or no Sureties.*

6. Proceedings against the sheriff.

If the sheriff neglect to take a bond, he is not liable to an

(*i*) *Anon.*, 5 Taunt. 776.
(*k*) *Short* v. *Hubbard*, 10 Moore, 107; 2 Bing. 445, *S. C.*
(*l*) *Bowser* v. *Lloyd*, 9 Dowl. 1029.
(*m*) *Branscombe* v. *Scarbrough*, 6 Q. B. 13.
(*n*) *Hefford* v. *Alger*, 1 Taunt. 218.
(*o*) *Ward* v. *Henley*, 1 Y. & J. 285.
(*p*) *Hunt* v. *Round*, 2 Dowl. 558. And see *Miers* v. *Lockwood*, *supra*.
(*q*) *Austen* v. *Howard*, 1 Moore, 68; 7 Taunt. 28, *S. C.*; Id. 327; 2 Marsh, 352, *S. C.*
(*r*) *Moore* v. *Bowmaker*, 7 Taunt. 97; 7 Price, 223; 2 Marsh, 393, *S. C.*: *Aldridge* v. *Harper*, 10 Bing. 118; 3 Moo. & Sc. 518, *S. C.* And see *Hallett* v. *Mountstephen*, 2 D. & Ry. 343.
(*s*) *Moore* v. *Bowmaker*, 6 Taunt. 379.
(*t*) *Archer* v. *Hale*, 1 Moo. & P. 285; 4 Bing. 464, *S. C.* And see *Aldridge* v. *Harper*, 10 Bing. 124; 3 Moo. & Sc. 518, *S. C.*: *Bank of Ireland* v. *Beresford*, 6 Dowl. 238: *Donelly* v. *Dunn*, 2 B. & P. 45.
(*u*) *Turner* v. *Turner*, 2 B. & P. 107; 4 Moore, 606, 616, *S. C.*

attachment, nor will the court grant relief against him on motion (*x*); but the defendant, if damnified, may have his remedy against him by action on the case (*y*). So, he may have such action against him for taking insufficient pledges (*z*); and this, it seems, without getting a return of *elongata* to the writ *de retorno habendo*, or without even suing out that writ (*a*), unless in the case of a distress, *damage feasant* (*b*). The high-sheriff, under-sheriff, and replevin clerk, are all answerable to the defendant for the sufficiency of the pledges *de retorno habendo* (*c*). The sheriff, however, is not liable for taking insufficient pledges, if they were apparently responsible at the time of the taking the bond (*d*); but if the sheriff had notice of the fact of their insufficiency, or neglected the means in his power of knowing it, and did not use a reasonable degree of caution in deciding upon their sufficiency, he would be liable: and it is for the jury to say whether he used such caution or not (*e*). If a person known to the sheriff make inquiries as to the credit or reputation of a tradesman, and the value of his stock, and communicate the result of such inquiry to the sheriff, if it be favourable, the latter need not make a personal inquiry (*f*). And the sheriff or replevin clerk is not bound to go out of the office to make inquiries; but if the sureties are unknown to him, he ought to require information beyond their own statement as to their sufficiency (*g*). And, where persons of respectable appearance were brought to the replevin clerk as sureties, by the attorney's clerk, on behalf the party replevying, their circumstances being unknown both to the attorney's clerk and to the replevin clerk, and the latter caused the sureties to make affidavit in detail as to their sufficiency, with which he was satisfied, and an action was afterwards brought against the sheriff for taking insufficient sureties, it was considered that the jury might properly find that the inquiry made did not excuse the sheriff (*h*). The sheriff is, it seems, liable in this respect, if one of the sureties was insufficient (*i*). The sureties themselves may be witnesses to prove whether they were sufficient or not (*k*). The sheriff is liable only to the extent to which the sureties themselves are liable (*l*); and this is the limit, although a greater loss is confessed on the pleadings (*m*).

(*x*) R. v. *Lewis*, 2 T. R. 619: *Tvoells* v. *Colville*, Willes, 375.

(*y*) R. v. *Lewis*, 2 T. R. 617: *Treasyman* v. *Gibbart*, 1 N. R. 292; 1 Saund. 195; 2 Inst. 340. In *Perreau* v. *Bevan*, 5 B. & C. 284, an action was held to lie against the sheriff for losing the bond.

(*z*) *Rouse* v. *Patterson*, 16 Vin. Ab. 399.

(*a*) *Perreau* v. *Bevan*, 5 B. & C. 284. See 1 Brown, C. C., 427.

(*b*) *Hucker* v. *Gordon*, 1 C. & M. 56; 3 Tyrw. 107, *S. C.*

(*c*) *Richards* v. *Acton*, 1 W. Bl. 1220.

(*d*) *Hindle* v. *Blades*, 1 Marsh. 27; 5 Taunt. 225, *S. C.*

(*e*) *Jeffery* v. *Bastard*, 4 A. & E. 823: *Scott* v. *Waithman*, 3 Stark. 168; 1 Phil. Ev. 433. And see *Gwillim* v. *Scholay*, 6 Esp. 102.

(*f*) *Sutton* v. *Waite*, 8 Moore, 28.

(*g*) *Jeffery* v. *Bastard*, 4 A. & E. 823; 6 Nev. & M. 303, *S. C.*

(*h*) *Jeffery* v. *Bastard*, 4 A. & E. 823.

(*i*) *Scott* v. *Waithman*, 3 Stark. 168. But he is not bound to take more than one pledge on a replevin for distraining cattle *damage feasant*. (*Hucker* v. *Gordon*, 1 C. & M. 58).

(*k*) 1 Saund. 195 *g.* (n.): *Hindle* v. *Blades*, 5 Taunt. 225; 1 Marsh. 27, *S. C.*

(*l*) *Evans* v. *Brander*, 2 H. Bla. 547: *Baker* v. *Garratt*, 3 Bing. 59; 10 Moore, 324, *S. C.*: *Paul* v. *Goodluck*, 2 Bing., N. S., 220: overruling *Yea* v. *Lethbridge*, 4 T. R. 433. As to the extent of the liability of the sureties, see *ante*, 1006.

(*m*) *Jeffery* v. *Bastard*, 4 A. & E. 823.

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Taking an assignment of the replevin-bond is not a waiver of your remedy against the sheriff; and, therefore, if, after proceeding against the pledges, you find them insufficient, you may still bring your action against the sheriff for taking insufficient pledges (*n*).

(*n*) 1 Saund. 195 e. And see *Baker* v. *Garrett*, 3 Bing. 56; 10 Moore, 324, *S. C.*

CHAPTER III.

SCIRE FACIAS.

SECT. 1. *What, and in what Cases requisite,* 1009 *to* 1023.
2. *Proceedings upon,* 1024 *to* 1033.

SECT. 1.

What, and in what Cases requisite, &c.

A SCIRE FACIAS is a judicial writ, founded upon some record, and requiring the person against whom it is brought to shew cause why the party bringing it should not have advantage of such record, or (as in the case of a *scire facias* to repeal letters-patent) why the record should not be annulled and vacated. It is, however, considered in law as an action, and in the nature of a new original (*a*); and, when brought to repeal letters-patent, may in fact be an original writ, returnable in Chancery (*b*), or a judicial writ returnable in the superior court (*c*). The *scire facias* against bail on their recognisance, against pledges in replevin, to repeal letters-patent, or the like, is in fact altogether an *original proceeding;* but, when brought to revive a judgment after a year and a day, or upon the death, marriage, or bankruptcy, &c., of parties, or when brought on a judgment in debt on bond, or on a judgment *quando* &c., against an executor, it is a *continuation* of the original action (*d*), though not, perhaps, merely so, for it creates a new right (*e*). In some cases it is merely an *interlocutory* proceeding, and in the nature of process, as in the case of a *scire facias quare executionem non,* and *scire facias ad audiendum errores,* when those writs were in force; sometimes a proceeding after the action has terminated, as in the case of *scire facias quare restitutionem non,* and *scire facias ad rehabendam terram.* It seems doubtful whether a *scire facias* will lie upon an interlo-

(a) See *Woolaer* v. *Gresham*, Skin. 682; Comb. 468, S. C.: *Winter* v. *Kretchmer*, 2 T. R. 46: *Fenner* v. *Evans*, 1 Id. 267.

(b) See the form, Tidd's Forms, 426; also a form of *scire facias* for the Queen on a bond and declaration, Id. 494. As to when her Majesty must proceed by *scire facias*, and not by information of debt, see *Att.-Gen.* v. *Sewell*, 4 M. & W. 77; 6 Dowl. 673; 8 C. & P. 376, S. C.

(c) 3 H. 4, 6, 29.

(d) See *Executors of Wright* v. *Nutt*, 1 T. R. 388. And see *Agassis* v. *Palmer*, 8 Scott, N. R., 603; 1 Dowl. & L. 18, S. C.

(e) *Farrell* v. *Gleeson*, 11 Cl. & Fin. 702.

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cutory judgment to revive it, after it has been signed a year and a day (*f*).

Limitation of, by statute.

A *scire facias*, being founded on matter of record, was not within the Statute of Limitations, 21 *Jac.* 1, *c.* 16, *s.* 3. But now, by the Law Amendment Act, 3 & 4 *W.* 4, c. 42, *s.* 3, a *scire facias*, upon a recognisance, is included in the limitation of actions therein prescribed: viz. ten years after the then session of parliament, or twenty years after the cause of action or suit, but not after. And the effect of the 3 & 4 *W.* 4, *c.* 27, *s.* 40, upon the proceeding by *scire facias* on a judgment, appears to be, that no *scire facias* can be sued out to revive a judgment, unless within twenty years next after a present right to receive the sum due on the judgment shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and that even in such case no such proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given. But it would seem that this section does not apply to judgments on which a *scire facias* has been sued out, and judgment obtained thereon within twenty years; and if the statute were pleaded to a *scire facias* to revive such a judgment, it seems, from analogy to the cases decided on the Statute of Limitations, that the intermediate *scire facias* and judgment thereon might be replied.

Writ of error no bar to.

It seems that a writ of error does not prevent the plaintiff from proceeding by *scire facias* on a judgment (*g*); and it has been expressly decided, that, on a *scire facias* to revive a judgment against an executor, it is not a good plea that a writ of error is pending (*h*).

Defendant cannot be held to bail in.

The defendant cannot be held to bail on a *scire facias*; for the 1 & 2 *Vict. c.* 110, *s.* 3, does not apply to such a case (*i*).

Is within R. H. T., 4 W. 4.

A *scire facias* is within the rules of *H. T.*, 4 *W.* 4, when it is a continuation of the original action, and that action was within those rules (*k*).

In what cases a sci. fa. is necessary.

It is a general rule, that, where a person, who is not a party to a judgment or recognisance, derives a benefit by, or becomes chargeable to the execution, there must be a *scire facias* to make him a party to the judgment or recognisance (*l*). In a case coming within this rule, where the plaintiff proceeded by suggestion instead of *scire facias*, and a writ of error was brought, which prayed that the judgment and award of

(*f*) *Benn* v. *Greatwood*, 6 Scott, 891.
(*g*) *Thomas* v. *Williams*, 3 Dowl. 665.
(*h*) *Snook* v. *Mattock*, 5 A. & E. 239. See Tidd, 9th ed., 530; Com. Dig., Pleader (3 L. 10); Bac. Abr., Supersedeas (D. 5): *Sampson* v. *Brown*, 3 T. R. 643.
(*i*) *Aggassis* v. *Palmer*, 6 Scott, N. R., 603; 1 Dowl. & L. 18, *S. C.*
(*k*) *Collins* v. *Beaumont*, 5 Dowl. 700.
(*l*) 2 Saund. 6 n. 1: *Penoyer* v. *Brace*, 1 Salk. 319; 1 L. Raym. 245. See *post*, Pt. 4, Ch. 3, as to *sci fa.* being necessary before issuing execution against members of a public company, upon a judgment obtained against their public officer.

execution might be reversed, &c., the Court reversed the judgment as to the award of the execution, affirming the rest (*m*).

The cases in which a *scire facias* is necessary shall be considered under the following heads:—

1. Scire Facias, *to revive a Judgment after a Year and a Day*—1011.
2. ————, *upon the Death of Parties*—1013.
3. ————, *upon the Marriage of Feme Plaintiff or Defendant*—1019.
4. ————, *upon the Bankruptcy, &c. of Parties*—1020.
5. ————, *on a Judgment quando &c., against an Executor*—1021.
6. ————, *in other Cases*—1022.

1. *Scire Facias to revive Judgment after a Year and a Day.*

1. To revive a judgment after a year and a day. When necessary.

When a year and a day have elapsed after judgment signed, without execution being sued out upon it, the law presumes that the judgment has been satisfied, or that the plaintiff has released the execution; and therefore it is that a *scire facias* is required in such a case, in order to give an opportunity to the defendant to shew that the judgment has been already satisfied, or other cause, if he can, why execution should not issue against him (*n*). And so strict is the rule in this respect, that a plaintiff cannot sue out a *ca. sa.* after the year, even for the purpose of proceeding against the bail, without first reviving the judgment against the principal by *scire facias* (*o*). At common law, a judgment in a personal action could not be revived, after a year and a day, by *scire facias*, but the only remedy the plaintiff had was to bring an action of debt on the judgment (*p*). In real (*q*) and mixed actions (*r*), it was otherwise. By stat. *Westm.* 2, (13 *Ed.* 1), *c.* 45, however, all matters inrolled, to which the Court can give effect, shall have such force, that it shall no longer be necessary to implead upon them; but if the plaintiff come into the court within a year, he shall have execution forthwith; or if he come after the year, a *scire facias* shall issue to warn the defendant to appear and shew cause why the said matters inrolled should not be executed; and if he shew no cause, or if he do not appear, then the sheriff shall be commanded to cause the said matter inrolled to be executed. This statute extends to judgments in

(*m*) *Rainsford* v. *Bosanquet*, 12 Ad. & E. 813; 2 G. & D. 324, *S. C.* And see *post*, 1041.

(*n*) 2 Inst 470; 2 Bac. Abr., Execution, H. It is necessary in the case of an *elegit*, as in other cases: *Putland* v. *Newman*, 6 M. & Sel. 179: *Seymour* v. *Greenwill*, Carth. 263: *Cooke* v. *Bathurst*, 2 Show. 238; Comb. 232; Clift. 874, 883.

(*o*) *Cholmondeley* v. *Bealey*, 2 L. Raym. 1096: *Cholmley* v. *Veal*, 6 Mod. 304.

(*p*) 2 Inst. 469; Co. Litt. 290. b.

(*q*) 2 Inst. 470: *Booth* v. *Booth*, 6 Mod. 288.

(*r*) *Withers* v. *Harris*, 1 Salk. 258; 2 Id. 600; 7 Mod. 64; 2 L. Raym. 806, *S. C.*: *Proctor* v. *Johnson*, 1 L. Raym. 609.

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ejectment (*s*); and, indeed, from the general manner in which it is worded, it would seem to include judgments in every species of action, real, personal, and mixed. It seems doubtful whether it extends to interlocutory judgments (*t*). The year mentioned in the statute must be computed from the time of the signing of the judgment (*u*), and by calendar months, and not by terms (*x*).

Not necessary for Queen.

A *scire facias* is not necessary to revive a judgment for the Queen (*y*).

Nor where plaintiff unable to issue execution within the year.

Also, if the plaintiff has been prevented from suing out execution by a writ of error (*z*), or injunction (*a*), or by having a judgment with a *cesset executio* for a certain time (*b*), or by agreement (*c*), the year and a day do not begin to run until the writ of error is determined, the injunction dissolved, or the time for which the execution was stayed has elapsed.

Nor where writ of error brought.

And it has even been determined, that if a writ of error be brought after the year, and the judgment be affirmed (*d*), or the plaintiff be nonsuit, or the writ of error be discontinued (*e*), the party may sue out execution, without a *scire facias*, at any time within a year and a day from such determination of the writ of error; because the other party, by bringing error, has revived the judgment.

Nor where dispensed with.

Also, it is not necessary, before issuing execution on a judgment more than a year old, to sue out a *scire facias*, if the defendant has agreed to dispense with the necessity for so doing; and an agreement to this effect is frequently inserted in cognovits and warrants of attorney (*f*). A parol agreement is sufficient (*g*).

Nor where execution issued within a year.

If a writ of execution is sued out within the year, it may be executed at any time after its date before the return-day, even after the expiration of the year; and, if returnable immediately after execution, it will continue in force until executed, without being returned and filed within the year; and if it be not executed, so as to give the party obtaining the judgment the full benefit of it, other writs of execution may be sued out after the year, and this without first returning and filing the first writ (*h*). But it is no objection to a *scire facias*, that a *fi. fa.* has issued within a year after the judgment was entered

(*s*) *Withers* v. *Harris, supra*: *Underhill* v. *Devereux*, 2 Saund. 72 e. See per *Bayley*, J., in *Putland* v. *Newman*, 6 M. & Sel. 181. It lies on a judgment against the casual ejector. *Doe Rambottam* v. *Roe*, 2 Dowl., N. S., 690.

(*t*) *Benn* v. *Greenwood*, 6 Scott, 891. The Court refused to decide the question on motion, *S. C.*

(*u*) *Simpson* v. *Gray*, Barnes, 197. See the forms of writ to revive a judgment, Chit. Forms, 444, 445.

(*x*) *Winter* v. *Lightbound*, 1 Str. 301.

(*y*) *Anon.*, 2 Salk. 603: *Burr* v. *Attwood*, 1 L. Raym. 398.

(*z*) 2 Inst. 471; 5 Co. 88: Ro. Abr. 899: *Winter* v. *Lightbound*, 1 Str. 301: *Booth* v. *Booth*, 6 Mod. 228; 1 Salk. 322, *S. C.*: *Adams* v. *Savage*, 3 Id. 321.

(*a*) *Michel* v. *Cue*, 2 Burr. 690. And see Tidd, 9th ed., 1105: *Pewis* v. *Pewis*, 6 Moore, 517. But see *Winter* v. *Lightbound*, 1 Str. 301: *Booth* v. *Booth*, 1 Salk. 322: 3 P. Wms. 36; Bac. Abr., Sci. Fa., C.

(*b*) *Hiscocks* v. *Kemp*, 5 Nev. & M. 113; 3 A. & E. 676, *S. C.*: *Dillon* v. *Bresca*, 6 Mod. 14: *Booth* v. *Booth*, Id. 228: *Withers* v. *Harris, supra*: *Belloes* v. *Hamsford*, 1 Ro. Rep. 104; Tidd, 9th ed., 1104.

(*c*) *Hiscocks* v. *Kemp*, 3 Ad. & E. 676: *Morris* v. *Jones*, 2 B. & Cres. 242; 3 D. & Ry. 603, *S. C.* *Ante*, 846, 874.

(*d*) Ro. Abr. 899. And see *Fish* v. *Wiseman*, Palm. 449; Latch. 193, *S. C.*

(*e*) *Belknis* v. *Hansford*, C. Jac. 364. And see 1 Ro. Rep. 104, *S. C.*: *Dennis* v. *Drake*, Lane, 20: *Howard* v. *Pitt*, 1 Show. 402, 403.

(*f*) See *ante*, 846, 874. And see *Harmer* v. *Johnson*, 3 D. & L. 38; 14 M. & W., *S. C.*

(*g*) *Morgan* v. *Burgess*, 1 Dowl., N. S., 850.

(*h*) Vol. 1, p. 598. And see *Franklin* v. v. *Hodgkinson*, 3 D. & L. 654.

up, so that the plaintiff might have had execution by continuing it without a *scire facias* (*i*).

Nor on judgment under 1 & 2 Vict. c. 110, s. 87.

Also, no *scire facias* is necessary to revive a judgment against an insolvent, on the warrant of attorney given before adjudication, under the 1 & 2 *Vict. c.* 110, *s.* 87, and execution may at all times be issued thereon by order of the insolvent Court.

Execution sued out after year and day voidable.

Execution sued out without a *scire facias* after the year and a day, is voidable, but not void (*k*), and may be set aside at any time (*l*) within twenty years, upon application to the court or a judge (*m*). The omission to sue out a *scire facias*, when requisite, is also a ground of error (*n*).

2. Scire Facias, *upon the Death of Parties* (*o*).

On Death of sole Plaintiff or Defendant after final Judgment and before Execution, 1013.

The like between Verdict and Judgment, 1015.

The like between interlocutory and final Judgment, 1017.

On Death of one of several Plaintiffs or Defendants, after Judgment, 1019.

2. Scire facias, upon death after final judgment and before execution.

Death of sole Plaintiff or Defendant after final Judgment and before Execution.]—If the plaintiff die after final judgment, his executors &c. must sue out a *scire facias* against the defendant, before they can have execution; or, if the defendant die after final judgment, a *scire facias* must be sued out against his executors, or against his heir and terretenants (*p*). But if the plaintiff die after a *fi. fa.* sued out, inasmuch as the sheriff derives authority from the writ, it may be executed notwithstanding, and the executor or administrator shall have the money (*q*); or if the plaintiff appointed no executor, or administration be not granted, the money must be brought into court, and there be deposited, until &c. (*r*) So, if the defendant die after the judgment, we have seen that a writ of execution may, in some cases, be sued out against his goods in the hands of his executor, without a *scire facias*, provided such writ of execution bear *teste* before his death (*s*). So, if he die after a *fi. fa.* sued out, but before it has been executed, there is no necessity for a *scire facias*, but the writ may be executed upon the defendant's goods in the hands of his executor,

(*i*) *Hobart* v. *Newlands*, 5 Q. B. 634. And see Id. 367.

(*k*) *Blanchenay* v. *Burt*, 12 Law J., N. S., 291, 4 Q. B., 707, S. C.: *Patrick* v. *Johnson*, 3 Lev. 404: *Shirley* v. *Wright*, 1 Salk. 323; 2 L. Raym. 775, S. C.: *Reynolds* v. *Martin*, 1 G. & D. 157. See *Mortimer* v. *Piggott*, 2 Dowl. 615; 4 Ad. & E. 363, N. S.

(*l*) *Gouldsmith d. Murrell* v. *Buttsitle*, 9 Dowl. 1019.

(*m*) *Pulland* v. *Newman*, 6 M. & Sel. 179.

(*n*) *Gouldsmith d. Murrell*, *supra*; *Mortimer*, *Piggott*, *supra*; *Blanchenay* v. *Burt*, *supra*.

(*o*) Vol. 1, p. 528.

(*p*) Fitz. Execution, 243; 1 Saund. 219 e, f; 2 Saund. 6, 72 o. By a terretenant here is meant the owner of the fee. (*Braithwaite* v. *Skinner*, 5 M. & W. 320; per *Parke*, B., 2 Saund. 9 a, n. 9).

(*q*) *Cleve* v. *Beer*, Cro. Car. 459: *Harrison* v. *Bowden*, 1 Sid. 29: *Clerk* v. *Withers*, 2 L. Raym. 1073; 1 Salk. 322, *S. C.*; Tidd, 9th ed., 1000.

(*r*) *Thoroughgood's case*, Noy, 73: *Clerk* v. *Withers*, 2 L. Raym. 1073.

(*s*) See 2 Bac. Abr., Execution, G. 2; 2 Williams, Exors., 1217, 1228.

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&c. (*t*) If a judgment be revived by *scire facias*, and the defendant die before execution, a new *scire facias* must be issued against his executors &c., before the plaintiff can execute the judgment (*u*).

By and against whom to be issued.

Against personal representative.

The *scire facias* must be brought by or against the person or persons who represent the deceased. If the plaintiff in a personal action die, the *scire facias* must be brought by his executor or administrator; in a real action by his heir (*x*). In a mixed action, it is said, if the lands to be recovered be fee-simple, the heir and executor shall join in the *scire facias*, and the heir have execution as to the lands, and the executor execution as to the damages (*y*). On the death of a plaintiff, the *scire facias* may be in the names of all the executors, though one only has proved the will (*z*). If the defendant die, the *scire facias* must be brought against his executor, or his heir and terretenants, as shall be mentioned presently.

Against representative of representative.

A *scire facias* may be sued out by or against the executor of an executor who has proved the will; but not by or against the administrator of an executor, or the executor or administrator of an administrator, because they do not represent the deceased (*a*). In these latter cases, administration *de bonis non* must be sued out, and then the administrator *de bonis non* may, by 17 *C.* 2, *c.* 8, *s.* 2, sue out a *scire facias*, and have execution of the judgment; or he may perfect an execution already begun (*b*). This statute, however, does not extend to allow an administrator *de bonis non* to proceed upon a judgment in *scire facias* (*quod habeat executionem*) already obtained by the executor in his lifetime, but he must sue out a *scire facias* to revive the original judgment (*c*); nor does it extend to judgments by default, but to judgments after verdict only (*b*). Also, if a judgment be recovered *against* an executor who dies intestate, it may be revived as against the administrator *de bonis non*, at common law, and execution had upon the judgment (*d*).

By administrator *durante minori* &c.

If an administrator *durante minori ætate* bring an action, and recover, and the executor then come of age, the latter may have a *scire facias* upon the judgment (*e*).

Where personal representative feme covert &c.

If the personal representative of the deceased be a *feme covert*, her husband must be made a party to the *scire facias* (*f*). But if the personal representative be a bankrupt, he may notwithstanding proceed or be proceeded against by *scire facias*; for his bankruptcy does not affect his representative character (*f*).

Against heir and terretenants.

If *nihil* be returned to a *scire facias* against the executor, the plaintiff may have a *scire facias* against the heir and terretenants (*g*), in order to have execution of any lands of which

(*t*) 6 Bac. Abr., Sci. Fa., C. 1. *Ante*, Vol. 1, p. 548.

(*u*) *Hardisty* v. *Barry*, 2 Salk. 598.

(*x*) 6 Bac. Abr., Sci. Fa., C. 5.

(*y*) 19 E. 4, 5 b; 43 E. 3, 2; Ro. Abr. 889.

(*z*) *Scott* v. *Briant*, 6 Nev. & M. 381; 2 H. & W. 54, *S. C.*

(*a*) 5 Co. 9 b.

(*b*) *Clerk* v. *Withers*, 1 Salk. 323; 2 L. Raym. 1072; 6 Mod. 290; 11 Id. 34, *S. C.*

(*c*) *Trevilian* v. *Lawrence*, 2 L. Raym. 1049.

(*d*) 2 Saund. 72 o: *Snape* v. *Norgate*, Cro. Car. 167; 1 Ro. Abr. 890, T. pl. 3: *Norgate* v. *Snape*, W. Jon. 214.

(*e*) Ro. Abr. 888: *Beamond* v. *Long*, Cro. Car. 227; 2 Brownl. 83; Godb. 104: *Hatton* v. *Mascal*, 1 Lev. 181. See forms of *scire facias* for or against an executor, &c., to revive a judgment obtained by or against the testator, &c., Chit. Forms, 495, 461; Co. Ent. 617 a, 618 b; Lil. Ent. 638 to 659. And see *Morfoot* v. *Chivers*, 1 Str. 631; 2 L. Raym. 1395, *S. C.*

(*f*) 2 Saund. 72 o.

(*g*) By terretenants here is meant the owners of the fee. (2 Saund. 9 a, n. 2: *Brathwaite* v. *Skinner*, 5 M. & W. 320).

the defendant was seised at the time of or after the judgment (*h*); but it is said that, in the case of a judgment against one defendant, the *scire facias* will not lie against the heir and terretenants, unless *nihil* have first been returned to a *scire facias* against the personal representatives of the deceased (*i*). It is usual to join the heir and terretenants in the writ (*k*). It may, however, be sued out against the heir alone, without naming the terretenants; but it seems that it cannot be sued out against the terretenants alone, without the heir, unless the latter has been already summoned, or it be returned that there is no heir, or that he has no lands; for he may have a release or some other matter to plead in bar of execution (*l*). If brought against both, and it be returned that the heir has no lands, it is said the writ may proceed against the terretenants without him (*m*). The writ may be against the tenants either generally or by name (*n*). The former, however, is preferable; for if the plaintiff undertake to name them, and do not name them all, those named may plead in abatement (*o*). After a *scire facias* against the heir and terretenants, the plaintiff, previous to the 1 & 2 *Vict. c.* 110, could have had execution only of a moiety of the lands of the defendant in the hands of the heir or terretenants, by *elegit*, in the same manner as if the defendant were living (*p*); although the heir had pleaded a false plea (*q*), which, in actions against an heir on the bond of his ancestor, would have the effect of charging the defendant in the same manner as if the action were for his own debt (*r*). But, by the 11th section of that statute, (*ante, Vol* 1, *p.* 600), the effect of the *elegit* (except in certain cases already noticed, as against purchasers, mortgagees, and creditors) has been extended so as to give the plaintiff execution of all such lands, tenements, rectories, tithes, rents, and hereditaments, including such lands and hereditaments of copyhold or customary tenure, as the debtor, or any person in trust for him, shall have been seised or possessed of at the time of entering up the judgment, or at any time afterwards, or over which such person shall, at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit.

Death between verdict and judgment.

Death of sole Plaintiff or Defendant between Verdict and Judgment.]—By the common law, if any one of the parties died before final judgment, the suit abated (*s*). But by stat. 17 *C.* 2, *c.* 8, *s.* 1, in all actions, personal, real, or mixed, the death of either party between verdict and judgment shall not be alleged for error, so as such judgment be entered within

(*h*) 2 Saund. 7, n. (4); 72 o, p.

(*i*) Preston v. *Terretenants of Hall*, Carth. 107: *Eyres* v. *Taunton*, Cro. Car. 313; 2 Salk. 598, *S. C.*

(*k*) F. N. B. 597 a: *Sir C. Haydon's case*, Cro. El. 896: *Eyres* v. *Taunton*, *supra*: Preston v. *Terretenants of Hall*, 2 Salk. 598; Lil. Ent. 384, 385.

(*l*) 6 Bac. Abr., Sci. Fa., C. 5; 27 H. 6, 13b; 1 E. 2, 243; 3 Co. 13 a: *Eyres* v. Taunton, Cro. Car. 295, 313.

(*m*) F. N. B. 597 a.

(*n*) Proctor v. *Johnson*, 2 Salk. 600; 1 L. Raym. 669, *S. C.*

(*o*) *Beresford* v. *Cole*, Comb. 232: *Adams* v. *Terretenants of Savage*, 1 Salk. 40; 2 Id. 679, 601; 6 Mod. 134, 199, 226, *S. C.*: *Holland* v. *Lee*, 1 Ro. Rep. 57.

(*p*) 2 Saund. 7 n.

(*q*) *Bowyer* v. *Rivett*, W. Jon. 87, 88: *Brandlin* v. *Milbank*, Carth. 93; Comb. 162, *S. C.*

(*r*) See the forms of *scire facias* &c. against heir and terretenants, Chit. Forms, 463.

(*s*) See Saund. 72 l.

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two terms after such verdict (*u*). It would seem that the in tention of the statute was to make a verdict, obtained against party who dies before judgment is signed, equivalent to judgment entered up during the lifetime of such party, pro vided it be entered up as above (*x*). The statute extends t all personal actions, notwithstanding the cause of action coul not have survived to the representatives of the deceased, as fo a libel, &c. (*y*) It does not extend to a nonsuit (*z*).

Before assizes or sittings.

Nor is the death of either party, before the assizes or sit tings, remedied by this statute (*a*); but the death of a part after the assizes began (*b*), or after the first day of the sit tings, though before the trial (*c*) is, for the assizes or sittings are but one day in law.

When entered.

It is not necessary that the judgment should be actually en tered upon the roll within two terms after the verdict; if i be signed within that time, it will suffice (*d*).

Leave to enter nunc pro tunc.

The Court will in general permit a judgment to be entered *nunc pro tunc*, where the signing of it has been delayed by the act of the Court. Therefore, if a party die after special verdict, or after a special case has been stated for the opinion of the Court, or after a motion in arrest of judgment, or for a new trial, or after a demurrer set down for argument, and pending the time taken for argument, or whilst the Court are considering of their judgment, the Court will allow judgment to be entered up after his death *nunc pro tunc*, in order that a party may not be prejudiced by a delay arising from an act of the Court (*e*). But if the judgment was not entered up by reason of the laches of the plaintiff, or those representing him (*f*), or by reason of a proceeding in the common course of law, as by a writ of error, or the like (*g*); or if some prejudice would arise to the other party, to which he could not otherwise be subject (*h*), the Court will not allow the judgment to be so entered up. In fact, they will not grant such leave in any case, except where the party entitled to sign judgment has been prevented so doing, by reason of an unavoidable delay occasioned by an act of the Court (*g*). Therefore, where a verdict was found, subject to a special case, to be agreed on between the parties, but it was not set down for argument

(*u*) See *Pond* v. *King*, 1 Wils. 194: *Copley* v. *Day*, 4 Taunt. 702. In *Chaswell* v. *Chiswell*, 4 B. & Ad. 800; 1 Nev. & M. 731, *S. C.*, where plaintiff's attornies gave defendant's attornies their own undertaking as security for costs; the defendant obtained a verdict and died, and judgment was entered up in his name within two terms: it was held that the attorney for such deceased party, having a claim against his estate in respect of the costs, might enforce the security to satisfy such claim, without any *scire facias* having been sued out by the personal representatives.

(*x*) *Burnett* v. *Holden*, 1 Lev. 277; 2 Keble, 549: *Saunders* v. *M'Geoveran*, 12 M. & W. 221; 3 D. & L., 405, *S. C.*: *Colbeck* v. *Peak*, 2 L. Raym. 1280.

(*y*) *Palmer* v. *Cohen*, 2 B. & Ald. 966.

(*z*) *Doebiggin* v. *Harrison*, 10 B. & C. 480.

(*a*) *Taylor* v. *Harris*, 3 B. & P. 549.

(*b*) *Anon.*, 1 Salk. 8: *Plumer* v. *Webb*, 2 L. Raym. 1415: *Anon.*, 7 T. R. 32 n.

(*c*) *Jacobs* v. *Minicond*, 7 T. R. 31. Each sittings in term is considered independent of the others. (*Johnson* v. *Bridge*, 3 Dowl. 207. See *Johnson* v. *Hamilton*, 4 Dowl. 702.

(*d*) *Helis* v. *Baker*, 1 Sid. 365: *Webb* v. *Spurrell*, Barnes, 261; 2 Saund. 79 n. See *Duke of Norfolk's case*, 1 Salk. 401.

(*e*) *Miles* v. *Bough*, D. & L. 105: *Lawrence* v. *Hodson*, 1 Y. & J. 353: *Gilbert* v. *Dyneley*, 3 Scott, N. R., 326: *Arniston* v. *Lipscombe*, 6 Jur. 371, B. C., per *Patteson*, J.: *Lanman* v. *Lord Audley*, 2 Scott, 93; 8 Bing. 92: *Vaughan* v. *Wilson*, M. & W. 255: *Bridges* v. *Smith*, 1 M. & 5 Scott, 404; 4 Bing., N. S., 194, *S. C.*: *Evans* v. *Rees*, 2 Ad. & E. 167; 4 P. & D. 36, *S. C.*: *Mare* v. *Quin*, 6 T. R. 6, a case against executors.

(*f*) *Bates* v. *Lechmere*, 1 T. R. 667.

(*g*) *Lanman* v. *Lord Audley*, 2 M. & W. 535: *Evans* v. *Rees*, *supra*: *Vaughan* v. *Wilson*, *supra*: *Bowler* v. *Wheelwright*, Barnes, 262: *Lawrence* v. *Hodgson*, 1 Y. & J. 353.

(*h*) Per Cur., *Miles* v. *Bough*, 3 Dowl. & L. 106.

until after the death of one of them, against whom judgment was ultimately given; the Court refused to allow judgment to be entered *nunc pro tunc*, at the instance of the successful party, as the delay in setting down the special case could not be considered as that of the Court (*i*). So, where an instalment on a cognovit became due after the death of a defendant, the Court refused to allow judgment to be entered up on the cognovit *nunc pro tunc* (*j*). And so, where a judge's order was made to stay proceedings on a certain day named in the order, on payment of debt and costs, the plaintiff having liberty to sign judgment in case the costs were unpaid: the plaintiff died before the day named. *Coleridge*, J., held, that the judgment could not be entered *nunc pro tunc* (*k*). We have seen, *ante*, *Vol.* 1, *p.* 468, that, by the rule of *H. T.*, 4 *W.* 4, *r.* 3, judgments must be entered up of the day of the month and year when signed, and shall not have relation to any other day, with a proviso empowering the Court or judge to order a judgment to be entered up *nunc pro tunc;* and the Court or judge may still, therefore, as formerly, order the judgment to be entered up *nunc pro tunc;* but that proviso does not give them greater powers than they had before (*l*). It may be added, that the power of the Court to enter judgment *nunc pro tunc* does not in any respect depend upon stat. 17 *C.* 2, *c.* 8: it is a power at common law, and by the ancient practice of the Court, to prevent an unjust prejudice to the suitor by the delay unavoidably arising from the act of the Court. The effect of the judgment, when entered, may depend upon the statute; but the power to enter it does not (*m*).

Form of judgment.

The judgment is entered for or against the deceased party, as if he were living (*n*). But though this is so, it must be revived by *scire facias* before execution can be sued out upon it (*o*). It may be so revived both against the personal representatives (*p*) and the heir and terretenants (*q*). As the *scire facias* must pursue the judgment, it must recite it as if it had been entered in the deceased party's lifetime (*r*); and be in the same form as if he had died after judgment (*s*).

Must be revived by sci. fa.

Death of sole Plaintiff or Defendant between interlocutory and final Judgment.]—By the common law, as we have just seen, the suit abated, if either of the parties died before final judgment. But by the 8 & 9 *W.* 3, c. 11, *s.* 6, if either plaintiff or defendant, in actions in courts of record, die after interlocutory and

Death between interlocutory and final judgment.

(*i*) *Doe Taylor* v. *Crisp*, 7 Dowl. 584.

(*j*) *Blackburn* v. *Godrick*, 9 Dowl. 337: *Lamman* v. *Lord Audley*, 2 M. & W. 535: *Vaughan* v. *Wilson*, *supra*.

(*k*) *Wilkins* v. *Canty*, 1 Dowl., N. S., 253, per *Coleridge*, J. "The inconveniences for the future may be very easily remedied by the introduction of a few words into these orders." And see *Wilks* v. *Peyto*, 5 Scott, N. R., 42, where the plaintiff was misled by the officer at the Master's Office in delaying the judgment; and per *Tindal*, C. J., *S. C.*, "If it had appeared that the officer refused to sign judgment, the plaintiff might have had good ground for the present application."

(*l*) *Lamman* v. *Lord Audley*, 2 M. & W. 535; *Vaughan* v. *Wilson*, *supra*: *Doe Taylor* v. *Crisp*, 7 Dowl. 584: *Lambirth* v. *Barrington*, 2 Bing. N. C. 149.

(*m*) *Evans* v. *Rees*, 12 Ad. & E. 167; 4 P. & D. 36, *S. C.* See *Copley* v. *Day*, 4 Taunt. 602.

(*n*) *Weston* v. *James*, 1 Salk. 42: *Colebeck* v. *Peck*, 2 L. Raym. 1280.

(*o*) *Earl* v. *Brown*, 1 Wils. 302. See *Saunders* v. *M'Gowran*, 12 M. & W. 221; 1 D. & L. 405.

(*p*) *Burnett* v. *Holden*, 1 Lev. 277; 2 Keb. 549.

(*q*) *Saunders* v. *M'Gowran*, 12 M. & W. 221; *ante*, 1014, 1015.

(*r*) *Colebeck* v. *Peck*, 2 L. Raym. 1280. And see *Burnett* v. *Holden*, 1 Lev. 277; 2 Saund. 72 m.: *Saunders* v. *M'Gowran*, *supra*.

(*s*) See *ante*, 1014. See the form, Chit. Forms, 459.

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before final judgment, the action does not abate, if it be such a one as might originally be prosecuted by or against the executor or administrator of the party dying; but the plaintiff, or his executors or administrators, shall have a *scire facias* against the defendant or his executors or administrators, to shew cause why damages should not be assessed and recovered by him or them; and upon *scire feci* returned, or upon *nihil* returned and eight days elapsed from its return, and leave of the Court or a judge obtained (*u*), and default made, or no cause shewn, a writ of inquiry shall be awarded, executed, and returned, and final judgment thereupon given (*x*).

Form of sci. fa.

If the death happen before the writ of inquiry is executed, the *scire facias* should be for the defendant or his executors or administrators to shew cause why the damages should not be *assessed* and recovered against them (*y*). But if the death happen after the execution of a writ of inquiry, the *scire facias* should be to shew cause why the damages assessed should not be *adjudged* to the plaintiff, or his executors or administrators; otherwise it will be quashed (*z*).

Form of judgment.

The final judgment in this case is, of course, for or against the executor or administrator, and not for or against the testator himself, as upon the statute 17 *C.* 2, above mentioned (*a*).

Scire facias against executors on the final judgment before execution.

Also, in case of the death of a defendant, besides the *scire facias* here mentioned, sued out before final judgment to make the executors or administrators parties to the record, another *scire facias* must be sued out after final judgment, in order to give the executor or administrator an opportunity of pleading the want of assets, &c.; for it would be unreasonable that the executor, &c. should be in a worse situation when the defendant dies before final judgment, than he would have been in if had died after it (*b*). Where the defendant died intestate after interlocutory judgment, and a writ of inquiry of damages executed, but before it was returned the plaintiff declared in *scire facias* against the administrators, who pleaded *plene administravit*, and set forth in his pleas divers specialties due and owing from the intestate, and charging the estate; the plaintiff having replied, admitting the truth of the pleas, and praying judgment and execution of the goods of the intestate *quando acciderint*, entered up final judgment "to have execution against the defendant as administrator, according to the force, form, and effect *of the said recovery*," no recovery having been before stated in any part of the proceedings on the record, and no final judgment having been given in the original action, and no provision being made by the judgment for payment of the specialty debts; and it was held that the judgment was erroneous, and it was reversed, with costs (*c*).

(*u*) R. H., 2 W. 4, r. 81, *post*, 1028.

(*x*) See *Wallop* v. *Irwin*, 1 Wils. 315: *Fort* v. *Oliver*, 1 M. & Sel. 242: *Berger* v. *Green*, Id. 229.

(*y*) *Smith* v. *Harmon*, 1 Salk. 315; Lil. Ent. 647. And see the form, where the death happened before the issuing of the writ of inquiry, Chit. Forms, 478; and when it happened after the issuing, and before execution of the writ, Id. 474. (Clift. 680; Lil. Ent. 647).

(*z*) *Goldsworthy* v. *Southcott*, 1 Wils. 243: *Executors of Wright* v. *Nutt*, 1 T. R. 388. See the form, Chit. Forms, 474.

(*a*) *Weston* v. *James*, 1 Salk. 42.

(*b*) 2 Saund. 72 q.: *Tomkins* v. *Gratton*, Say. 298: 2 Williams, Exors. 1232. See form of the *sci. fa.* upon the first judgment, Chit. Forms, 475.

(*c*) *Poulett* v. *Wightman*, 1 Bligh, N. S., 138.

Death of one of several Plaintiffs or Defendants after Judgment (d).]—Where there are two or more plaintiffs or defendants, and one dies after judgment and before execution, execution by *fieri facias* or *ca. sa.* may be sued out as in other cases, without any *scire facias* (*e*); and the execution must be in the joint names of all the plaintiffs or defendants, as the case may be, and must in other respects pursue the judgment (*f*); but it should be executed against the survivors only (*g*). If the plaintiff wish to sue out an *elegit* against the lands of a deceased defendant, as well as against the survivor, he may have a *scire facias* against such survivor and the heir and terretenants of the deceased, to have execution against the lands and goods of the former, and the lands of the latter (*h*).

Death of one of several parties after judgment.

3. Scire Facias, *upon the Marriage of a Feme Plaintiff or Defendant.*

Marriage of a Feme Plaintiff.]—If a *feme sole* obtain judgment, and marry before execution, a *scire facias* must be brought by husband and wife, in order to have execution (*i*); and if, after execution awarded on this *scire facias*, but before execution, the wife die, the husband alone may have execution upon the judgment, without even taking out administration (*k*). Where an action is brought by a *feme sole*, who marries after the commencement of the suit, but before the trial, it is not necessary to sue out a *scire facias*, to make the husband a party to the suit, in order to sue out execution (*l*).

3. Scire facias, upon marriage of a feme plaintiff.

If the husband and wife obtain judgment for a debt due to the wife *dum sola*, the husband may have a *scire facias* to execute the judgment (*m*); or he may, it seems, sue out execution in the names of himself and wife, without a *scire facias;* for the nature of the debt is altered by the judgment, and it is become a debt due to the husband (*m*). If judgment be recovered by a *feme sole*, and she marry, and then the husband and wife sue out a *scire facias* upon the judgment, and have an award of execution, and afterwards die, the husband alone may bring a *scire facias* to have execution (*n*). But if the husband has not been made party to the judgment by *scire facias* in the lifetime of the wife, he cannot, after the death, bring a *scire facias* to have execution, unless he takes out administration to her (*o*). So, if judgment be recovered by a *feme sole* for

(*d*) As to the death of one of several plaintiffs or defendants before judgment, see post, Pt. 5, Ch. 32.

(*e*) 6 Bac. Abr., Sci. Fa., C. 4: *Withers* v. *Harris*, 7 Mod. 68; 2 L. Raym. 808, & C.: *Bruce* v. *Pennoyer*, 5 Mod. 339: Pennoyer v. *Bruce*, Carth. 404: *Howard* v. *Pitt*, 1 Show. 402; 2 Saund. 72 l.

(*f*) See Vol. 1, p. 333.

(*g*) *Pennoyer* v. *Bruce*, 1 L. Raym. 244; Comb. 541; 1 Salk. 319, *S. C.* See *Withers* v. *Harris*, 2. L Raym. 808; 7 Mod. 68, S. C.

(*h*) Paston v. *Terretenants of Hall*, Carth. 107; 2 Saund. 72 l. See forms, Chit. Forms, 476, 477.

(*i*) 2 Saund. 72 k. See *Agassis* v. *Palmer*, 6 Scott, N. R., 603; 1 Dowl. & L. 18, *S. C.* See form, Chit. Forms, 469.

(*k*) 6 Bac. Abr., Sci. Fa., C. 6; *Woodyer* v. *Gresham*, 1 Salk. 110; Comb. 455; Carth. 415; Skin. 682, *S. C.*

(*l*) *Walker* v. *Golding*, 11 M. & W. 78; 2 Dowl., N. S., 776; 12 Law J., N. S., 185, Exch. The objection ought to be taken by plea where the marriage takes place before judgment. *S. C.*

(*m*) *Eyres* v. *Coward*, 1 Sid. 337: *Butler* v. *Delt*, Cro. El. 844: *Obrian* v. *Ram*, 3 Mod. 158; 2 Saund. 72 m. See a form of *sci. fa.* by wife after death of husband, Chit. Forms, 470.

(*n*) *Woodyer* v. *Gresham*, 1 Salk. 116; Skin. 642, *S. C.*

(*o*) *Betts* v. *Kimpton*, 2 B. & Ad. 273.

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the penalty of a bond conditioned for the payment of an annuity to her, and she marries, and then the annuity is in arrear, and afterwards the wife dies, the husband cannot bring a *scire facias*, under the 8 & 9 *W.* 3, *c.* 11, to have execution for such arrears, except as administrator to his wife (*p*). And if the husband and wife have judgment for a debt due to the wife as executrix, and the wife die before execution, the succeeding executor or administrator *de bonis non*, and not the husband, shall have the *scire facias* (*q*).

Marriage of feme defendant.

Marriage of Feme Defendant.]—If judgment be recovered against a *feme sole*, and she marry before execution, a *scire facias* must be brought against the husband and wife, before the judgment can be executed against them both, or the husband alone (*r*); and if, after execution awarded upon this *scire facias*, but before execution, the wife die, the husband is liable to the execution (*s*). But a *scire facias* is not necessary to have execution by *ca. sa.* against a *feme covert* on a judgment obtained against her alone, and this though she marry pending the suit (*t*). And where a *feme sole* defendant in ejectment married before trial, and the plaintiff proceeded to judgment, and sued out an *habere facias* and *fi. fa.* against her by her maiden name, without a *scire facias*, the Court held that there was no pretence for setting aside these writs on that account; for the writ of possession could not affect the husband or his property, the verdict proving that the wife had no interest in the term; and as to the *fi. fa.* it was merely inoperative, as the wife could have no separate property in the goods upon which such a writ might be executed (*u*).

Where a *feme covert*, sued as a *feme sole*, had judgment on a plea of coverture, and execution was sued out in the names of her and her husband, the Court held it to be clearly irregular; execution should not have been sued out in the name of the husband, until he had first been made a party to the judgment by *scire facias;* but, in this case, the wife might have sued out execution in her own name, because the plaintiff, by declaring against her as a *feme sole*, was concluded from denying it (*x*).

4. Scire Facias, *in case of Bankruptcy or Insolvency.*

4. Scire facias on bankruptcy or insolvency of plaintiff.

Bankruptcy, &c. of Plaintiff.]—If a party obtain interlocutory judgment, and before final judgment become bankrupt, his assignees may proceed to final judgment in his name, and then sue out a *scire facias* to make themselves parties, in

(*p*) *Betts* v. *Kimpton*, 2 B. & Ad. 273.
(*q*) *Beamond* v. *Long*, Cro. Car. 208, 227; W. Jon. 248, *S. C.*; 6 Bac. Abr., Sci. Fa., C. 6.
(*r*) 2 Saund. 72 m. See the form, Chit. Forms, 470; Thes. Brev. 247, 251.
(*s*) 6 Bac. Abr., Sci. Fa., C. 6: *Obrian* v. *Ram*, 1 Salk. 116.
(*t*) See *Cooper* v. *Hunchin*, 4 East, 521: *Thorpe* v. *Argles*, 1 D. & L. 931: *Rayner* v. *James*, 6 June, 1846, Exch., *post*, 1026.
(*u*) *Doe* v. *Butcher*, 3 M. & Sel. 557.
(*x*) *Wortley* v. *Rayner*, 2 Doug. 637.

order to have execution (*y*). However, even where execution was taken out in the name of the bankrupt, without a *scire facias* being sued out by the assignees, the Court refused to set aside the proceedings (*z*). If a defendant brings a writ of error upon a final judgment obtained by the plaintiff, and pending such writ the plaintiff become bankrupt, his assignees ought to proceed to an affirmance of the judgment in the bankrupt's name, and then sue out a *scire facias* in order to have execution (*a*). The Court have allowed the *scire facias* to be amended, even after issue joined, by inserting the name of the official assignee (*b*). It is sufficient if the *scire facias* by the assignees states generally, that he became bankrupt within the true intent and meaning of the statutes &c., and that his goods and effects were afterwards in due manner assigned to the plaintiffs, without alleging that the plaintiff was declared a bankrupt, or how his effects were assigned (*c*).

The practice, it should seem, is the same, where the plaintiff takes the benefit of an insolvent act.

Bankruptcy, &c. of defendant.

Bankruptcy, &c. of Defendant.]—If a party, after he has been a bankrupt, or taken the benefit of an insolvent act, or compounded with his creditors, again become a bankrupt, and obtain his certificate, his person only is thereby protected; but his future estate and effects, (with the exception of his "tools of trade, necessary household furniture, and the wearing apparel of himself, his wife and children"), unless his estate pay 15*s.* in the pound under the first fiat, will vest in the *assignees* under such fiat, who may seize them in the same way as they may seize property possessed by the bankrupt at the issuing of the fiat (*d*). Since this enactment, therefore, the property being vested in the assignees, the judgment-creditor in these cases has not, as such creditor, any right of seizing such future effects, as he formerly had (*e*).

Not necessary on judgment, under 1 & 2 Vict. c. 110, s. 87.

No *scire facias*, on account of lapse of time, is necessary to revive the judgment on the warrant of attorney, executed by an insolvent before adjudication, pursuant to the 87th section of the 1 & 2 *Vict.* c. 110, (the Insolvent Act), and execution may at all times issue thereon, by virtue of the order of the insolvent court.

5. On a judgment quando

5. Scire Facias, *on a Judgment quando &c. against an Executor.*

If, on a plea of *plene administravit* in an action against an executor or administrator, or on a plea of *riens per descent* in

(*y*) *Bibbins* v. *Mantell*, 2 Wils. 358. And see *Hewitt* v. *Mantell*, 2 Wils. 372. *Swann* v. *Sutton*, 10 Ad. & E. 623. See the form, Chit. Forms, 480.

(*z*) *Waugh* v. *Austen*, 3 T. R. 437. And see *Guinness* v. *Carroll*, 1 B. & Ad. 464, per Taunton, J., acc. See also *Ouchterlony* v. *Gibson*, 6 Scott, N. R., 577, 581. *Plummer* v. *Lee*, 5 Mod. 88: *Winter* v. *Kretchman*, 2 T. R. 45. It would be safest to make the assignees parties to the judgment by a *scire facias*.

(*a*) *Kretchman* v. *Beyer*, 1 T. R. 463, 631; *Monk* v. *Morris*, 1 Mod. 93; 1 Vent. 199, & C.: *Hewett* v. *Mantell*, 2 Wils. 372. See *Swann* v. *Sutton*, 10 Ad. & E. 623.

(*b*) *Holland* v. *Phillips*, 2 P. & D. 336. See *post*, 1033.

(*c*) *Winter* v. *Kretchman*, 2 T. R. 45.

(*d*) 6 G. 4, c. 16, s. 127. See this enactment fully discussed in *Herbert* v. *Sayer*, Cam. Sacc., E. T., 1844. And see *post*, Pt. 4, Ch. 12. See 6 & 7 W. 4, c. 14, s. 145.

(*e*) As to the former law and practice, see 2 Saund. 72 *g*. And see Id., as to proceeding to obtain execution by *sci. fa.* against insolvents discharged under the Lord's Act, now rendered inoperative by the 1 & 2 Vict. c. 110.

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&c. against an executor.

an action against an heir, the plaintiff, instead of taking issue on the plea, take judgment of assets *quando acciderint*, and assets afterwards come to the hands of the executor or heir, the plaintiff must first sue out a *scire facias* against such executor or heir, before he can have execution.

That assets must be subsequent to the judgment.

As the judgment *quando acciderint* is, that the plaintiff do recover his debt, to be levied of the goods, &c. of the testator, which shall *thereafter* come to the hands of the executor, &c., it is necessary that the *scire facias* should state that the assets came to the executor's hands after the judgment; otherwise it would be bad (*g*). And, in debt or *scire facias* on this judgment, proof of the executor receiving assets is always, at the trial, confined to a period subsequent to the judgment (*h*).

Recovery of part.

If, upon this *scire facias*, assets be found for part, the plaintiff may have judgment to recover so much immediately, and the residue of the assets *in futuro* (*i*).

The inquiry.

As to the *scire fieri* inquiry, see *post*, *Pt.* 4, *Ch.* 8.

6. Scire Facias, *in other Cases.*

6. Scire facias, in other cases.

Against bail.

When special bail becomes fixed, by the recognisance being forfeited, one of the modes of proceeding against them, as we have seen, *Vol.* 1, *p.* 801, is by *scire facias* on the recognisance. The *scire facias* in this case is an original proceeding.

Against pledges in replevin.

If, to the *pluries capias in withernam* in *replevin*, the sheriff return *nihil*, a *scire facias* issues against the pledges (*k*); and if no cause be shewn, another *capias in withernam* issues against the cattle of the pledges; and if *nihil* be returned to that writ, a *scire facias* issues against the sheriff himself (*l*). But this *scire facias* against the pledges and the sheriff is obsolete, it being the practice to proceed upon the replevin-bond against the former, and by action on the case against the latter, for taking insufficient pledges, or no pledges, without bringing any *scire facias*.

For restitution after reversal in error.

After judgment in error, reversing the judgment of the court below, if the amount of the damages awarded by the former judgment have been previously levied, but not paid over, the plaintiff in error must now sue out a *scire facias quare restitutionem non*, suggesting the matter of fact, namely, the sum levied, &c., before he can have a writ of restitution (*m*).

To recover land extended under elegit.

Where a plaintiff in an action has execution by *elegit*, and is put into possession of the rents and profits of the defendant's lands, if the defendant tender the debt, &c. to the plaintiff, and it be refused, or if the plaintiff have been satisfied his debt from any casual profit of the land, the defendant may have a *scire facias ad rehabendam terram;* or, if the plaintiff have been satisfied his debt from the extended value of the lands, the defendant may either have this *scire facias*, or he

(*g*) 2 Saund. 219 *a*: *Mara* v. *Quin*, 6 T. R. 1. See form, Chit. Forms, 505.

(*h*) *Taylor* v. *Holtman*, B. N. P. 169; 2 Williams, 1221. *Quære* if the judgment might not be taken of assets *quando acciderint after plea pleaded?*

(*i*) See *Noel* v. *Nelson*, 1 Sid. 448; 1 Saund. 336 b.

(*k*) *Ante*, 1003. See *Darrington* v. *Edwin*, Comb. 1.

(*l*) *Ante*, 1003. See *Trevors* v. *Michaelborne*, Hut. 77.

(*m*) Vol. 1, p. 511. See the form of it, Chit. Forms, 127.

may enter upon the land, and recover actual possession by ejectment (*s*). But, as has been already observed, (*ante, Vol.* 1, *p.* 607), a preferable mode of proceeding, to either the *scire facias* or ejectment, is by summary application to the court out of which the *elegit* issued.

To repeal letters patent.

A *scire facias* is the only means of repealing letters patent. The *scire facias*, in this case, may be brought either on behalf of the Queen, or, where the patent has been granted to the prejudice of another, by the injured party at the Queen's suit. It may be sued out either in the Petty-bag-office in Chancery (*o*), or in the Court of Queen's Bench (*p*).

On pardon of outlawry.

When an outlawry is pardoned by the Queen, the defendant must sue out a *scire facias*, requiring the plaintiff to appear and prosecute his suit against him, and he must have the plaintiff summoned thereon (*q*). There are no further proceedings upon this writ.

To certify bill of exceptions.

If a bill of exceptions be sealed by a judge, and he die, a *scire facias* lies against his executors or administrators to certify it (*r*).

Against a sheriff.

If a sheriff, after returning to a *fi. fa.* that he has levied the debt, retain the money in his hands, a *scire facias* may be sued out to compel him to pay it over to the execution creditor (*s*). Or, if a sheriff to a *fi. fa.* return that he has seized goods and sold part of them, but that the remainder were rescued, a *scire facias* lies against him, to have execution for the entire sum returned (*t*). But if a sheriff return merely that the goods remain in his hands for want of buyers, a *scire facias* does not lie, but a *venditioni exponas*, or a *distringas nuper vicecomitem*, as mentioned *Vol.* 1, 596 (*u*).

On a judgment on bond.

In debt on bond or other instrument in a penal sum, conditioned for the performance of covenants, &c., although the judgment is entered up for the entire penalty, yet execution is sued out for the amount of such damages only as the jury assess upon the breaches assigned or suggested. The judgment, however, remains as a security to the plaintiff for such damages as he may sustain by any further breaches; and in case of any such, the plaintiff may have a *scire facias* upon the judgment against the defendant, his heirs, &c., suggesting such other breaches, and for having execution of them, as noticed *ante*, 908.

On error.

The writ of *scire facias quare executionem non*, in the case of a writ of error, is abolished (*x*); so is the writ of *scire facias ad audiendum errores*, except in the case of a change of parties (*y*).

Against public companies, &c.

As to the proceeding by writ of *scire facias* against members of a public company, to obtain execution against them upon judgment obtained against their public officers, see *post*, *Pt.* 4, *Ch.* 3.

(*n*) 6 Bac. Abr., Sci. Fa., C. 2: 2 Saund. 72 u—x.

(*o*) 4 Inst. 88; 2 Saund. 72.

(*p*) 3 H. 4, 6, 29. See as to this *scire facias*, 2 Saund. 72 p, q.: 6 Bac. Abr., Sci. Fa., C. 3; and the form, Tidd's Forms, 487.

(*q*) Trye, 134, 154. See *Ellis* v. *Pipin*, Style, 348: *Allen* v. *Powell*, 1 Sid. 231; and *post*, Pt. 5, Ch. 2.

(*r*) 2 Inst. 438, *ante*, Vol. 1, p. 431.

(*s*) *Smith* v. *Lindsey*, Hut. 32: *Sly* v. *Finch*, Cro. Jac. 514, and 247; Godb. 276.

(*t*) *Sly* v. *Finch*, Cro. Jac. 514; 2 Saund. 243.

(*u*) See note (*p*), and 2 Saund. 71 b, c.

(*x*) Vol. 1, p. 500.

(*y*) Id. 502.

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Proceedings upon a Scire Facias.

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The writ.

To whom directed.

The Writ, Summons, &c.]—A *scire facias* upon a recognisance of bail, must, in the Queen's Bench, have been always *directed* to the sheriff of Middlesex, where the record is (*z*), although the *venue* in the original action was laid in a different county (*a*), for recognisances in that court are not obligatory by the caption as in the Common Pleas, but by being entered of the record. But on a recognisance of bail on a writ of error, if it were entered as taken at the judges' chambers in Serjeants' Inn, the *scire facias* might have been sued out in *London* (*b*), and in the Common Pleas upon a recognisance taken in Serjeants' Inn, or before a commissioner in the country, and recorded at Westminster, the *scire facias* might have been brought in London, or in the county where the recognisance was taken, or in Middlesex (*c*). But now, by rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 1, *s.* 80, "a *scire facias* upon a recognisance taken in Serjeants' Inn, or before a commissioner in the country, and recorded at *Westminster*, shall be brought in Middlesex only; and the form of the recognisance shall not express where it was taken." A *scire facias* founded upon a judgment, being only a continuation of the former suit, must be directed to the sheriff of the county in which the *venue* in the action in which the judgment is obtained was laid, the defendant being supposed to reside in that county (*d*), though, indeed, on a return of *nihil* to the writ against the personal representatives, the plaintiff, upon a *testatum*, may have a *scire facias* against the heir and terretenants into a different county (*e*). An objection, that the writ is directed to a wrong sheriff, is not available to the defendant under a plea of *nul tiel record* to the declaration in the *scire facias* (*f*).

Teste of.

A *scire facias* on a recognisance against bail may be tested

(*z*) *Bond* v. *Isaac*, 1 Burr. 409; 2 Saund. 72 c.
(*a*) *Coster* v. *Burke*, 2 East, 461.
(*b*) *Palmer* v. *Ryfield*, 3 Mod. 290.
(*c*) *Hall* v. *Winckfield*, Hob. 195; Tidd, New Prac., 991.
(*d*) *Wharton* v. *Musgrave*, Cro. Jac. 331; Yelv. 218; Hob. 4, *S. C.*
(*e*) *Eyres* v. *Taunton*, Cro. Car. 313: *Panton* v. *Terretenants of Hall*, Carth. 105.
(*f*) *Phillips* v. *Smith*, 2 Dowl., N. S., 688.

on or after the return day of the *ca. sa.* against the principal (*g*), and the *alias sci. fa.* (if issued, but which is now rarely the case) must be tested upon the return day of the *sci. fa.* if the original action were commenced by writ of *capias* or detainer (*h*); or if the action against the principal were by original, (which cannot be the case except in ejectment or replevin, and in some other actions removed from inferior courts), the *alias sci. fa.* (if issued) should be tested on the *quarto die post* of the *sci. fa.* (*i*) A *scire facias* upon a *judgment* may, it seems, be tested on any day of the term in which the judgment is signed (*k*), or in any subsequent term; and the *alias*, (if issued), on the return day of the *quarto die post* of it, according to whether the original action was commenced by writ of summons, *capias*, or detainer (*l*), or by original. A *scire facias* cannot be tested in vacation, not being within sect. 12 of the Uniformity of Process Act (*m*). If so tested it would be void (*n*).

Return of.

A *scire facias* upon a judgment in an action commenced by a writ of summons, or upon a recognisance of bail, must be made returnable on a day certain in term (*o*). If the original action was commenced by original, (as it may be, or is supposed to be, in ejectment), the *scire facias* must be made returnable on a general return-day in term (*o*); and in all other cases it may be returnable on a general return-day (*p*). If returnable on a day certain, and only one writ is to be sued out, it is, it seems, sufficient if there be *four days exclusive* between the *teste* and return (*q*). But if the writ *must* be returnable on a *general return*-day, there must be fifteen days between the *teste* and return (*r*). If it be intended to sue out two writs, (which, as we shall presently see, is now in general unnecessary), there must be fifteen days inclusive (*s*) between the return of the second and the *teste* of the first writ (*t*); the number of days, however, between the *teste* and return of each writ is immaterial (*u*).

It must pursue the judgment, &c.

The *scire facias* must strictly pursue the terms of the judgment, recognisance, or other record, upon which it is founded. Upon a judgment against two, you cannot sue out a *scire facias* against one (*x*); but upon a recognisance it is otherwise, because it is joint and several (*y*). A *scire facias* for the non-performance of a certain promise, (in the singular number),

(*g*) See *Sandland* v. *Claridge*, 2 Dowl. 115; 1 C. & M. 672, S. C.: *Stewart* v. *Smith*, 2 L. Raym. 1567; 2 Str. 866, S. C.: *Shiters* v. *Brooks*, 8 T. R. 628.

(*h*) See R. E., 5 G. 2, r. 3, a: *Stewart* v. *Smith*: *Shiters* v. *Brooks*, *supra*: *Anon.*, 2 Salk. 599; 6 Mod. 86: *Andrews* v. *Harper*, 8 Mod. 227.

(*i*) *Stewart* v. *Smith*, *supra*. It seems, the *alias sci. fa.*, if issued, although the action were commenced by original, may be tested on the return-day of the first *sci. fa.*, or on any other day between it and the *quarto die post* inclusive. (See *Combe* v. *Cuttill*, 10 Moore, 535; 3 Bing. 162, S. C.) At all events, it may be so in the Common Pleas.

(*k*) 2 Salk. 599.

(*l*) See *ante*, p. 3, as to commencement of actions by these writs.

(*m*) *Seaton* v. *Heap*, 5 Dowl. 247: *Bosanquet* v. *Graham*, 7 Jur. 631, Q. B., Trin. Term, 1843.

(*n*) *Bosanquet* v. *Graham*, *supra*.

(*o*) See R. E., 5 Geo. 2, r. 3, a: *Eden* v. *Wills*, 2 L. Raym. 1417; 2 Str. 694, S. C.

(*p*) R. E., 5 G. 2, r. 3, a.

(*q*) *Bell* v. *Jackson*, 4 T. R. 663.

(*r*) R. E., 5 G. 2, r. 3, a; T., 8 W. 3, r. 3, a: *Hicks* v. *Jones*, 2 Str. 765: *Goodwin* v. *Peck*, 2 Salk. 599.

(*s*) R. T., 8 W. 3, r. 1, a; E., 5 G. 2, r. 3, a: *Goodwin* v. *Beukheam*, Carth. 468; 12 Mod. 215, S. C.: *Levington* v. *Stoner*, T. Jun. 220, 221: *Combe* v. *Cuttill*, 10 Moore, 535.

(*t*) *Elliott* v. *Smith*, 2 Str. 1139.

(*u*) *Panton* v. *Hall*, 2 Salk. 599.

(*x*) 2 Inst. 395. And see 2 Ro. Abr. 468; 2 Saund. 72 b, c: *Sainsbury* v. *Pringle*, 10 B. & C. 751.

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where the judgment was upon several promises, was holden bad (*z*). So where, upon a judgment of assets *quando acciderint*, a *scire facias* was sued out praying execution of assets generally, instead of such assets only as had come to the hands of the executor since the former judgment, the Court held that it could not be supported (*a*).

From what court issued.

The writ must in all cases be sued out of and returnable in the court in which the record is supposed to remain (*b*).

Leave of court, when necessary, and how obtained.

In the case of a *scire facias* to revive a judgment, it is sometimes necessary to obtain the leave of the Court or a judge to sue it out. At any time before *seven* years from the date of the judgment, it may be sued out, as a matter of course; after seven years, and under *ten*, there must be a side-bar or treasury rule, obtained from one of the Masters; and by *R. H.*, 2 *W.* 4, *r.* 79, "a *scire facias* to revive a judgment *more than ten years old* shall not be allowed without a motion for that purpose in term, or a judge's order in vacation; nor, if more than *fifteen*, without a rule to shew cause." The rule, it will be seen, applies only to a *scire facias* to *revive* a judgment. It does not, therefore, apply to a *scire facias* against the terretenants, which can be founded only on a previous *scire facias* against the personal representative, and a rule *nisi* is therefore unnecessary, though the judgment is more than fifteen years old (*c*). The judge will grant an order for a *sci. fa.* without a summons in cases where the judgment is more than ten years and under fifteen years old. After fifteen years, a judge at chambers will not interfere. The affidavit in support of the application should state the existence of the debt, that the judgment remains unsatisfied, and that the defendant is living (or as the case may be) (*d*). It has been held, that, if the affidavit be not made by the plaintiff, it should be made by the person who was his attorney when the judgment was obtained (*e*); but under circumstances it would seem that such an affidavit may be dispensed with (*f*). A motion for a *sci. fa.* to revive a judgment was granted in one case, on an affidavit by the attorney of the parties seeking to enforce the judgment, although he was not their attorney at the time the judgment was obtained; it appearing that they were then infants residing abroad, and that the judgment was more than fifteen years old; as the rule was only a rule *nisi* in the first instance (*g*). On a *scire facias* against executors the rule should be served on each of the executors who proved the will (*h*). Where a motion was made for leave to issue a *sci. fa.* to revive a judgment more than fifteen years old: it appeared, that, in 1828, the defendant went to reside in America—a letter from him, dated 17th October, 1842, was said to have been received by a person in Ireland on the 18th of No-

(*z*) *Bayes* v. *Forrest*, 2 Str. 893.
(*a*) *Mara* v. *Quin*, 6 T. R. 1.
(*b*) See *Guillam* v. *Hardisty*, 3 Salk. 320; 1 L. Raym. 216, *S. C.*; 2 Saund. 72 n.
(*c*) *Wright* v. *Maddox*, 15 L. J., N. S., Q. B., 81.
(*d*) *Hardisty* v. *Barny*, 2 Salk. 598: *Lowe* v. *Robins*, 1 B. & B. 381; 3 Moore, 757, *S. C.*; Tidd, 9th ed., 1105; 2 Sell. Pr. 196. See the forms of affidavit and rule, Chit. Forms, 442, 443.
(*e*) *Duke of Norfolk* v. *Leicester*, 1 M. & W. 204; 4 Dowl. 746; 1 T. & G. 249, *S. C.*
(*f*) See *Smith* v. *Mee*, *infra*; and as to obtaining leave to enter up judgment on an old warrant of attorney, *ante*, 869; 7 Scott, N. R., 799, *S. C.*
(*g*) *Smith* v. *Mee*, 1 Dowl. & L. 907.
(*h*) *Thomas* v. *Williams*, 3 Dowl. 654.

vember following; and that the defendant was the owner of some houses in Liverpool; the Court said: "The proper course under the circumstances is, to grant a rule to shew cause for next term; notice of the rule to be stuck up in the office, and to be served upon the defendant's tenants in Liverpool" (*i*). Where a rule is served by leaving a copy with a servant, inquiry should be subsequently made of the servant whether the master has received the copy (*k*). The validity of the judgment cannot be impeached for the purpose of opposing the motion for the *scire facias;* but a separate application must be made to set aside the judgment (*l*). It may be here observed, that a *scire facias* on a recognisance, or to revive a judgment, cannot be sued out after twenty years (*m*). As to obtaining leave of the Court to issue a *sci. fa.* against members of a public company for the purpose of issuing execution against them on a judgment obtained against their public officer, see *post, Pt.* 4, *Ch.* 3.

How sci. fa. sued out.

In order to sue out the writ, *make out a præcipe for it* (*n*). *Ingross the writ on plain parchment, and take the præcipe and writ to one of the Masters in Queen's Bench or Common Pleas, who will seal the latter; or, if in Exchequer, get the writ sealed at the Exchequer Seal-office, at Westminster; and in that court get it also signed by one of the Masters.*

Leaving it at sheriff's office.

Having thus sued out the writ, *leave it at the sheriff's office, at least four clear searching days before the return of it, exclusive of the day of leaving it at the office, and of the day on which it is returnable* (*o*). These days need not be in term time (*p*). Sunday, or any other day on which search cannot be made at the sheriff's office, must not be reckoned as one of them (*q*); but Whit-Monday, Tuesday, and Wednesday may be, the sheriff's office being open on these days for the purpose of searching for writs of *scire facias* (*r*). The sheriff must indorse on every *scire facias* the day of the month on which it was left with him (*s*). If there is an objection to the proceedings in *sci. fa.*, on the ground that the writ did not lay a sufficient number of days in the office, the defendant should not apply to set aside the writ itself, but only the proceedings thereon (*t*).

Necessary, in general, to summon or give notice to defendant.

The next step to be taken is, if possible, *to give the defendant notice of the scire facias, by summons, if he reside in the county into which the sci. fa. issues, or by notice, if he reside elsewhere.* Formerly, it was the constant practice, where you did not intend to summon the defendant, or, in other words, to let him know of the *scire facias* having been sued out, or where you could not summon him, to have issued a writ of *scire facias;* and, having procured the sheriff's return of *nihil*, you sued out an *alias scire facias*, and procured the

(*i*) *Macdonald* v. *Maclaren*, 11 M. & W. 483.

(*k*) *Pester* v. *Seaman*, 5 Nev. & M. 672.

(*l*) *Thomas* v. *Williams*, 3 Dowl. 654.

(*m*) *Ante*, 1010.

(*n*) See the forms, Chit. Forms, 444.

(*o*) R. E., 5 G. 2, r. 3: *Forty* v. *Herman*, 4 T. R. 863: *Miller* v. *Yerressway*, 3 Burr. 1723: *Fraser* v. *Miller*, 1 Dowl. 141: *Furnell* v. *Smith*, 7 B. & C. 603: *Goodwin* v. *Lugar*, 6 M. & Sel. 133; 2 Chit. Rep. 192, *S. C.*: *Scott* v. *Larkin*, 7 Bing. 109; 4 Moo. & P. 748; 8 Dowl. 202, *S. C.*

(*p*) *Sandland* v. *Claridge*, 1 C. & M. 672.

(*q*) *Supra*, n. (*o*).

(*r*) *Armitage* v. *Rigbye*, 5 A. & E. 81.

(*s*) R. E., 5 G. 2, r. 3.

(*t*) *Williams* v. *Brown*, 2 Do

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sheriff's return of *nihil* to that writ also, upon which return you might, if the defendant did not appear, have obtained judgment against him, two *nihils* being deemed equivalent to a *scire feci* or garnishment (*u*). Now, however, by rule of *H. T.*, 2 *W.* 4, *r.* 81, "*no judgment shall be signed for non-appearance to a scire facias without leave of the Court or a judge, unless the defendant has been summoned; but such judgment may be signed by leave, after eight days from the return of one scire facias.*" This rule applies to proceedings by *scire facias* against the defendant to revive a judgment, as well as against bail on their recognisance (*x*). The object of it is to make it in general the plaintiff's duty to give notice of the *scire facias* to the defendant as above mentioned, either by *summons* if the defendant reside in the county into which the *scire facias* issues, or by *notice* if he reside elsewhere; and if neither of these things can be done, the plaintiff must shew by affidavit that he has attempted to summon the defendant or give him notice, and what endeavours he has made for that purpose (*y*). Where several attempts had been made to summon a defendant on a *scire facias*, returnable on the 28th day of *April*, and eight days had elapsed after the return of the writ, an application, on the 5th of November, to sign judgment, was holden to be too late, without summoning the defendant again (*z*). Under particular circumstances, as if the defendant be about to abscond, &c., this may be dispensed with; and where the defendant was out of the country, but notice had been given at his last place of abode, and several efforts made to serve him without effect, the Court granted a rule for judgment against him (*a*).

Leave to sign judgment without summoning.

Where the defendant can be summoned, *get a warrant on the writ of sci. fa. from the sheriff's office, and give the warrant to an officer, who will thereupon summon the defendant* (*b*). *The summoning of him is usually effected by delivering a copy of the warrant to him, or a written summons containing a statement of the substantial contents of the scire facias* (*c*). A verbal notice would not, it is conceived, be sufficient, unless under particular circumstances. The defendant may be summoned at any time before the return of the *scire facias;* or even upon the return-day, provided it be before the rising of the Court (*d*). The sufficiency of the summons, if disputed, will be determined by the Court or a judge (*e*); and if insufficient, the proceedings on the *sci. fa.* may be set aside, and this notwithstanding the sheriff has returned *scire feci* (*f*).

Defendant, how summoned.

Where the defendant cannot be summoned by reason of his

Notice, when

(*u*) *Randall* v. *Wale*, Yelv. 86: *Bromley* v. *Lyttleton*, Id. 112: *Clarke* v. *Bradshaw*, 1 East, 89.

(*x*) *Jackson* v. *Elam*, 1 Dowl. 515.

(*y*) See *Jackson* v. *Elam*, 1 Dowl. 515: *Sabine* v. *Field*, 1 C. & M. 466; 1 Tyr. 388, *S. C.*; and the cases as to bail, *ante*, Vol. 1, p. 803.

(*z*) *Wood* v. *Mosley*, 1 Dowl. 513.

(*a*) *Bertrim* v. *Solyman*, 7 Leg. Obs. 226: *Weatherhead* v. *Landless*, 3 Scott, 406; 5 Dowl. 189, *S. C.* And see *Armitage* v. *Rigbye*, 5 A. & E. 76: *Dixon* v. *Thorold*, 8 M. & W. 297; 9 Dowl. 829, *S. C.*

(*b*) See form of warrant, Chit. Forms, 448.

(*c*) See form of summons, Chit. Forms, 448.

(*d*) *Clarke* v. *Bradshaw*, 1 East, 66; recognised in *Lewis* v. *Pyne*, 1 C. & M. 771; 2 Dowl. 133, *S. C.*: *Webb* v. *Harvey*, 2 T. R. 737: *Obrien* v. *Frazier*, 1 Str. 644. The Court have held the sheriff liable to an action for damages, for not summoning a party, when he might have done so. (MS. 1831).

(*e*) *Wright* v. *Page*, 2 Bla. Rep. 837.

(*f*) *Pool* v. *Wills*, 2 T. R. 758, n. *Semble*, overruling *Barr* v. *Satchell*, 2 Str. 813. But see Tidd, 9th ed., 1124.

siding out of the county into which the *scire facias* issues, r otherwise, *prepare a notice* (*g*), *stating the issuing of the cire facias, and when it was left at the sheriff's office, and the urpose for which it was left. It is usual and proper also to nnex to the notice a copy of the scire facias. Serve it, or use your best endeavours to serve it, and, generally speaking, as long s time as possible before the return-day.* Where a party called t a house where he saw a female, who told him she was the lefendant's housekeeper, that the defendant was somewhere in London, that she could not account for his absence, except hat he was avoiding legal process, and the party thereupon ft the notice with her, the Court held the service sufient (*h*). And where a defendant was resident at Boulogne, n France, the Court granted leave to sign judgment against im upon a *sci. fa.*, on an affidavit of a service of notice of the rit upon him in that place (*i*).

defendant cannot be summoned.

Judgment for Non-appearance.]—Call at the sheriff's office t the return of the writ, for the return, and if the sheriff have eturned *scire feci* (*k*), then, on or after the return-day, if the riginal proceedings were by summons, or the *quarto die post*, f they were by original (*l*), *make out a memorandum for a ule to appear upon plain paper* (*m*), *and enter it with the Master.* This is a four-day rule (*n*); and if at the expiration f it no appearance has been made or entered, *then enter the roceedings upon a roll* (*o*); *take it to one of the Masters, who ill sign judgment; then file the scire facias and return, and sue ut execution.*

Judgment for non-appearance.

Or, if the defendant has not been summoned, call at the sheriff's office for the writ on or after the return-day, and get the writ and the sheriff's return of nihil (*p*). *Make out a memorandum for a rule to appear, on plain paper, and enter it with the Masters.* This is a four-day rule (*q*). *If no appearance has been made and entered in eight days from the return-day, prepare an affidavit* (*r*) *of the issuing of the scire facias and the sheriff's return thereto, and of the service of the notice on defendant, or of the due endeavours to serve it* (*s*). *At the expiration of the eight days after the return of the writ, or in a reasonable* (*t*) *time afterwards, move the Court or apply to a judge on this affidavit for leave to sign judgment, and the Court will grant the rule, or the judge will grant his order for the rule for judgment accordingly.* No summons for the judge's order is requisite or usual. The rule is absolute in the first instance. *Then enter the proceedings upon a roll* (*u*). *Take the judge's order or rule of court to one of the Masters, who will sign judgment. Then file the scire facias and return, and sue out exe-*

Where defendant has not been summoned.

(*g*) See the form, Chit. Forms, 449.
(*h*) Bloss v. Thorold, 8 M. & W. 297; 9 Dowl. 822, S. C.: ante, 1026, note (*a*).
(*i*) Stockport v. Hamshire, 1 Dowl. & L. 3.
(*k*) See the form, Chit. Forms, 449. The sufficiency of the summoning of defendant may be contested, notwithstanding this return, and the proceedings set aside, if insufficient, ante, 1022.
(*l*) Sharp v. Clark, 13 East, 391.
(*m*) See the form, Chit. Forms, 272.
(*n*) See *Wathen* v. *Beaumont*, 11 East, 272.
(*o*) See the form, Chit. Forms, 451.
(*p*) Id. 449.
(*q*) See *Wathen* v. *Beaumont*, 11 East, 272.
(*r*) See form, Chit. Forms, 450.
(*s*) See *Wimall* v. *Cook*, 2 Dowl. 173.
(*t*) *Wood* v. *Moseley*, 1 Dowl. 513.
(*u*) See form, Chit. Forms, 451.

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cution (*x*). If the defendant was not *summoned*, it seems that he may, notwithstanding judgment against him, have advantage of any matter he might have pleaded to the *scire facias*, either on an *auditâ querelâ* (*y*), or by motion to the Court (*z*), or even by application to a judge at chambers in vacation. When a judge's order has been made, empowering the plaintiff to sign judgment on the *scire facias*, on an application for a rule to set aside the judgment, the Court will not inquire into the sufficiency of the notice, or whether the bail or party against whom the *scire facias* is issued have or have not been summoned: if the bail or party against whom the *scire facias* is issued intend to avail themselves of any objection on such grounds, they should apply to set aside the judge's order (*a*). Such order, therefore, if acquiesced in, is conclusive as to the sufficiency of the notice or summons (*b*).

Against one of several.

Upon a *scire facias* to have execution of a judgment against two, if one be returned summoned, and *nihil* be returned as to the other, or that he is dead, and the one summoned make default, the plaintiff may have judgment against the party summoned for the entirety (*c*).

Appearance.

Appearance.]—Let the defendant's attorney give a written notice to the attorney or agent of the plaintiff, that he appears for the defendant. This will be now sufficient in all cases in proceeding by *scire facias*, and no appearance is filed (*d*).

Declaration.

Declaration.]—As soon as the defendant has appeared, you may declare against him. *Ingross your declaration on plain paper, indorse upon it the notice to plead, and deliver it to the defendant's attorney or agent* (*e*). It would seem, that the stat. 2 *W.* 4, *c.* 39, and the rules of *M. T.*, 3 W. 4, which were framed to meet it, apply to proceedings upon a writ of *scire facias* when it is a continuation of a suit within the act and rules (*f*); otherwise not. Where such statute and rules do not apply, the rules as to declaring and giving the notice to plead, which existed before the statute and rules, must be still regarded. In such cases, the declaration should be intitled of the term in which the writ of *scire facias* was returnable, or of the term of which defendant appeared; and the rules as to the time for pleading, and as to when the defendant will be entitled to an imparlance, are, perhaps, the same as those noticed *ante*, 994, in a replevin suit.

Where there are two defendants, it seems that the plaintiff cannot declare in *sci. fa.* against either until both are before

(*x*) See the former mode of proceeding by two writs of *scire facias*, where you did not intend that the defendant should be summoned, Tidd, 9th ed.

(*y*) *Lampton* v. *Collingwood*, 1 Salk. 62; 1 L. Raym. 27, *S. C.*

(*z*) *Ludlow* v. *Lennard*, 2 L. Raym. 1295: *Anon.*, 1 Salk. 93: see *Dodd* v. *Beckman*, 1 L. Raym. 445: *Wharton* v. *Richardson*, 2 Str. 1075: *Holt* v. *Frank*, 1 M. & Sel. 199.

(*a*) *Ladbrook* v. *Hewitt*, 1 Dowl. 469.

(*b*) See Bagley's Pract. 325.

(*c*) 1 Ro. Abr. 890, S., pl. 1, 2.

(*d*) R. H., 2 W. 4, r. 82. By that rule, "a notice in writing to the plaintiff, his attorney or agent, shall be a sufficient appearance by the bail or defendant on a *scire facias*." See form of notice, Chit. Forms, 454.

(*e*) See forms of declaration, Chit. Forms, 455. And see 2 Saund. 72 t: *Ward* v. *Gansell*, 3 Wils. 154: and of notice to plead, Chit. Forms, 457.

(*f*) *Ante*, p. 101), 223.

the Court (*g*). Where a *sci. fa.*, for the purpose of obtaining execution of a judgment obtained against a public officer of a banking copartnership, issued against fifteen persons, and twelve only were declared against, without any reason being given for the omission of the three, the Court held that the variance was an irregularity which should have been taken advantage of by motion, and not by demurrer (*h*).

Plea.

Plea.]—As soon as you have declared, rule the defendant to plead, and demand a plea, in the same manner as in ordinary cases (*i*). In *scire facias* against bail, Sunday or a *dies non* is not reckoned as one of the four days given by the rule to plead, even when it is not the last day of the four (*k*). It would seem, as just observed, that the 2 *W.* 4, *c.* 39, *s.* 11, as to pleading between the 10th August and 24th October, and the 12th rule of *M. T.*, 3 *W.* 4, framed to meet it (*l*), apply to proceedings in *scire facias* when the *scire facias* is a continuation of a suit within that statute and rule, otherwise not; and they do not apply to proceedings in *scire facias* when it is an *original* proceeding (*m*). *Ingross your plea on plain paper. Get it signed by counsel, as in other cases, if necessary,* (see *Vol.* 1, 247), *and deliver it to the plaintiff's attorney or agent* (*n*). If the defendant be summoned, and neglect to appear and plead, he is for ever after barred from availing himself of any matter which he might have pleaded (*o*); although, if not summoned, as we have seen, he may be relieved either by *auditâ querelâ*, or upon motion (*p*). It may be added, that the defendant cannot plead, to a *scire facias* on a judgment, matter which ought to have been pleaded to the original action (*q*).

Issue.

Issue and Trial.]—The issue is in all cases made up by the attorney (*r*). If it be an issue of fact, indorse on it the notice of trial, as in ordinary cases.

Trial.

Proceed to trial as in ordinary cases (*s*). The jury find the affirmative or negative of the issue; but they cannot give damages for the delay of execution (*t*). The plaintiff may be nonsuit, as in other cases (*u*).

Judgment after.

Judgment after a Trial.]—*Get the Nisi Prius record from the associate, and indorse the postea upon it, if it be not already indorsed by the associate* (*v*), *and sign judgment and proceed to execution, as in ordinary cases.*

(*g*) Panton v. *Hall*, 2 Salk. 598: *Sainsbury* v. *Pringle*, 10 B. & C. 751: *Fowler* v. *Rickerby*, 3 Scott, N. R., 138; 2 Man. & G. 710, *S. C.*

(*h*) *Fowler* v. *Rickerby*, *supra*.

(*i*) See Chit. Forms, 457.

(*k*) *Wathen* v. *Beaumont*, 11 East, 271: *Anon.*, 1 Dowl. 142: *Fraser* v. *Miller*, Id. 141.

(*l*) *Ante*, Vol. 1, 209.

(*m*) *Ante*, 1030.

(*n*) See as to pleas in *scire facias*, 6 Bac. Abr., Sci. Fa., (E.): 2 Saund. 72 t, u, 12, n. (10); 6, 7, a; 9 a, b, 10, 11: and forms of pleas and replications, Chit. Forms, 458.

(*o*) *Cooke* v. *Berry*, 1 Wils. 98.

(*p*) *Ante*, 474. See form of entry of judgment by default, Chit. Forms, 457; and of execution thereon, Id. 463, 457.

(*q*) *Bradley* v. *Eyre*, 11 M. & W. 432: *Phillipson* v. *Earl of Egremont*, 6 Q. B. 587: *Bradley* v. *Urquhart*, 2 Dowl., N. S., 1042; 11 M. & W. 456, *S. C.*; 6 Bac. Abr., Sci. Fa. (E).

(*r*) R. T., 12 W. 3, a: R. H., 4 W. 4, r. 5, *ante*, Vol. 1, 281. See as to the form, Chit. Forms, 458.

(*s*) See Chit. Forms, 458.

(*t*) *Henriques* v. *Dutch East India Company*, 2 L. Raym. 1532: 2 Str. 807, *S. C.*: *Knox* v. *Costello*, 3 Burr. 1791. The 3 & 4 W. 4, c. 42, ss. 29, 29, 30, does not apply to proceedings by *scire facias*.

(*u*) *O'Meally* v. *Wilson*, 1 Camp. 484.

(*v*) See as to the forms, Chit. Forms, 458, 9 Went. 552. See as to the form of entry of judgment on roll, Chit. Forms, 459, &c.

PART III.

Costs.

Costs.]—Before the stat. 3 & 4 *W.* 4, *c.* 42, the plaintiff was not entitled to costs on a *scire facias*, until after plea pleaded (*x*). But by the 34th section of that act, "in all writs of *scire facias*, the plaintiff obtaining judgment on an award of execution shall recover his costs of suit upon a judgment by default, as well as upon a judgment after plea pleaded or demurrer joined." By the 8 & 9 *W.* 3, *c.* 11, *s.* 3, if the plaintiff be nonsuit or discontinue, or if a verdict pass against him, the defendant shall be entitled to costs. Also, by the *R. H.*, 2 *W.* 4, *r.* 78, "a plaintiff shall not be allowed a rule to quash his own writ of *scire facias*, after a defendant has appeared, except on payment of costs" (*y*). The above statutes do not, it seems, extend to a *scire facias* to repeal letters patent (*z*). If costs be given where they should not be, the judgment may be reversed as to that, and affirmed as to the residue (*a*). Where a *sci. fa.* was unnecessarily sued out, but the defendant's attorney on his behalf proposed terms of compromise, which were for a time acted on, *Patteson*, J., held that the defendant could not afterwards object to the proceedings or to the payment of the costs (*b*).

Execution.

Execution.]—The execution is the same, and nearly in the same form, as in ordinary cases (*c*). In the case of a *scire facias* to revive a judgment, the writ of execution must be founded on the judgment in the *scire facias*, even in cases where the *scire facias* may have been unnecessary (*d*). And the same, of course, in all other cases. As to execution against bail on a *scire facias*, see *Vol.* 1, 804 (*e*). As to the manner in which the execution must pursue the judgment, see *Vol.* 1, 533. Upon a *scire facias* against bail, you may have one writ of execution against both, or a separate writ against each; for the recognisance is joint and several (*f*).

Quashing scire facias.

Quashing Scire Facias.]—If there be any irregularity in the *scire facias*, the party who sued it out may apply to have it quashed. By *R. H.*, 2 *W.* 4, *r.* 78, "a plaintiff shall not be allowed a rule to quash his own writ of *scire facias* after a defendant has appeared, except on payment of costs." The application will be granted on payment of costs of the proceedings on the *scire facias* only (*g*). The Court will not, after appearance, make a rule for this purpose absolute in the first instance (*h*).

Amendment of.

Amendment of.]—The Court have power to amend a *scire facias* for any misprision of the clerks by the 8 *H.* 6, *c.* 12,

(*x*) *Pocklington* v. *Peck*, 1 Str. 638; Saund. 72 u; 8 & 9 W. 3, c. 11, s. 3.
(*y*) See 1 B. & Ald. 486; Tidd, New Pract., 895.
(*z*) *R.* v. *Mills*, 7 T. R. 367.
(*a*) *Bellew* v. *Aylmer*, 1 Str. 188.
(*b*) *Brewster* v. *Meeke*, 2 Dowl. 612.
(*c*) See the 8 & 9 W. 3, c. 11, s. 3. See forms of execution, Chit. Forms, 453, 454.
(*d*) *Davis* v. *Norton*, 1 Bing. 133.
(*e*) See form of *fi. fa.* or *ca. sa.*, Chit. Forms, 453, 454.
(*f*) 1 Ro. Abr. 888. See *Sainsbury* v. *Pringle*, 10 B. & C. 71: *ante*, 804.
(*g*) *Oliverson* v. *Latour*, 7 Dowl. 605. See *Pickman* v. *Robson*, 1 B. & A. 486.
(*h*) *Ade* v. *Stubbs*, 4 Dowl. 282: 1 H. & W. 520, S. C.: *Oliverson* v. *Latour*, 7 Dowl. 605.

that statute including writs generally (*i*). They have accordingly allowed a *scire facias* to revive a judgment, and the declaration thereon to be amended (*k*), even where execution thereon had been executed and returned (*l*). Where the *scire facias* is an original proceeding, it may be amended in all cases where an amendment of an original writ would be allowed (*m*), even after *nul tiel* record pleaded (*n*); and where the assignees of a bankrupt issued a *scire facias* to revive judgment obtained by the bankrupt before his bankruptcy, but omitted to make the official assignee a co-plaintiff, the Court, after issue joined, allowed an amendment by inserting his name, with liberty to the defendant to plead *de novo* (*o*). But the Court have refused to allow a *scire facias* on a recognisance of bail to be amended, in order that the bail might have a further time to render their principal (*p*). In cases where leave to amend will not be granted, the plaintiff, if *nul tiel* record be pleaded, should move to quash the writ.

What defect aided by verdict, &c.

If the defendant plead to the *scire facias*, and the plaintiff proceed to trial, after verdict all defects in form and substance are aided by 18 *Eliz. c.* 14, and defects both in form and substance by 5 *G.* 1, c. 13: and the defects aided after verdict by 18 *Eliz. c.* 14, are now aided, after judgment by confession or default, by 4 & 5 *Anne, c.* 16, *s.* 2 (*q*).

Second scire facias.

Second Scire Facias.]—After reviving a judgment by *scire facias*, if a year and a day pass before execution, the judgment must be again revived by *scire facias*, before the execution can be sued out (*r*). And the same in the cases of death, marriage, &c.; after *scire facias* sued out, the judgment must be again revived before execution (*s*). The second *scire facias* should recite the previous *scire facias*, and the judgment obtained thereon; and this although the previous *scire facias* has not been returned and filed (*t*).

(*i*) *Thorpe* v. *Hook*, 1 Dowl. 501; *post*, Pt. 5, Ch. 30.

(*k*) *Brassell* v. *Jeco*, 9 East, 316. See *Perkins* v. *Petit*, 2 B. & P. 275, and the cases there cited. See *Klos* v. *Dodd*, 1 H. & W. 349; 4 Dowl. 67, *S. C.*

(*l*) *Thorpe* v. *Hook*, 1 Dowl. 501.

(*m*) *Buxom* v. *Hoskins*, 6 Mod. 263: *Reg.* v. *Aires*, 10 Mod. 258, 384: *Rex* v. *Eyre*, 1 Str. 43; 6 Bac. Abr., Sci. Fa., (D.)

(*n*) *Hampson* v. *Chamberlain*, Barnes, 2: *Sweetland* v. *Beezeley*, Id. 4: *Braswell* v. *Jeco*, 9 East, 316.

(*o*) *Holland* v. *Phillips*, 2 Per. & D. 336; 10 Ad. & E. 149, *S. C.*

(*p*) *Grey* v. *Jefferson*, 2 Str. 1165: *Bond* v. *Turner*, 8 Mod. 305: *Stevenson* v. *Grant*, 2 New Rep. 103: *Fulwood* v. *Annis*, 3 B. & P. 361. But see *Sweetland* v. *Beezeley*, Barnes, 4: *Perkins* v. *Petit*, 1 B. & P. 275.

(*q*) See 6 Bac. Abr., Sci. Fa., (D).

(*r*) 2 Sellon, 189. See the form, Chit. Forms, 447.

(*s*) *Hardisty* v. *Baring*, 2 Salk. 598; 2 Sellon, 186.

(*t*) *Walker* v. *Thelluson*, 1 Dowl., N. S., 578.

PART IV.

PROCEEDINGS IN ACTIONS BY AND AGAINST PARTICULAR PERSONS.

CHAPTER I.

PROCEEDINGS AGAINST PEERS AND MEMBERS OF PARLIAMENT.

PART IV.

Peers, &c., privileged from arrest.

Proceedings against, in ordinary Cases.]—Peers and peeresses, as we have seen, cannot be holden to bail (*a*). Nor can they be taken in execution on a *capias ad satisfaciendum* (*b*): consequently, judgment against them must be executed by *fieri facias* or *elegit*. Members of the House of Commons, also, during the session of Parliament, and for a convenient time before and after it, are privileged from arrest (*c*), and, therefore, during the time of their privilege, they must not be held to bail, or taken in execution on a *ca. sa.* An unprivileged person in custody in execution, who becomes a peer or member of Parliament, is entitled to his discharge on motion (*d*).

The process against.

The process to enforce the appearance in a personal action of a person entitled to privilege of peerage or of Parliament, is by the writ of summons, or by the writ of summons and *distringas* (*e*), the same as in ordinary cases. There seems no occasion to state in the process that the defendant is entitled to privilege of peerage, or of Parliament. It is to be remembered, however, that he is to be still privileged from being holden to bail (*f*); also, that he cannot be outlawed (*g*). It is no ground for a plea in abatement, that a defendant sued as a peer is also described as having privilege of Parliament (*h*).

(*a*) Vol. 1, 633.
(*b*) Vol. 1, 609.
(*c*) Vol. 1, 609, 634.
(*d*) *Phillips* v. *Wellesley*, 1 Dowl. 9: *Ex p. Burton*, Id. 14.
(*e*) As to a writ of *distringas* issuing against a peer of Parliament, for the purpose of compelling his appearance, see Vol. 1, 171.
(*f*) Vol. 1, 633.
(*g*) See *post*, Pt. 5, Ch. 2.
(*h*) *Cantwell* v. *Earl Stirling*, 1 M. & Scott, 297; 8 Bing. 174, *S. C.*

The remaining proceedings in the cause are the same as in ordinary cases, excepting that the execution must be by *fi. fa.* or *elegit*, and not by *ca. sa.* A *ca. sa.* cannot even be issued, although there be no intention on the part of the party suing it out to execute it (*i*). A doubt formerly existed, whether, if a person were taken in execution, and set at liberty by privilege of either house of Parliament, the party at whose suit such execution was issued was for ever barred and disabled from suing forth a new writ of execution; but by 2 *Jac.* 1, c. 13, *s.* 2, the plaintiff may sue forth and execute a new writ of execution when the privilege has ceased, the same as if the former execution had not taken place (*k*).

Other proceedings.

Arrest of, under a ca. sa.

As to when an attachment will be granted against a peer or member of the House of Commons, see *post*, *Pt.* 8.

Attachment against.

Proceedings against Members of Parliament subject to the Bankrupt Laws.]—By stat. 6 *G.* 4, *c.* 16, *ss.* 9 & 10, if any creditor or creditors of a trader having privilege of Parliament, to such amount as is declared requisite to support a commission, shall file an affidavit or affidavits in any court of record at Westminster, that such debt or debts is or are justly due to him or them respectively, and that such debtor, as he or they verily believe, is such trader as aforesaid, and shall sue out of the same court a [summons (2 *W.* 4, *c.* 39, *s.* 9) (*l*)] against such trader, and serve him with a copy of such summons—if such trader shall not, within one calendar month after personal service of such summons, pay, secure, or compound for such debt or debts to the satisfaction of such creditor or creditors, or enter into a bond in such sum, and with two sufficient sureties, as any of the judges of the court out of which such summons shall issue shall approve of, to pay such sum as shall be recovered in such action or actions, together with such costs as shall be given in the same (*m*), and, within *one calendar month next after personal service* of such summons, *cause an appearance* or appearances *to be entered* to such action or actions in the proper court or courts in which the same shall have been brought, every such trader shall be deemed to have committed an act of bankruptcy from the time of the service of such summons, and any creditor or creditors of such trader to such amount as aforesaid may sue out a commission against him, and proceed thereon in like manner as against other bankrupts; but such person shall not be subject to be arrested or imprisoned during the time of such privilege, except in cases thereby made felony (*n*).

Proceedings against members subject to bankrupt laws.

Mode of compelling appearance, and security for debt and costs.

It is optional, of course, with the plaintiff in this case to adopt the remedy here given, or to proceed as directed in the first section of this Chapter.

(*i*) *Cassidy* v. *Stewart*, 2 Scott, N. R., 473; 1 Chit. Rep. 731, *S. C.*: *Jameson* v. *Campbell*, 5 B. & Ald. 250; 1 Bing. 320, *S. C.*, in error.

(*k*) See *Phillips* v. *Wellesley*, 1 Dowl. 9: *Ex p. Burton*, Id. 14; *ante*, 609, 621.

(*l*) And see the form prescribed by the act, Chit. Forms, 481.

(*m*) *Hunter* v. *Campbell*, 3 B. & Ald. 393; 9 Dowl. 366, *S. C.*

(*n*) See Arch. Bkt. L. 299. And see as to the form of the affidavit, Chit. Forms, 481.

PART IV.

The process against.

The 2 *W.* 4, *c.* 39, *s.* 9, in the schedule No. 6, prescribes the form of this summons. It is issued and indorsed in the same manner as the ordinary writ. Where, in proceeding against a member of Parliament, it appeared that the action was brought in 1823, against the defendant, who was then a member, but had since ceased to be so; the action was commenced by *bill*, and writ of *summons* thereon, and the writ was returned *non est inventus*, and entered of record, but no further steps had afterwards been taken, as the defendant had been taken out of the country; and the plaintiff being desirous of continuing the proceedings in order to save the Statute of Limitations, the Court held that a writ of *distringas* ought to issue, and would be the proper continuance of the suit (*p*).

(*p*) *Taylor* v. *Duncombe*, 2 Dowl. 401. R. 241; 4 Tyr. 450, *S. C.* And see *Dickenson* v. *Teague*, 1 C., M., &

CHAPTER II.

PROCEEDINGS BY AND AGAINST CORPORATIONS.

Must sue, or defend by attorney.

CORPORATIONS aggregate (to which alone this Chapter has reference) cannot sue or defend otherwise than by attorney, which attorney must be appointed under their common seal (*a*).

Proceedings by.

In actions *by* corporations, they may hold to bail and proceed in the same manner as individuals (*b*). Even in ejectment they may now proceed in the ordinary way, without executing a power of attorney authorising a third person to enter and make a lease on the land, as used to be the practice (*c*). They cannot, however, sue as a common informer (*d*). An action of assumpsit may, in some cases, be maintained by a corporation aggregate (*e*). A corporation must be described in all legal proceedings by its corporate name (*f*). Frequently, acts of Parliament enable corporate bodies to sue, and others to sue them, in the names of their clerks, treasurers, &c., for the time being.

Proceedings against.

Proceedings *against* corporations aggregate must, formerly, have been by original, summons, or attachment, and *distringas;* and the mode of proceeding was the same as it formerly was in actions against peers, excepting that the plaintiff was not authorised by any statute to enter an appearance for the defendants, but he must have proceeded to compel an appearance by levying, on the lands and goods which constitute the common stock of the corporation, issues on successive writs of *distringas*, moving to increase them, and from time to time to sell them. Now, however, by the 2 *W.* 4, *c.* 39, *ss.* 21, 22, 23, the process against corporations aggregate, to enforce their appearance in a personal action, is the same as in ordinary cases, by writ of summons, or summons and *distringas*. The corporate name must be inserted accurately in the writ. The service of the writ may be "on the mayor or other head officer, or on the town-clerk, clerk, treasurer, or secretary of such corporation" (*g*). The corporation, or any members of it, cannot be holden to bail (*h*). In some cases, assumpsit lies against a

(*a*) Co. Litt. 66. b.; Vol. 1, 65. See *R.* v. *Birmingham and Gloucester Railway Co.*, 9 C. & P. 478; 1 G. & D. 457: *Arnold* v. *The Mayor, Aldermen, and Burgesses of Poole*, 5 Scott, N. R., 741; 2 Dowl., N. S., 574. As to the mode of appointing an attorney for the City of London, see 8. C.

(*b*) See Chit. Forms, 482.

(*c*) Run. Eject. 150; Ros. 325.

(*d*) *Weavers' Company* v. *Forrest*, 2 Str. 1241.

(*e*) See *Arnold* v. *Mayor of Poole*, *supra*: *The Barber Surgeons of London* v. *Pelson*, 2 Lev. 252: *The Dean and Chapter of Rochester* v. *Pierce*, 1 Camp. 466: *Mayor of Stafford* v. *Till*, 12 Moore, 260; 4 Bing. 75, *S. C.*: *Fishmongers' Company* v. *Robertson*, 12 Law J., N. S., C. P., 185; 6 Scott, N. R., 56, *S.C.*

(*f*) 1 Leach, 4th ed., 253.

(*g*) 2 W. 4, c. 39, s. 13.

(*h*) Vol. 1, 641.

corporation (*i*). So may *indebitatus* in debt lie (*k*). Tro
is sustainable against them; so is case for a false return
and so is trespass (*m*). A corporation aggregate, not being
pable of a personal appearance, can only appear by attor
regularly appointed under their common seal (*n*).

It would seem that corporate property is not protected by
5 & 6 *W.* 4, *c.* 76, though directed to be applied to public p
poses only, from the claims of persons having demands on
corporation (*o*).

The remaining proceedings are the same as in ordinary ca

(*i*) See *Mayor of Ludlow* v. *Charlton*, 6 M. & W. 815: *Arnold* v. *The Mayor of Poole*, 5 Scott, N. R., 741; 2 Dowl., N. S., 874; 4 M. & Gr. 860, *S. C.*: *Hall* v. *Mayor, &c., of Swansea*, 13 Law J., N. S., Q. B., 107; 5 Q. B. 526; 1 Dav. & M. 475, *S. C.*, *Saunders* v. *Guardians of St. Neots*, 15 Law J., N. S., Q. B., 225.

(*k*) *De Grave* v. *The Mayor &c.*, 4 C. & P. 111. And see *Tilson* v. *Warwick Gas Company*, 4 B. & C. 962. And *Carden* v. *The General Cemetery Company*, 7 Scott, 97: *Hopkins* v. *Swansea* (*Mayor of, &c.*), 4 M. & W. 621; *S. C.*, in error, 8 M. & W.

(*l*) *Yarborough* v. *Bank of England*, East, 6: *Smith* v. *Birmingham and S fordshire Gas Company*, 1 A. & E. 53 Nev. & M. 771, *S. C.*

(*m*) *Maund* v. *Monmouth Canal C pany*, 1 Car. & M. 606; 2 Dowl., N. 113; 5 Scott, N. R., 457; 4 M. & Gr. S. C.

(*n*) Bro. Abr., tit. Corp. 28; Co. L 66. a. b.; 10 Co. 30 b.; *ante*, 1037, n. (

(*o*) *Doe Parr* v. *Roe*, 1 Q. B. 700; 1 G & D. 220, *S. C*

CHAPTER III.

PROCEEDINGS BY AND AGAINST JOINT-STOCK AND OTHER PUBLIC COMPANIES.

Process.

JOINT-STOCK or other public companies may often sue and be sued in the name of one or more of its members or officers. It is not, perhaps, necessary to describe such member or officer as such, in the writ, though it is usual and safest to do so (*a*).

Service of.

As to the service of process in an action against a trading or other company or body within the meaning of the 7 *W.* 4 & 1 *Vict. c.* 73, see *Vol.* 1, 156. There are also many statutory enactments pointing out the mode of service in action against public companies, for which see *Vol.* 1, 157 (*b*). Service of a writ in Ireland will not do (*c*).

Several pleas.

As to what pleas will be allowed to be pleaded together, in an action against the public officer of a company, see *ante*, *Vol.* 1, 254, &c.

Inspection of books.

As to when the books of public companies may be inspected, see *post*, *Pt.* 5, *Ch.* 13. In an action against a shareholder for calls, it was held that the defendant could not claim to inspect the minute-books of the company and of the directors' meetings, "particularly with respect to the calls" sued upon, for the purpose of framing his plea (*d*).

Parties to action.

If a statute enable a company to sue on covenants in which they are interested in the name of their secretary, an action may be brought in his name upon a covenant entered into with individuals in which the company are interested (*e*). Where a statute stated that *it should be sufficient*, in all actions to be instituted or prosecuted against the company, to state the name of the secretary, or some one of the directors, &c., as the nominal defendant representing the company, the Court held, upon the construction of the whole act of Parliament, that it was not imperative to sue in this manner, but that an individual shareholder might be proceeded against (*f*). If an action is brought on a contract entered into with the directors of a joint-stock company constituted by deed, all the directors should sue (*g*).

(*a*) See Vol. 1, 146.

(*b*) See also the 7 & 8 Vict. c. 113, s. 43, (An Act to regulate certain Joint-stock Banks in England).

(*c*) *Evans* v. *The Dublin and Drogheda Railway Company*, 14 M. & W. 142; 2 D. & L. 353, *S. C.*

(*d*) *Birmingham, Bristol, and Thames Junction Railway Company* v. *White*, 1 Q. B. 282.

(*e*) *Smith* v. *Goldsworthy*, 4 Q. B. 430. And see *Skinner* v. *Lambert*, 4 M. & G. 477; 5 Scott, N. R., 197, *S. C.*

(*f*) *Beech* v. *Sir J. Eyre*, 6 Scott, N. R., 327; 5 M. & G. 415. (The company was the "Patent Rolling and Compressing Iron Company," established under 4 & 5 Vict. c. 89). And see *Blewitt* v. *Gordon*, 1 Dowl., N. S., 815. (*Monmouthshire Iron and Coal Company*).

(*g*) *Phelps* v. *Lyle*, 10 Ad. & E. 113; 2 P. & D. 314, *S. C.*

PART IV.

Action by or against a public officer of a banking company.

The creditors of a banking company, under the 7 *G.* 4, 46, cannot sue an individual member of the company the debt of the company, but must proceed against the p lic officer, as enacted by the 9th section of that act. An would seem that this is the case, though there is no pul officer, or he is out of the jurisdiction; but, in such a c it would seem that the company could be compelled to point a public officer (*h*). The public officer of such a co pany may, notwithstanding its change of name and the cession of new proprietors, maintain an action on a guaran given to the company before its change of name (*i*). Wh such a copartnership had begun to carry on the trade business of bankers, and issued notes accordingly, but sub quently stopped payment, and merely kept the establishm open for the purpose of paying their notes and winding up affairs of the concern, it was held that they still continued be a banking copartnership, so as to be entitled to sue by th public officer (*k*). It would seem that the 7 *G.* 4, *c.* 46, a the 1 & 2 *Vict. c.* 96, enable banking copartnerships to s in the name of their public officer for the price of sha therein (*l*). Where an action was improperly brought und the former statute in the names of two persons as public o cers, the Court allowed the proceedings to be amended striking out the name of one of the plaintiffs on payment costs (*m*). An objection, that the plaintiff ought to have su as the public officer, cannot be taken, unless it has been plea ed (*n*). If a judgment is obtained against a person as the *publ* officer of a company, who in fact is not so, application shou be made to set it aside, for until that is done, it is binding upo the company (*o*). But if the judgment was obtained by t collusion and connivance of the plaintiff and the public office the same is not binding on the other members of the copar nership, and may be taken advantage of by plea to a *sci. fa.* o the judgment, or, it seems, by motion to set the judgment aside(*p*

Judgment obtained against a party not a public officer, &c.

Where a public officer ceased to be such.

Where an action was brought by a public officer of a bankin company under the 7 *G.* 4, *c.* 46, judgment having been entere up and execution issued in his name after he had ceased to b such public officer, the Court permitted a suggestion *of hi* removal and the name of another officer to be entered *nun pro tunc* on the roll, and the judgment and *ca. sa.* to be amende by the insertion of the officer's name, without costs, though th defendant had been arrested, and applied to set aside the pro ceedings for irregularity (*q*). It seems doubtful whether such

(*h*) *Steward* v. *Greaves*, 10 M. & W. 711; 2 Dowl., N. S., 415, S. C. See the 7 & 8 Vict. c. 113, s. 47, for regulating joint-stock banks. The 1 & 2 Vict. c. 96, enables members of banking companies established under 7 Geo. 4, c. 46, and 6 G. 4, c. 42, to sue, either alone or jointly with others, the public officer of such company, and the public officer to sue such members either alone or jointly with others. This act of 1 & 2 Vict., extended by the 3 & 4 Vict. c. 111, is made perpetual by the 5 & 6 Vict. c. 86.

(*i*) *Wilson* v. *Craven*, 8 M. & W. 584.

(*k*) *Davidson* v. *Cooper*, 11 M. & W. 778.

(*l*) *Davidson* v. *Bower*, 5 Scott, N. R. 539.

(*m*) *Holmes* v. *Binney*, 6 Scott, 946. See *ante*, 163, as to when an amendment will be allowed in the writ of summons.

(*n*) *Robertson* v. *Steward*, 1 Scott, N. R. 419; 1 M. & G. 511, S. C.

(*o*) *Bradley* v. *Eyre*, 1 D. & L. 260. See *Fowler* v. *Rickerby*, 9 Dowl. 662.

(*p*) *Phillipson* v. *Earl of Egremont*, 6 Q. B. 587; *Bradley* v. *Eyre*, *supra*: *Fowler* v. *Rickerby*, 2 M. & G. 760.

(*q*) *Webb* v. *Taylor*, 13 Law J., N. S., Q. B. 24; 1 D. & L. 676. *Quære*, as to whether a defendant is precluded from taking

a suggestion can be traversed (*r*). So, where a *cognovit* was given in an action by the public officer under the 7 *G.* 4, *c.* 46, by which it was provided, that, upon default in payment of a sum of money, the plaintiff should be at liberty to enter up judgment and issue execution, it was held that judgment might be signed in the name of another public officer, upon a suggestion being entered of the removal of the original plaintiff (*r*). The Court in one case set aside a *sci. fa.* which had been issued upon a judgment on a warrant of attorney, given by the public officer of a banking company, under the 7 *G.* 4, *c.* 46, for an irregularity which made it void, and directed issues to try the liability of the defendant, the title of the plaintiff, and the validity of the warrant of attorney (*s*). It seems, that, in support of an application by a member of such a company to set aside a warrant of attorney and judgment and *sci. fa.* in the proceedings against the public officer, and the *sci. fa.* in the proceeding against himself, the affidavits may be entitled in both rules (*s*).

Cognovit to.

Setting aside sci. fa. on judgment on warrant of attorney.

Where judgment is obtained against the public officer of a joint-stock banking company sued on their behalf, under the 7 G. 4, c. 46, *s.* 9, the proper mode of proceeding to execution against a member not being such public officer, is by *sci. fa.*, and not by suggestion (*t*), and leave of the Court is necessary for issuing the *sci. fa.* Execution may be issued against the public officer without a *sci. fa.* (*u*). The Court will not give leave to issue a *sci. fa.* against former members of a banking copartnership, unless it be made to appear that the plaintiff has really and *bonâ fide* attempted to enforce the judgment against the members for the time being (*v*). It would seem that the motion for the *sci. fa.* against a member of a banking copartnership trading under the 7 *G.* 4, *c.* 46, must be made in open court (*x*). The rule is absolute in the first instance (*y*), though in some cases a rule *nisi* only has been granted. It is no answer to the application, that the parties called on to shew cause are not shareholders of the company (*z*). The issuing of the *sci. fa.* without the leave of the Court cannot be pleaded as a defence, but is an irregularity merely, for which the writ of *sci. fa.* may be set aside (*a*), upon application for that purpose made in due time. After judgment on demurrer, the Court

Scire facias and execution against members of a banking company.

Issuing sci. fa. without leave, irregularity.

advantage of such a defect by a clause in a cognovit, that he will not obtain any summons or rule of court to set aside any proceedings for irregularity, or otherwise to do any matter or thing whereby the plaintiff may be delayed in entering up judgment and suing out execution, *S. C.*

(*r*) *Webb* v. *Taylor*, *supra*.

(*s*) *Beaunquet* v. *Graham*, 7 Jur. 831, Q. B. See *Beaunquet* v. *Woodford*, 5 Q. B. 318.

(*t*) *Ransford* v. *Beaunquet*, 2 Q. B. 972. A suggestion was entered in this case, and the court of errors set aside the award of execution: *Wingfield* v. *Barton*, 2 Dowl., N. S., 355, (*Patent Rolling and Consuming Iron Company*): *Winfield* v. *Peel*, 12 Law J., N. S., 102, B. C.: *Clowes* v. *Brettell*, 10 M. & W. 506; 2 Dowl., N. S., 528: *Whittenbury* v. *Law*, 8 Scott, 661; 6 Bing. N. C. 345: *Beaunquet* v. *Ransford*, 11 Ad. & E. 521: *Cross* v. *Law*, 6 M. & W. 217. See *Williams* v. *Aspinall*, 7 Scott, 822. See form of *sci. fa.*, Chit. Forms, 483.

(*u*) *Harwood* v. *Law*, 7 M. & W. 203; 8 Dowl. 899, *Parke*, B., *dubitante*. See *Beaunquet* v. *Ransford*: *Paulet* v. *Nuttall*, 11 Ad. & E. 520; 3 P. & D., 298, *S. C.*

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(*z*) *Clowes* v. *Brettell*, 11 M. & W. 461; 2 Dowl., N. S., 1020, *S. C.*

(*a*) *Bradley* v. *Warburg*, 11 M. & W. 452; 2 Dowl., N. S., 1069.

PART IV.

Action by or against a public officer of a banking company.

The creditors of a banking company, under the 7 *G.* 4, 46, cannot sue an individual member of the company f the debt of the company, but must proceed against the pu lic officer, as enacted by the 9th section of that act. And would seem that this is the case, though there is no publ officer, or he is out of the jurisdiction; but, in such a ca it would seem that the company could be compelled to a point a public officer (*h*). The public officer of such a co pany may, notwithstanding its change of name and the a cession of new proprietors, maintain an action on a guarant given to the company before its change of name (*i*). Whe such a copartnership had begun to carry on the trade a business of bankers, and issued notes accordingly, but subs quently stopped payment, and merely kept the establishme open for the purpose of paying their notes and winding up t affairs of the concern, it was held that they still continued be a banking copartnership, so as to be entitled to sue by the public officer (*k*). It would seem that the 7 *G.* 4, *c.* 46, a the 1 & 2 *Vict. c.* 96, enable banking copartnerships to s in the name of their public officer for the price of shar therein (*l*). Where an action was improperly brought und the former statute in the names of two persons as public off cers, the Court allowed the proceedings to be amended b striking out the name of one of the plaintiffs on payment costs (*m*). An objection, that the plaintiff ought to have sue as the public officer, cannot be taken, unless it has been plea ed (*n*). If a judgment is obtained against a person as the publ officer of a company, who in fact is not so, application shoul be made to set it aside, for until that is done, it is binding upo the company (*o*). But if the judgment was obtained by th collusion and connivance of the plaintiff and the public office the same is not binding on the other members of the copar nership, and may be taken advantage of by plea to a *sci. fa.* o the judgment, or, it seems, by motion to set the judgment aside (*p*).

Judgment obtained against a party not a public officer, &c.

Where a public officer ceased to be such.

Where an action was brought by a public officer of a bankin company under the 7 *G.* 4, *c.* 46, judgment having been entere up and execution issued in his name after he had ceased to b such public officer, the Court permitted a suggestion of hi removal and the name of another officer to be entered *nun pro tunc* on the roll, and the judgment and *ca. sa.* to be amende by the insertion of the officer's name, without costs, though th defendant had been arrested, and applied to set aside the pro ceedings for irregularity (*q*). It seems doubtful whether such

(*h*) *Steward* v. *Greaves*, 10 M. & W. 711; 2 Dowl., N. S., 415, *S. C.* See the 7 & 8 Vict. c. 113, s. 47, for regulating joint-stock banks. The 1 & 2 Vict. c. 96, enables members of banking companies established under 7 Geo. 4, c. 46, and 6 G. 4, c. 42, to sue, either alone or jointly with others, the public officer of such company, and the public officer to sue such members either alone or jointly with others. This act of 1 & 2 Vict., extended by the 3 & 4 Vict. c. 111, is made perpetual by the 5 & 6 Vict. c. 85.

(*i*) *Wilson* v. *Craven*, 8 M. & W. 584.

(*k*) *Davidson* v. *Cooper*, 11 M. & W. 778.

(*l*) *Davidson* v. *Bower*, 5 Scott, N. R. 539.

(*m*) *Holmes* v. *Binney*, 6 Scott, 346. See *ante*, 163, as to when an amendment will be allowed in the writ of summons.

(*n*) *Robertson* v. *Steward*, 1 Scott, N. R. 419; 1 M. & G. 511, *S. C.*

(*o*) *Bradley* v. *Eyre*, 1 D. & L. 260. See *Fowler* v. *Rickerby*, 2 Dowl. 682.

(*p*) *Phillipson* v. *Earl of Egremont*, Q. B. 587; *Bradley* v. *Eyre*, *supra*: *Fowler* v. *Rickerby*, 2 M. & G. 760.

(*q*) *Webb* v. *Taylor*, 13 Law J., N. S., Q. B. 24; 1 D. & L. 676. *Quære*, as to whether a defendant is precluded from taking

Cognovit to.

suggestion can be traversed (*r*). So, where a *cognovit* was iven in an action by the public officer under the 7 *G.* 4, *c.* 46, y which it was provided, that, upon default in payment of a am of money, the plaintiff should be at liberty to enter up udgment and issue execution, it was held that judgment night be signed in the name of another public officer, upon a uggestion being entered of the removal of the original laintiff (*r*). The Court in one case set aside a *sci. fa.* which ad been issued upon a judgment on a warrant of attorney, iven by the public officer of a banking company, under the *G.* 4, *c.* 46, for an irregularity which made it void, and di- ected issues to try the liability of the defendant, the title of he plaintiff, and the validity of the warrant of attorney (*s*). t seems, that, in support of an application by a member of uch a company to set aside a warrant of attorney and judg- ment and *sci. fa.* in the proceedings against the public officer, nd the *sci. fa.* in the proceeding against himself, the affidavits nay be entitled in both rules (*s*).

Setting aside sci. fa. on judgment on warrant of attorney.

Where judgment is obtained against the public officer of a oint-stock banking company sued on their behalf, under the 7 . 4, *c.* 46, *s.* 9, the proper mode of proceeding to execution gainst a member not being such public officer, is by *sci. fa.*, nd not by suggestion (*t*), and leave of the Court is necessary or issuing the *sci. fa.* Execution may be issued against the ublic officer without a *sci. fa.* (*u*). The Court will not give eave to issue a *sci. fa.* against former members of a banking co- artnership, unless it be made to appear that the plaintiff has ully and *bonâ fide* attempted to enforce the judgment against the embers for the time being (*v*). It would seem that the mo- on for the *sci. fa.* against a member of a banking copartner- hip trading under the 7 *G.* 4, *c.* 46, must be made in open ourt (*x*). The rule is absolute in the first instance (*y*), though n some cases a rule *nisi* only has been granted. It is no an- wer to the application, that the parties called on to shew cause re not shareholders of the company (*z*). The issuing of the *i. fa.* without the leave of the Court cannot be pleaded as a efence, but is an irregularity merely, for which the writ of *i. fa.* may be set aside (*a*), upon application for that purpose ade in due time. After judgment on demurrer, the Court

Seire facias and execution against members of a banking company.

Issuing sci. fa. without leave, irregularity.

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(*t*) *Ransford* v. *Beaanquet*, 2 Q. B. 972. suggestion was entered in this case, and he court of errors set aside the award of xecution: *Wingfield* v. *Barton*, 2 Dowl., N. S., 355, (*Patent Rolling and Compressing Iron Company*): *Winfield* v. *Peel*, 2 Law J., N. S., 102, B. C.: *Clowes* v. *Brettell*, 10 M. & W. 506; 2 Dowl., N. S., 528: *Whittenbury* v. *Law*, 8 Scott, 661; 6 Bing. N. C. 345: *Beaanquet* v. *Ransford*, 11 Ad. & E. 521: *Cross* v. *Law*, 6 M. & W. 217. See *Williams* v. *Aspinall*, 7 Scott, 822. See form of *sci. fa.*, Chit. Forms, 483.

(*u*) *Harwood* v. *Law*, 7 M. & W. 203; 8 Dowl. 899, *Parke*, B., *dubitante*. See *Beaanquet* v. *Ransford*; *Paulet* v. *Nuttall*, *Beaanquet* v. *Ransford*; *Paulet* v. *Nuttall*, 11 Ad. & E. 520; 3 P. & D., 293, S. C.

(*v*) *Eardley* v. *Law*, 4 P. & D. 379; 12 Ad. & E. 802.

(*x*) *Wingfield* v. *Barton*, 2 Dowl., N. S., 355.

(*y*) *Johnson* v. *Brettell*, 7 Jur. 219.

(*z*) *Clowes* v. *Brettell*, 11 M. & W. 461; 2 Dowl., N. S., 1020, S. C.

(*a*) *Bradley* v. *Warburg*, 11 M. & W. 452; 2 Dowl., N. S., 1059.

PART IV.

Action by or against a public officer of a banking company.

The creditors of a banking company, under the 7 *G.* 4 46, cannot sue an individual member of the company the debt of the company, but must proceed against the p lic officer, as enacted by the 9th section of that act. An would seem that this is the case, though there is no pu officer, or he is out of the jurisdiction; but, in such a c it would seem that the company could be compelled to point a public officer (*h*). The public officer of such a c pany may, notwithstanding its change of name and the cession of new proprietors, maintain an action on a guara given to the company before its change of name (*i*). Wh such a copartnership had begun to carry on the trade business of bankers, and issued notes accordingly, but sub quently stopped payment, and merely kept the establishm open for the purpose of paying their notes and winding up affairs of the concern, it was held that they still continued be a banking copartnership, so as to be entitled to sue by th public officer (*k*). It would seem that the 7 *G.* 4, *c.* 46, the 1 & 2 *Vict. c.* 96, enable banking copartnerships to in the name of their public officer for the price of sha therein (*l*). Where an action was improperly brought un the former statute in the names of two persons as public o cers, the Court allowed the proceedings to be amended striking out the name of one of the plaintiffs on payment costs (*m*). An objection, that the plaintiff ought to have su as the public officer, cannot be taken, unless it has been ple ed (*n*). If a judgment is obtained against a person as the *pub* officer of a company, who in fact is not so, application shou be made to set it aside, for until that is done, it is binding up the company (*o*). But if the judgment was obtained by t collusion and connivance of the plaintiff and the public offic the same is not binding on the other members of the copa nership, and may be taken advantage of by plea to a *sci. fa.* the judgment, or, it seems, by motion to set the judgment aside(*p* Where an action was brought by a public officer of a bank company under the 7 *G.* 4, *c.* 46, judgment having been enter up and execution issued in his name after he had ceased to such public officer, the Court permitted a suggestion of h removal and the name of another officer to be entered *nun pro tunc* on the roll, and the judgment and *ca. sa.* to be amende by the insertion of the officer's name, without costs, though th defendant had been arrested, and applied to set aside the pro ceedings for irregularity (*q*). It seems doubtful whether suc

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Where a public officer ceased to be such.

(*h*) *Steward* v. *Greaves*, 10 M. & W. 711; 2 Dowl., N. S., 415, *S. C.* See the 7 & 8 Vict. c. 113, s. 47, for regulating joint-stock banks. The 1 & 2 Vict. c. 96, enables members of banking companies established under 7 Geo. 4, c. 46, and 6 G. 4, c. 42, to sue, either alone or jointly with others, the public officer of such company, and the public officer to sue such members either alone or jointly with others. This act of 1 & 2 Vict., extended by the 3 & 4 Vict. c. 111, is made perpetual by the 5 & 6 Vict. c. 86.

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(*p*) *Phillipson* v. *Earl of Egremont*, 1 Q. B. 587; *Bradley* v. *Eyre*, *supra*; *Fowler* v. *Rickerby*, 2 M. & G. 760.

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Cognovit to.

a suggestion can be traversed (*r*). So, where a *cognovit* was given in an action by the public officer under the 7 *G.* 4, *c.* 46, by which it was provided, that, upon default in payment of a sum of money, the plaintiff should be at liberty to enter up judgment and issue execution, it was held that judgment might be signed in the name of another public officer, upon a suggestion being entered of the removal of the original plaintiff (*r*). The Court in one case set aside a *sci. fa.* which had been issued upon a judgment on a warrant of attorney, given by the public officer of a banking company, under the 7 *G.* 4, *c.* 46, for an irregularity which made it void, and directed issues to try the liability of the defendant, the title of the plaintiff, and the validity of the warrant of attorney (*s*). It seems, that, in support of an application by a member of such a company to set aside a warrant of attorney and judgment and *sci. fa.* in the proceedings against the public officer, and the *sci. fa.* in the proceeding against himself, the affidavits may be entitled in both rules (*s*).

Setting aside sci. fa. on judgment on warrant of attorney.

Where judgment is obtained against the public officer of a joint-stock banking company sued on their behalf, under the 7 *G.* 4, *c.* 46, *s.* 9, the proper mode of proceeding to execution against a member not being such public officer, is by *sci. fa.*, and not by suggestion (*t*), and leave of the Court is necessary for issuing the *sci. fa.* Execution may be issued against the public officer without a *sci. fa.* (*u*). The Court will not give leave to issue a *sci. fa.* against former members of a banking copartnership, unless it be made to appear that the plaintiff has fully and *bonâ fide* attempted to enforce the judgment against the members for the time being (*v*). It would seem that the motion for the *sci. fa.* against a member of a banking copartnership trading under the 7 *G.* 4, *c.* 46, must be made in open court (*x*). The rule is absolute in the first instance (*y*), though in some cases a rule *nisi* only has been granted. It is no answer to the application, that the parties called on to shew cause are not shareholders of the company (*z*). The issuing of the *sci. fa.* without the leave of the Court cannot be pleaded as a defence, but is an irregularity merely, for which the writ of *sci. fa.* may be set aside (*a*), upon application for that purpose made in due time. After judgment on demurrer, the Court

Scire facias and execution against members of a banking company.

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vantage of such a defect by a clause *cognovit*, that he will not obtain any motions or rule of court to set aside any proceedings for irregularity, or otherwise do any matter or thing whereby the plaintiff may be delayed in entering up judgment and suing out execution, *S. C.* *Webb* v. *Taylor*, *supra*.

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Ramsford v. *Beaunquet*, 2 Q. B. 972. The suggestion was entered in this case, and the grant of errors set aside the award of execution: *Wingfield* v. *Barton*, 2 Dowl., N. S., 355, (*Patent Rolling and Coining Iron Company*): *Winfield* v. *Peel*, 2 Dowl. N. S., 1032, B. C.: *Clowes* v. *Brettell*, 10 M. & W. 506; 2 Dowl., N. S., 528: *Whittenbury* v. *Law*, 8 Scott, 661; 6 Bing. N. C. 345: *Beaunquet* v. *Ramsford*, 11 Ad. & E. 521: *Cross* v. *Law*, 6 M. & W. 217. See *Williams* v. *Aspinall*, 7 Scott, 822. See form of *sci. fa.*, Chit. Forms, 483.

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(*v*) *Johnson* v. *Bretell*, 7 Jur. 219.

(*x*) *Clowes* v. *Brettell*, 11 M. & W. 461; 2 Dowl., N. S., 1030, S. C.

(*a*) *Bradley* v. *Warburg*, 11 M. & W. 452; 2 Dowl., N. S., 1069.

PART IV.

Action by or against a public officer of a banking company.

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Cognovit to.

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Scire facias and execution against members of a banking company.

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(*v*) *Eardley* v. *Law*, 4 P. & D. 379; 12 Ad. & E. 902.

(*x*) *Wingfield* v. *Barton*, 2 Dowl., N. S., 335.

(*y*) *Johnson* v. *Bretell*, 7 Jur. 219.

(*z*) *Clowes* v. *Brettell*, 11 M. & W. 461; 2 Dowl., N. S., 1090, *S. C.*

(*a*) *Bradley* v. *Warburg*, 11 M. & W. 452; 2 Dowl., N. S., 1089.

Action by or against a public officer of a banking company.

The creditors of a banking company, under the 7 *G.* 4, 46, cannot sue an individual member of the company the debt of the company, but must proceed against the public officer, as enacted by the 9th section of that act. And would seem that this is the case, though there is no public officer, or he is out of the jurisdiction; but, in such a case it would seem that the company could be compelled to appoint a public officer (*h*). The public officer of such a company may, notwithstanding its change of name and the cession of new proprietors, maintain an action on a guarantee given to the company before its change of name (*i*). Where such a copartnership had begun to carry on the trade as business of bankers, and issued notes accordingly, but subsequently stopped payment, and merely kept the establishment open for the purpose of paying their notes and winding up the affairs of the concern, it was held that they still continued to be a banking copartnership, so as to be entitled to sue by the public officer (*k*). It would seem that the 7 *G.* 4, *c.* 46, as the 1 & 2 *Vict. c.* 96, enable banking copartnerships to sue in the name of their public officer for the price of shares therein (*l*). Where an action was improperly brought under the former statute in the names of two persons as public officers, the Court allowed the proceedings to be amended by striking out the name of one of the plaintiffs on payment of costs (*m*). An objection, that the plaintiff ought to have sued as the public officer, cannot be taken, unless it has been pleaded (*n*). If a judgment is obtained against a person as the public officer of a company, who in fact is not so, application should be made to set it aside, for until that is done, it is binding upon the company (*o*). But if the judgment was obtained by the collusion and connivance of the plaintiff and the public officer the same is not binding on the other members of the copartnership, and may be taken advantage of by plea to a *sci. fa.* on the judgment, or, it seems, by motion to set the judgment aside (*p*).

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Where an action was brought by a public officer of a banking company under the 7 *G.* 4, *c.* 46, judgment having been entered up and execution issued in his name after he had ceased to be such public officer, the Court permitted a suggestion of his removal and the name of another officer to be entered *nunc pro tunc* on the roll, and the judgment and *ca. sa.* to be amended by the insertion of the officer's name, without costs, though the defendant had been arrested, and applied to set aside the proceedings for irregularity (*q*). It seems doubtful whether such

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Cognovit to.

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Where judgment is obtained against the public officer of a joint-stock banking company sued on their behalf, under the 7 *G.* 4, *c.* 46, *s.* 9, the proper mode of proceeding to execution against a member not being such public officer, is by *sci. fa.*, and not by suggestion (*t*), and leave of the Court is necessary for issuing the *sci. fa.* Execution may be issued against the public officer without a *sci. fa.* (*u*). The Court will not give leave to issue a *sci. fa.* against former members of a banking copartnership, unless it be made to appear that the plaintiff has really and *bonâ fide* attempted to enforce the judgment against the members for the time being (*v*). It would seem that the motion for the *sci. fa.* against a member of a banking copartnership trading under the 7 *G.* 4, *c.* 46, must be made in open court (*x*). The rule is absolute in the first instance (*y*), though in some cases a rule *nisi* only has been granted. It is no answer to the application, that the parties called on to shew cause are not shareholders of the company (*z*). The issuing of the *sci. fa.* without the leave of the Court cannot be pleaded as a defence, but is an irregularity merely, for which the writ of *sci. fa.* may be set aside (*a*), upon application for that purpose made in due time. After judgment on demurrer, the Court

Scire facias and execution against members of a banking company.

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PART IV.

Action by or against a public officer of a banking company.

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Cognovit v.s.

a suggestion can be traversed (*r*). So, where a *cognovit* was given in an action by the public officer under the 7 *G.* 4, *c.* 46, by which it was provided, that, upon default in payment of a sum of money, the plaintiff should be at liberty to enter up judgment and issue execution, it was held that judgment might be signed in the name of another public officer, upon a suggestion being entered of the removal of the original plaintiff (*r*). The Court in one case set aside a *sci. fa.* which had been issued upon a judgment on a warrant of attorney, given by the public officer of a banking company, under the 7 *G.* 4, *c.* 46, for an irregularity which made it void, and directed issues to try the liability of the defendant, the title of the plaintiff, and the validity of the warrant of attorney (*s*). It seems, that, in support of an application by a member of such a company to set aside a warrant of attorney and judgment and *sci. fa.* in the proceedings against the public officer, and the *sci. fa.* in the proceeding against himself, the affidavits may be entitled in both rules (*s*).

Setting aside sci. fa. on judgment on warrant of attorney.

Where judgment is obtained against the public officer of a joint-stock banking company sued on their behalf, under the 7 *G.* 4, *c.* 46, *s.* 9, the proper mode of proceeding to execution against a member not being such public officer, is by *sci. fa.*, and not by suggestion (*t*), and leave of the Court is necessary for issuing the *sci. fa.* Execution may be issued against the public officer without a *sci. fa.* (*u*). The Court will not give leave to issue a *sci. fa.* against former members of a banking copartnership, unless it be made to appear that the plaintiff has really and *bonâ fide* attempted to enforce the judgment against the members for the time being (*v*). It would seem that the motion for the *sci. fa.* against a member of a banking copartnership trading under the 7 *G.* 4, *c.* 46, must be made in open court (*x*). The rule is absolute in the first instance (*y*), though in some cases a rule *nisi* only has been granted. It is no answer to the application, that the parties called on to shew cause are not shareholders of the company (*z*). The issuing of the *sci. fa.* without the leave of the Court cannot be pleaded as a defence, but is an irregularity merely, for which the writ of *sci. fa.* may be set aside (*a*), upon application for that purpose made in due time. After judgment on demurrer, the Court

Scire facias and execution against members of a banking company.

Issuing sci. fa. without leave, irregularity.

advantage of such a defect by a clause in a *cognovit*, that he will not obtain any summons or rule of court to set aside any proceedings for irregularity, or otherwise [illegible] any matter or thing whereby the plaintiff may be delayed in entering up judgment and suing out execution, *S. C.*

(*r*) *Webb* v. *Taylor*, *supra*.

(*s*) *Beaunquet* v. *Graham*, 7 Jur. 831, Q. B. See *Beaunquet* v. *Woodford*, 5 Q. B. 310.

(*t*) *Ransford* v. *Beaunquet*, 2 Q. B. 972. A suggestion was entered in this case, and the court of errors set aside the award of execution: *Wingfield* v. *Barton*, 2 Dowl., N. S., 355, (*Patent Rolling and Compressing Iron Company*): *Winfield* v. *Peel*, 10 Law J., N. S., 102, B. C.: *Clowes* v. *Brettell*, 10 M. & W. 508; 2 Dowl., N. S., 528; *Whittenbury* v. *Law*, 8 Scott, 661; 6 Bing. N. C. 345: *Beaunquet* v. *Ransford*, 11 Ad. & E. 521: *Cross* v. *Law*, 6 M. & W. 217. See *Williams* v. *Aspinall*, 7 Scott, 822. See form of *sci. fa.*, Chit. Forms, 483.

(*u*) *Harwood* v. *Law*, 7 M. & W. 203; 8 Dowl. 899, *Parke*, B., *dubitante*. See *Beaunquet* v. *Ransford*: *Paulet* v. *Nuttall*, 11 Ad. & E. 520; 3 P. & D., 296, *S. C.*

(*v*) *Eardley* v. *Law*, 4 P. & D. 379; 12 Ad. & E. 802.

(*x*) *Wingfield* v. *Barton*, 2 Dowl., N. S., 355.

(*y*) *Johnson* v. *Bretell*, 7 Jur. 219.

(*z*) *Clowes* v. *Brettell*, 11 M. & W. 461; 2 Dowl., N. S., 1020, *S. C.*

(*a*) *Bradley* v. *Warburg*, 11 M. & W. 452; 2 Dowl., N. S., 1059.

PART IV.

corporation (*i*). So may *indebitatus* in debt lie (*k*). Trover is sustainable against them; so is case for a false return (*l*); and so is trespass (*m*). A corporation aggregate, not being capable of a personal appearance, can only appear by attorney regularly appointed under their common seal (*n*).

It would seem that corporate property is not protected by the 5 & 6 *W.* 4, *c.* 76, though directed to be applied to public purposes only, from the claims of persons having demands on the corporation (*o*).

The remaining proceedings are the same as in ordinary cases.

(*i*) See *Mayor of Ludlow* v. *Charlton*, 6 M. & W. 815: *Arnold* v. *The Mayor of Poole*, 5 Scott, N. R., 741; 2 Dowl., N. S., 574; 4 M. & Gr. 860, *S. C.*: *Hall* v. *Mayor, &c., of Swansea*, 13 Law J., N. S., Q. B., 107; 5 Q. B. 596; 1 Dav. & M. 475, *S. C.*, *Saunders* v. *Guardians of St. Neots*, 15 Law J., N. S., Q. B., 225.

(*k*) *De Grave* v. *The Mayor &c.*, 4 C. & P. 111. And see *Tilson* v. *Warwick Gas Company*, 4 B. & C. 962. And *Carden* v. *The General Cemetery Company*, 7 Scott, 97: *Hopkins* v. *Swansea* (*Mayor of, &c.*), 4 M. & W. 621; *S. C.*, in error, 8 M. & W. 901.

(*l*) *Yarborough* v. *Bank of England*, 16 East, 6: *Smith* v. *Birmingham and Staffordshire Gas Company*, 1 A. & E. 526; 3 Nev. & M. 771, *S. C.*

(*m*) *Maund* v. *Monmouth Canal Company*, 1 Car. & M. 606; 2 Dowl., N. S., 113; 5 Scott, N. R., 457; 4 M. & Gr. 452, *S. C.*

(*n*) Bro. Abr., tit. Corp. 28; Co. Litt. 66. a. b.; 10 Co. 30 b.; *ante*, 1037. n. (*a*)

(*o*) *Doe Parr* v. *Roe*, 1 Q. B. 700; 1 Gale & D. 220, *S. C*

CHAPTER III.

PROCEEDINGS BY AND AGAINST JOINT-STOCK AND OTHER PUBLIC COMPANIES.

Process.

JOINT-STOCK or other public companies may often sue and be sued in the name of one or more of its members or officers. It is not, perhaps, necessary to describe such member or officer as such, in the writ, though it is usual and safest to do so (*a*).

Service of.

As to the service of process in an action against a trading or other company or body within the meaning of the 7 *W.* 4 & 1 *Vict. c.* 73, see *Vol.* 1, 156. There are also many statutory enactments pointing out the mode of service in action against public companies, for which see *Vol.* 1, 157 (*b*). Service of a writ in Ireland will not do (*c*).

Several pleas.

As to what pleas will be allowed to be pleaded together, in an action against the public officer of a company, see *ante*, *Vol.* 1, 254, &c.

Inspection of books.

As to when the books of public companies may be inspected, see *post*, *Pt.* 5, *Ch.* 13. In an action against a shareholder for calls, it was held that the defendant could not claim to inspect the minute-books of the company and of the directors' meetings, "particularly with respect to the calls" sued upon, for the purpose of framing his plea (*d*).

Parties to action.

If a statute enable a company to sue on covenants in which they are interested in the name of their secretary, an action may be brought in his name upon a covenant entered into with individuals in which the company are interested (*e*). Where a statute stated that *it should be sufficient*, in all actions to be instituted or prosecuted against the company, to state the name of the secretary, or some one of the directors, &c., as the nominal defendant representing the company, the Court held, upon the construction of the whole act of Parliament, that it was not imperative to sue in this manner, but that an individual shareholder might be proceeded against (*f*). If an action is brought on a contract entered into with the directors of a joint-stock company constituted by deed, all the directors should sue (*g*).

(*a*) See Vol. 1, 146.

(*b*) See also the 7 & 8 Vict. c. 113, s. 43, (An Act to regulate certain Joint-stock Banks in England).

(*c*) *Evans* v. *The Dublin and Drogheda Railway Company*, 14 M. & W. 142; 2 D. & L. 953, S. C.

(*d*) *Birmingham, Bristol, and Thames Junction Railway Company* v. *White*, 1 Q. B. 282.

(*e*) *Smith* v. *Goldsworthy*, 4 Q. B. 430. And see *Skinner* v. *Lambert*, 4 M. & G. 477; 5 Scott, N. R., 197, S. C.

(*f*) *Beech* v. *Sir J. Eyre*, 6 Scott, N. R., 327; 5 M. & G. 415. (The company was the "Patent Rolling and Compressing Iron Company," established under 4 & 5 Vict. c. 89). And see *Blewitt* v. *Gordon*, 1 Dowl., N. S., 815. (*Monmouthshire Iron and Coal Company*).

(*g*) *Phelps* v. *Lyle*, 10 Ad. & E. 113; 2 P. & D. 314, S. C.

Action by or against a public officer of a banking company.

The creditors of a banking company, under the 7 *G.* 4, 46, cannot sue an individual member of the company f the debt of the company, but must proceed against the pu lic officer, as enacted by the 9th section of that act. And would seem that this is the case, though there is no pub officer, or he is out of the jurisdiction; but, in such a ca it would seem that the company could be compelled to a point a public officer (*h*). The public officer of such a co pany may, notwithstanding its change of name and the a cession of new proprietors, maintain an action on a guaran given to the company before its change of name (*i*). Whe such a copartnership had begun to carry on the trade a business of bankers, and issued notes accordingly, but subs quently stopped payment, and merely kept the establishme open for the purpose of paying their notes and winding up t affairs of the concern, it was held that they still continued be a banking copartnership, so as to be entitled to sue by the public officer (*k*). It would seem that the 7 *G.* 4, *c.* 46, a the 1 & 2 *Vict. c.* 96, enable banking copartnerships to s in the name of their public officer for the price of shar therein (*l*). Where an action was improperly brought und the former statute in the names of two persons as public of cers, the Court allowed the proceedings to be amended b striking out the name of one of the plaintiffs on payment costs (*m*). An objection, that the plaintiff ought to have su as the public officer, cannot be taken, unless it has been plea

Judgment obtained against a party not a public officer, &c.

ed (*n*). If a judgment is obtained against a person as the publ officer of a company, who in fact is not so, application shou be made to set it aside, for until that is done, it is binding upo the company (*o*). But if the judgment was obtained by th collusion and connivance of the plaintiff and the public office the same is not binding on the other members of the copar nership, and may be taken advantage of by plea to a *sci. fa.* o the judgment, or, it seems, by motion to set the judgment aside(*p*

Where a public officer ceased to be such.

Where an action was brought by a public officer of a bankin company under the 7 *G.* 4, *c.* 46, judgment having been entere up and execution issued in his name after he had ceased to b such public officer, the Court permitted a suggestion of hi removal and the name of another officer to be entered nun *pro tunc* on the roll, and the judgment and *ca. sa.* to be amende by the insertion of the officer's name, without costs, though th defendant had been arrested, and applied to set aside the pro ceedings for irregularity (*q*). It seems doubtful whether suc

(*h*) *Steward* v. *Greaves*, 10 M. & W. 711; 2 Dowl., N. S., 415, *S. C.* See the 7 & 8 Vict. c. 113, s. 47, for regulating joint-stock banks. The 1 & 2 Vict. c. 96, enables members of banking companies established under 7 Geo. 4, c. 46, and 6 G. 4, c. 42, to sue, either alone or jointly with others, the public officer of such company, and the public officer to sue such members either alone or jointly with others. This act of 1 & 2 Vict., extended by the 3 & 4 Vict. c. 111, is made perpetual by the 5 & 6 Vict. c. 86.

(*i*) *Wilson* v. *Craven*, 8 M. & W. 584.

(*k*) *Davidson* v. *Cooper*, 11 M. & W. 778.

(*l*) *Davidson* v. *Bower*, 3 Scott, N. R. 539.

(*m*) *Holmes* v. *Binney*, 6 Scott, 346. *Se ante*, 163, as to when an amendment w be allowed in the writ of summons.

(*n*) *Robertson* v. *Steward*, 1 Scott, N. R. 419; 1 M. & G. 511, *S. C.*

(*o*) *Bradley* v. *Eyre*, 1 D. & L. 289. *Se Fowler* v. *Rickerby*, 9 Dowl. 602.

(*p*) *Phillipson* v. *Earl of Egremont*, Q. B. 587; *Bradley* v. *Eyre*, *supra*; *Fowler Rickerby*, 2 M. & G. 769.

(*q*) *Webb* v. *Taylor*, 13 Law J., N. S., Q. B. 24; 1 D. & L. 676. *Quære*, as to whether a defendant is precluded from taki

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Cognovit to.

Setting aside sci. fa. on judgment on warrant of attorney.

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advantage of such a defect by a clause in a *cognovit*, that he will not obtain any summons or rule of court to set aside any proceedings for irregularity, or otherwise to do any matter or thing whereby the plaintiff may be delayed in entering up judgment and suing out execution, *S. C.*

(*r*) *Webb* v. *Taylor*, *supra*.

(*s*) *Beaunquet* v. *Graham*, 7 Jur. 831, Q. B. See *Beaunquet* v. *Woodford*, 5 Q. B. 310.

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(*u*) *Harwood* v. *Law*, 7 M. & W. 203; 8 Dowl. 899, *Parke*, B., *dubitante*. See *Beaunquet* v. *Ramsford*: *Paulet* v. *Nuttall*, 11 Ad. & E. 520; 3 P. & D., 298, *S. C.*

(*v*) *Eardley* v. *Law*, 4 P. & D. 379; 12 Ad. & E. 302.

(*x*) *Wingfield* v. *Barton*, 2 Dowl., N. S., 355.

(*y*) *Johnson* v. *Brettell*, 7 Jur. 219.

(*z*) *Clowes* v. *Brettell*, 11 M. & W. 461; 2 Dowl., N. S., 1020, *S. C.*

(*a*) *Bradley* v. *Warburg*, 11 M. & W. 452; 2 Dowl., N. S., 1089.

Concurrent writs.

refused to entertain such an application (*b*). It seems doubtful whether it is a good objection, that the plaintiff has sued out, and is proceeding upon, separate concurrent writs of *sci. fa.* against different persons who were members of the company at the time the judgment was obtained (*c*); at all events, the only mode of taking such an objection is by plea in abatement (*d*).

Variance between writ and declaration.

A variance between the writ and declaration in the number of the defendants (if an irregularity) should be taken advantage of on motion, and not upon demurrer (*d*).

Pleas to sci. fa.

To the *sci. fa.* the defendant cannot plead in abatement the non-joinder of other members of the copartnership (*e*); nor any defence which could have been pleaded to the original action (*f*). But he may plead that there was fraud and collusion between the plaintiff and the nominal defendant in that action, in suffering a judgment in order to charge the defendant in the *sci. fa.* (*g*) Or, it seems, he might apply to set aside the judgment on that ground (*g*).

Against which shareholders plaintiff should first proceed.

Where the statute enacted that it should be lawful for the plaintiff to cause execution upon any judgment, obtained by him in action against the nominal defendant, to be issued against all or any of the shareholders for the time being of the company; and that if such execution should be ineffectual, then it should be lawful for him to issue execution against any person who was a shareholder at the time the contract was entered into, provided that no person, having ceased to be a shareholder, should be liable for any debt for which he would not have been liable as a partner, it was held that the execution should issue in the first instance against those persons who are shareholders at the time it is sued out, provided they were shareholders at the time of the contract, and would have been liable to the plaintiffs if the action had been against them instead of the nominal defendant (*h*).

Where remedy only against effects of the company.

The shareholders of some companies are not personally liable, but the plaintiff's only remedy is against the property of the company (*i*). Where the trustees of a turnpike road were sued in the name of their clerk, in pursuance of the 3 *G.* 4, *c.* 126, *s.* 74, it was held that the property of the clerk was not liable to be taken in execution to satisfy the judgment (*k*). The remedy, in order to obtain satisfaction of the judgment in such a case, is either by a *mandamus* or bill in equity (*l*).

Mandamus.

Where, by a statute, a company was established with power to make calls and to sue and be sued in the name of their treasurer or any director, an action was brought against the trea-

(*b*) *Bradley* v. *Urquhart*, 11 M. & W. 583.

(*c*) *Kedaile* v. *Lund*, 12 M. & W. 607.

(*d*) *Fowler* v. *Rickerby*, 2 M. & G. 710; 3 Scott, N. R., 138, *S. C.*

(*e*) *Fowler* v. *Rickerby*, *supra*.

(*f*) *Bradley* v. *Eyre*, *supra*: *Phillipson* v. *Earl of Egremont*, 6 Q. B. 587: *Bradley* v. *Urquhart*, 2 Dowl., N. S., 1042; 11 M. & W. 456, *S. C.*

(*g*) *Phillipson* v. *Earl of Egremont*, *supra*.

(*h*) *Bradley* v. *Eyre*, *supra*.

(*i*) See *Harrison* v. *Timmins*, 4 M. & W. 510; 7 Dowl. 28. And see *Corpe* v. *Glyn*, 3 B. & Ad. 801, where it was held that the nominal defendant had not rendered himself personally liable by submitting to an order of reference.

(*k*) *Wormwell* v. *Hailstone*, 6 Bing. 668; 4 M. & P. 512. See *Cane* v. *Chapman*, 5 Ad. & E. 661, per *Coleridge*, J.: *Emery* v. *Day*, 4 Tyr. 695.

(*l*) *Wormwell* v. *Hailstone*, *supra*: *R.* v. *St. Katharine Dock Company*, 4 B. & Ad. 360: *Corpe* v. *Glyn*, 3 B. & Ad. 801.

surer, and judgment entered up against *the company*, who appeared to have no assets, the Court refused to issue *a mandamus* commanding the company to pay the sum recovered, and costs (*m*). In this case, the Court also refused to issue a *mandamus* requiring the company to make calls to enable them to satisfy the debt, it appearing that calls sufficient to satisfy the judgment had been made but not paid, and that the company had not the proper officers for making such calls. It seems doubtful, whether, if these circumstances had not appeared, a *mandamus* would have gone commanding the company to make the calls.

(*m*) *R.* v. *The Victoria Park Company*, 1 Q. B. 288.

CHAPTER IV.

PROCEEDINGS AGAINST HUNDREDORS UNDER THE 7 & 8 G. 4, c. 31.

PART IV.

Liability of hundredors.

THE statute now in force, by which hundredors are liable for damages done by rioters, is the 7 & 8 *G.* 4, *c.* 31. All the prior statutes relative to such liability are repealed by the 7 & 8 *G.* 4, *c.* 27. Hundredors are now only liable for damage done by rioters acting *feloniously* (*a*). The proceedings which must be taken previous to the action, and those in the action itself, will now be considered in the following order:—

Proceedings before action brought.

Proceedings before Action brought.]—Previously to the commencement of the action, there are, by the 3rd section of the above act, certain acts required of the party injured, such as that he, or his servant having the care of the property injured, shall, within *seven* days after the commission of the offence, go before some near resident (*b*) justice, and state on his oath the names of the offenders, and submit to an examination, and enter into a recognisance to prosecute. The examination of the party must take place within seven days exclusively of the day on which the offence was committed (*c*).

All the persons damnified, who have any knowledge of the circumstances of the offence, or all the servants who had the care of the property damaged, and have any knowledge of such circumstances, should go before the justice to be examined (*d*). It is not necessary that both the person injured and servant be examined (*e*); if the former has no knowledge of the circumstances of the offence, being such a knowledge as is available in evidence, then the servant or servants who had the care of the property should be examined (*f*). Where the reversioner sued on the Black Act, his own oath was held sufficient, without examining the tenant or his servant (*g*). The party is not, it seems, in his examination, bound to state his *suspicion* respecting the offender (*g*). The swearing before a justice, to a deposition *previously* prepared, is a sufficient submission to examination within the meaning of the act, if the justice require nothing further (*h*). The examinations need not be taken down in writing (*i*), though it is better that they should be so.

(*a*) See 3 Burn's J., 29th ed., tit. "Hundredors."

(*b*) See Bull. N. P. 186.

(*c*) *Pellew* v. *Hundred Wonford*, 9 B. & C. 135.

(*d*) See *Duke of Somerset* v. *Hundred Mere*, 4 B. & C. 167; 6 D. & R. 247, *S. C.*: *Nesham* v. *Armstrong*, 1 B. & Ald. 146. But see *Lowe* v. *Inhabitants of Broxtowe*, 3 B. & Ad. 550.

(*e*) *Rolfe* v. *Hundred Eithorne*, 1 M. & M. 185.

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(*h*) *Lowe* v. *Inhabitants of Broxtowe*, 3 B. & Ad. 550.

(*i*) *Graham* v. *Hundred of Beantree*, B. N. P. 186. See several forms in Chit. Gen Prac. of the Law, 1st ed., 580, 581.

Limitation of Action.]—The action must be brought within three calendar months after the committing of the offence (*k*), exclusive of the day the offence was committed (*l*). If an action be brought by a termor upon this statute for an injury done to his house within such three calendar months, and that action abate by his death, after the three months have expired his executors cannot bring a fresh action (*m*). And it is a matter of doubt whether an executor of a termor can, in *any* case, bring an action upon this statute for an injury sustained in the lifetime of his testator. Limitation of action.

Process to compel Appearance.]—Formerly, the mode of proceeding to compel an appearance in this action was by original attachment and *distringas*, in the same manner as it used to be against corporations (*n*). Now, however, by the 2 *W.* 4, *c.* 39, *ss.* 21, 1, 3, the process against hundredors, to enforce their appearance, is the same as in ordinary cases, viz. by summons, or summons and *distringas*. The writ must be against "the inhabitants of the hundred of ——, in the county of ——," or "the men inhabiting within the hundred of ——, in the county of ——," or other like district generally, and not against any of them by name; otherwise, if the mistake be carried into the declaration, it would be bad even in arrest of judgment (*o*). In a case decided before the 2 *W.* 4, *c.* 39, where the word "hundred" was inserted in the writ and proceedings instead of "borough," the Court allowed an amendment by substituting the one for the other (*p*). Process to compel appearance.

The writ must be served upon the high constable, or one of the high constables of the hundred or like district (*q*) in which the offence happened, who should, within seven days after such service, give notice thereof to two justices residing in and acting for the hundred, &c. (*r*) If the writ be against the inhabitants of a county, of a city or town, or the inhabitants of a franchise, liberty, city, town, or place, not being part of a hundred or other like district, it may be served on any peace officer thereof (*s*).

Appearance.]—The high constable, upon being served with the summons, must enter an appearance, and defend the action for and on behalf of the inhabitants of the hundred or other like district, &c., as he may be advised (*t*). If he do not, however, the plaintiff may proceed as in other cases, and enter it for them. This appearance must be entered with one of the Masters on or before the expiration of eight days after the service of the writ, inclusive of such service, as directed in *Vol.* 1, 166. Appearance.

Declaration—Plea.]—As to the form of the declaration, see 2 Declaration.

(*k*) See the 3rd section.

(*l*) See *Pullen* v. *Hundred Wonford*, 9 B. & C. 138: *Norris* v. *the Hundred of Coorey*, Hob. 139; 2 Rol. Abr. 520 a, pl. 8; 1 Brownl. 156.

(*m*) *Adam* v. *Inhabitants of Bristol*, 4 Nev. & M. 144; 2 A. & E. 389, *S. C.*

(*n*) See *ante*, 1037.

(*o*) See 2 Saund. 376 f; Id. 375: *Johnson* v. *Jackson*, 2 D. & R. 439; 1 B. & C. 304. See the form, Chit. Forms, 485.

(*p*) *Horton* v. *Inhabitants of Stamford*, 2 Dowl. 96; 1 C. & M. 773; 3 Tyr. 969, *S. C.* When an amendment will be allowed in a writ of summons, see *ante*, Vol. 1, 163.

(*q*) 2 W. 4, c. 39, s. 13, *ante*, Vol. 1, 156.

(*r*) 7 & 8 G. 4, c. 31, s. 4.

(*s*) 2 W. 4, c. 39, s. 13, *ante*, Vol. 1, 156.

(*t*) 7 & 8 G. 4, c. 31, s. 4.

PART IV. *Saund.* 376, 376 *b*, *e*, *f*, 377 *f*, 379. The declaration is delivered or filed as in ordinary cases.

Plea. The constable may allow judgment to go by default, with the consent and approbation of the two justices (*u*). The defendant might formerly plead not guilty, and give all defences in evidence (*x*); but now such defences must be pleaded specially, as in other cases.

Amendment. *Amendment.*]—As this is not a penal action, it is within the statutes of jeofails, and is also amendable, even after issue joined, in the same manner as any other civil action (*y*).

Evidence. *Evidence.*]—Hundredors are made competent witnesses by the 7 & 8 *G.* 4, *c.* 31, *s.* 5; and see 6 & 7 *Vict. c.* 85.

Damages. *Damages.*]—The plaintiff cannot proceed by action, unless his loss exceed 30*l.*; for a loss amounting to that sum or under, his remedy is by summary proceedings before justices at a special petty session (*z*). As to the mode of assessing damages, &c., see *Duke of Newcastle* v. *Hundred of Broxtowe*, 4 B. & Ad. 273.

Costs. *Costs.*]—The plaintiff in this action is entitled to costs if he recover (*a*). So the hundred will, it seems, be entitled to costs if the plaintiff be nonsuit, &c., as in other cases (*b*).

Execution. *Execution.*]—The execution is by *fieri facias* against the inhabitants of the hundred, &c., generally directed to the sheriff of the county in which such hundred, &c., is situate, and indorsed thus: "The within damages are to be levied according to the statute 7 & 8 *G.* 4, *c.* 31," adding the attorney's name and residence, and the day of the month and year (*c*). The 13th section of the act makes provision for executing writs in certain places. When this writ is delivered to the sheriff, instead of levying the amount on any of the inhabitants of the hundred, &c., he must proceed as directed by the 6th section of the act. The 7th section of the act points out the mode of reimbursing the high constable for his expenses in defending the action. The 14th and 15th sections point out the mode of reimbursements in towns, &c., not in a hundred, but contributing to the county rate, and *vice versâ*.

(*u*) 7 & 8 G. 4, c. 31, s. 4.
(*x*) See Vid. Ent. 211; Lil. Ent. 296; Hans. Ent. 4; 1 And. 158.
(*y*) *Bearecroft* v. *Hundreds of Burnham and Stone*, 3 Lev. 347: *Merrick* v. *Hundred of Osmiston*, Hardw. 409; Andr. 115, *S. C.*
(*z*) See the 7 & 8 G. 4, c. 31, ss. 8, 9.
(*a*) 2 Saund. 378 b.: *Ratcliffe* v. *Eldon*, Cowp. 485: *Witham* v. *Hill*, 2 Wils. 91.
(*b*) *Gretham* v. *Hundred of Thesle*, 3 Bur. 1723.
(*c*) See the form of writ, Chit. Forms, 485.

CHAPTER V.

ACTIONS BY AND AGAINST ATTORNIES AND OFFICERS OF THE COURT.

[*For the Law relative to Attornies in general, see ante, Vol.* 1, *pp.* 21—126.]

Process in actions by.

Actions by.]—Formerly, an attorney or officer of the Courts of Queen's Bench or Common Pleas had in most cases the right of suing in the court of which he was an attorney or officer by *attachment of privilege;* and, having brought the defendant before the Court by that writ, he might have declared against him, and proceeded in the action as in ordinary cases. Now, however, the right of suing by this attachment of privilege is abolished by the 2 *W.* 4, *c.* 39, *ss.* 21, 1, 3, 4, and an attorney must, in all cases, sue in the same way as any other person.

Privileges of, &c.

Inasmuch as this statute thus abolishes the writ of attachment of privilege, so as to leave an attorney no option as to whether he will sue by it or not, his other privileges are not in anywise affected by the statute, and those privileges still exist to the same extent as they did before the statute, when he sued by attachment of privilege (*a*).

As to what privileges an attorney plaintiff has, and how they may be lost or waived, see *ante, Vol.* 1, 59, &c. These privileges in an action in general are, that he may lay and retain the *venue* in Middlesex, and that he is not bound to sue in a court of requests, unless the statute creating or regulating the court expressly subjects him to the jurisdiction of it. The proceedings at his suit, except where they are affected by his privileges, are, in general, the same as in proceedings against ordinary persons.

As to the delivery of his bill of costs, see *Vol.* 1, 85.

Actions against.

Actions against.]—We have pointed out in the first volume of this work, the duties and liabilities of attorneys, and the instances in which an action will lie; also in which the Court will interfere in a summary way against them.

Process against.

Formerly, an attorney or officer of the Courts of Queen's Bench or Common Pleas must have been sued in the court of which he was an attorney or officer, by *bill.* Now, however, by the 2 *W.* 4, *c.* 39, *ss.* 21, 1, 3, he must in all cases be sued as any other person.

Privileges of.

Although this enactment abolishes the former mode of proceeding in an action against an attorney, his other privileges

(*a*) Vol. 1, 59, *et seq.*

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still continue. As to what these privileges are, see *ante*, *Vol.* 1, 60. They, in general, are, that he shall be sued in the court of which he is an attorney (*b*), and that he cannot be sued in a court of request, unless the act creating and regulating the court expressly subjects him to its jurisdiction (*b*). Nor has he any privilege as an attorney from arrest (*c*). Nor has he any privilege as to costs. And in an action against an attorney, where there is a verdict for less than 40*s.* damages, the judge at *Nisi Prius* may, as in other cases, certify under the 43 *Eliz. c.* 6, to prevent him from recovering his costs (*d*).

Appearance. An appearance is entered, as in ordinary cases.

Declaration. The time for declaring and mode of declaring are the same as in ordinary cases. The defendant has no privilege as to *venue*, as in the case of an attorney plaintiff (*e*).

Plea. He must plead to the declaration within *four* days, whatever may be his distance from London, or wherever the *venue* is laid (*f*).

Other proceedings. All the remaining proceedings in the action are the same as in ordinary cases.

(*b*) Vol. 1, 60.
(*c*) Vol. 1, 636.
(*d*) *Wright* v. *Nuttall*, 10 B. & Cres. 492; 5 M. & Ry. 454, & *C.*
(*e*) Vol. 1, 60.
(*f*) Vol. 1, 208.

CHAPTER VI.

ACTIONS AGAINST THE KEEPER OF THE QUEEN'S PRISON FOR AN ESCAPE, &c.

Process.

THE process for the commencement of any personal action against the keeper of the Queen's Prison is the same as against any other person, viz. by summons, or summons and *distringas*. He must be sued in the Queen's Bench, otherwise he might plead his privilege in abatement (*a*).

When to be issued.

If the escape be *voluntary*, (that is, if it be with the consent, privity, or knowledge of the keeper), the writ may be issued at any time; but if it be *negligent* only, then it must be issued during the escape and before the party is retaken or returned into the keeper's custody, for the keeper may plead such retaking or return (*b*). You should always, therefore, when issuing the writ, have a witness who can speak to its being issued whilst the party is out of custody.

Declaration.

The time for declaring and mode of declaring are the same as in ordinary cases (*c*). The *venue* is transitory. An amendment of the declaration may, in general, be allowed as in other cases (*d*).

Particulars of escape.

The defendant is entitled to a particular of the escape for which the plaintiff sues; and the judge's order for the particulars may require the precise day of the escape to be stated, and which the plaintiff must state in his particular, if it is within his knowledge (*e*).

Plea.

The time, &c. for pleading is the same as in ordinary cases, and if the defendant do not plead within the limited time, the plaintiff may sign judgment and proceed to execute a writ of inquiry. But if he plead, then the issue is made up, and proceedings in the action are as in ordinary cases. By stat. 8 & 9 *W.* 3, *c.* 27, *s.* 6, no retaking on fresh pursuit shall be given in evidence on the trial of any issue in an action of escape, unless the same be specially pleaded; nor shall any special plea be allowed without an oath by the defendant that the prisoner escaped without his consent, privity, or knowledge (*f*). And see further as to the plea, *ante*, *Vol.* 1, 207, *et seq.*

Inspection of habeas corpus.

In this action against the keeper for an escape, the Court will compel him or his officer to permit the plaintiff's attorney to inspect the writ of *habeas corpus* and return, and the *commititur* indorsed thereon (*g*).

Shewing and

By stat. 8 & 9 *W.* 3, *c.* 27, *s.* 8, if the marshal of the Queen's

(*a*) See Bro. Abr., Bille, pl. 29.
(*b*) *Bingham* v. *Walker*, 2 T. R. 131.
(*c*) See *ante*, Vol. 1, 183.
(*d*) *Brazier* v. *Jones*, 6 B. & C. 196: *Barnes* v. *Eyles*, 2 Moore, 561; 8 Taunt. 512, S. C.
(*e*) *Davis* v. *Chapman*, 1 Nev. & P. 699: *Webster* v. *Jones*, 7 D. & R. 744.
(*f*) See 1 Saund. 35 n. See forms of pleas and affidavit, 3 Chit. Pl. 957, &c.
(*g*) *Fox* v. *Jones*, 7 B. & C. 732; 1 M. & R. 570, S. C.

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sheriff's or deputy sheriff's office, and obtain a warrant ... tainer upon it, directed to the officer or gaoler in whose cu... the defendant is, who will thereupon detain him under the ... You must also serve the defendant with a copy of the wr... summons, as in ordinary cases. In cases where the defen...

Where a remanded insolvent.

has been adjudged by the Insolvent Court to be discharg... some future period, and he is in custody of the sheriff, ... person at whose suit he is so to be discharged, or, if the re... be general, any one of the creditors whose debt amounts to ... may charge him in custody in the same manner as might ... been done before the statute 1 & 2 *Vict.* c. 110 (*a*), *i.e.* ... *may make an affidavit of debt to the amount of* 20*l.* or ... *as in the ordinary form* (*b*), *omitting that part which state... the defendant is about to quit England, and sue out a wr... capias without any judge's order for it, and thereupon obt... warrant upon it, and lodge it with the officer or gaoler who ... the custody of the defendant* (*c*). In this case the writ of c... would be the commencement of the action, and no writ of s... mons need be issued.

Where defendant in custody in the Queen's Prison.

Where the defendant is in custody of the keeper of ... Queen's Prison, and an order has been obtained to hold hi... bail on the usual affidavit, in such a case, inasmuch as the ... of *capias* (the only writ in force for such a purpose) cann... directed to any officer except a sheriff, or one who acts in ... capacity of a sheriff (*d*), the only mode of making it effec... appears to be by obtaining a warrant from the sheriff to ... keeper, making him a bailiff *pro hâc vice*. Should the ke... refuse to receive such a warrant, the Court cannot compel ... to receive it; and the only course left is to get him to give ... sheriff notice, or otherwise discover when the debtor is likel... be discharged, and watch the opportunity of retaking ... when he comes out (*e*).

In custody on criminal account.

The defendant, if in custody of the sheriff on a criminal ... count, may be detained in custody in a civil action, under a ... of *capias*, in the manner above pointed out; and this with... obtaining leave of the Court or a judge to charge him in s... custody, further than the ordinary leave to issue and ser... him under the *capias* (*f*). But if he be in custody of ... keeper of the Queen's Prison on a criminal account, he can... be charged in a civil action without such leave; the practice ... to which will be more fully considered while treating of t... subject of declaring against prisoners.

Where wrongfully in custody.

As to the detainer of a prisoner who has been wrongfully ... rested or detained in custody, see *ante*, *Vol.* 1, 689.

Bail.

Appearance—Bail.]—The plaintiff may enter an appearan... for the defendant as in other cases, notwithstanding he is ... custody (*g*); and an appearance must be entered before declar... ing. As to the time and mode of putting in and justifying ... special bail for a prisoner, see *Vol.* 1, 772.

(*a*) Sect. 85.
(*b*) *Bilton* v. *Clapperton*, 9 M. & W. 473.
(*c*) *Turner* v. *Darnell*, 5 M. & W. 29; 7 Dowl. 846, *S. C.*
(*d*) See per *Parke*, B., *Edwards* v. *Robertson*, 5 M. & W. 520; 7 Dowl. 859, *S. C.* Sect. 3 of the 1 & 2 Vict. c. 110, gives a judge a general power to order the ... fendant to be arrested, but it admits ... of the writ of *capias* for the arrest.
(*e*) *Edwards* v. *Robertson*, 7 Dowl. ...
(*f*) *Grainger* v. *Moore*, 5 Dowl. ... Murphy & H. 20, *S. C.*
(*g*) *Neale* v. *Southen*, 3 Dowl. & L. ...

CHAPTER VII.

PROCEEDINGS BY AND AGAINST PRISONERS.

Sect. 1. *Against Prisoners*, 1051 *to* 1061.
2. *By Prisoners generally*, 1061 *to* 1071.

Sect. 1.

Proceedings against Prisoners.

It should be premised, that, in actions against prisoners, in which they have not been holden to bail, the proceedings are the same as in ordinary cases in actions against persons who are not prisoners, excepting, indeed, as to the charging them in execution, which is effected in the same way as in actions against prisoners who have been holden to bail. The present section will contain only the practice as to the process for detaining and holding to bail a prisoner already in custody, and proceedings against a defendant while he remains a prisoner, in an action in which he has been held to bail. These will be considered under the following heads: viz.—

Process, 1051.
Appearance, Bail, 1052.
Declaration, 1053.
Plea, Issue, &c., 1055.
Trial or Final Judgment, 1056.
Execution, 1057.
Other Proceedings, 1061.

Process, when in custody of sheriff.

Process.]—The process by which a prisoner is detained and held to bail in an action, in respect of which he is not in custody, is the same as that by which defendants at large are arrested, viz. the writ of *capias* prescribed by the 1 & 2 *Vict.* c. 110, *s.* 3, which has been already treated of in *Vol.* 1, 629. And though the act does not expressly refer to the case of a defendant in custody, yet writs of *capias* have, in many cases since its enactment, been issued by permission of a judge at chambers against prisoners who, though in actual custody, were yet, by collusion with their detaining creditor, or otherwise, about to obtain their discharge, and forthwith quit England. In this case, where the defendant is already in custody of the sheriff, *having received the writ of capias against him in pursuance of the judge's order as in ordinary cases, take it to the*

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and demand a plea, and rule the defendant to plead, as in ordinary cases, and as directed in Vol. 1, 212, 213, 215. *If the plaintiff has entered an appearance for the defendant, the declaration should be filed, and notice given, as in ordinary cases* (*o*). *If the defendant has entered an appearance, the declaration should be delivered to him. The delivery of the declaration, or notice of declaration, need not be personally on the defendant; it will suffice to leave the declaration or notice for him at the office of the keeper of the Queen's Prison, if the defendant be in the custody of that officer; or with the gaoler or keeper of the sheriff's prison or gaol, if he be in the sheriff's custody* (*p*). If a defendant in custody employ an attorney merely for the purpose of putting in bail, the delivery of a declaration to such attorney is not sufficient (*q*); and it seems that in no case a delivery to an attorney would be a good service on a prisoner, unless, perhaps, under some special agreement (*r*). It is unnecessary to bring him up by *habeas corpus*, in order to charge him with a declaration where he is in custody of the keeper of the Queen's Prison (*s*); nor is it necessary where he is in the custody of the sheriff (*t*).

When in criminal custody.

If the defendant, or one of several defendants (*u*), be in custody of the keeper of the Queen's Prison, or sheriff, on a criminal account, and the action be in the Queen's Bench, he cannot be charged in custody in a civil action without the leave of the Court or a judge (*v*); upon which leave being granted, a *habeas corpus ad respondendum*, in order to charge him with a declaration, (or a *habeas corpus ad satisfaciendum*, in order to charge him in execution), is issued out of the Crown side of the court, and he is brought up under it and charged accordingly. This cannot be done when the action is in the Common Pleas or Exchequer, they not being courts of criminal jurisdiction; and in such a case the plaintiff must wait until the criminal custody is over (*x*). Nor can it be done if the prisoner be in custody on a criminal account in any other than the Queen's Prison, or of the sheriff (*y*). And where a defendant was under military arrest at Woolwich, under circumstances which might or might not lead to a court-martial, the Court refused

(*o*) See *Neale* v. *Snoulten*, 3 Dowl. & L. 422.

(*p*) See 4 & 5 W. & M. c. 21; 1 T. R. 191. The gaoler or keeper must forthwith deliver the copy to his prisoner, under pain of an attachment. (R. E., 5 W. & M., r. 3, s. 7).

(*q*) *Dent* v. *Halifax*, 1 Taunt. 493.

(*r*) See per *Patteson*, J., in *Spencer* v. *Newton*, 1 Nev. & P. 837; 6 Ad. & Ell. 630, *S. C.* It was there held, that appearing as an attorney before a judge for a prisoner in custody on a *capias ad respondendum*, does not constitute him attorney in the suit so as to entitle the plaintiff to leave the declaration at his office. In Price's Exch. Pract. p. 256, it is said, that if the defendant has appeared by attorney, the demand of plea should be made on the attorney.

(*s*) *Barnett* v. *Harris*, per *Taunton*, J., 2 Dowl. 186: *Millard* v. *Millman*, 3 M. & Scott, 63; 2 Dowl. 723, *S. C.* The charging the defendant with a declaration without a *habeas corpus*, where it was necessary, did not render the declaration a nullity, and it was an irregularity only, which could be cured by pleading thereto, or the like. (*Williams* v. *Macgregor*, per *Alderson*, B., at Chambers, 3rd Dec., 1836).

(*t*) 4 & 5 W. & M. c. 21. Before that act, the *habeas* was necessary in this case.

(*u*) *Ess* (or *Williams*) v. *Smith*, 3 Tyrw. 363; 1 Dowl. 703, *S. C.*

(*v*) *Crockall* v. *Thomson*, 1 Salk. 354: *Ramsden* v. *Macdonald*, 1 Wils. 217; 1 W. Bl. 30, nom. *Ramsay* v. *M'Donald*, *S.C.*: *Coppin* v. *Gunnell*, 2 L. Raym. 1572; 2 Str. 873, *S. C.*: *Goodman* v. ——, 1 Dowl. 128: *Altroffe* v. *Lawn*, 9 B. & C. 375; Tidd, 9th ed., 345.

(*x*) *Gibb* v. *King*, 14 Law J., N. S., C. P., 85. And see *Walsh* v. *Davies*, 2 New Rep. 245: *Freeman* v. *Weston*, 1 Bing. 221; 8 Moore, 81, *S. C.*

(*y*) *Guthrie* v. *Ford*, 4 D. & R. 271: *semb.*, overruling *Morland* v. *Weston*, 3 Id. 31. And see *Brandon* v. *Davis*, 9 East, 154.

a *habeas* to charge him in execution (*z*). The leave of the Court or judge for liberty to charge the defendant in custody is generally granted as of course, if he be not in custody for punishment, or if the leave be not inconsistent with the terms of a conditional pardon already granted to the defendant (*a*), or the like. A judge's signature to the writ of *habeas* will be a sufficient authority for the writ being issued, and evidence of his leave having been granted for it (*b*). If the *habeas* be issued, and the defendant charged in custody without such leave being granted, the proceedings will be irregular; but the irregularity may be waived (*c*). A prisoner in custody for a contempt is in criminal custody within the above rule (*d*); but not so if in custody under an attachment for the non-payment of costs (*e*), or the like.

Service of notices, &c.

It may be here added, that when the defendant is in custody, all papers, notices, &c., which do not ordinarily require personal service, may be delivered for him to the turnkey of the prison (*f*). As to the delivery to his attorney, see *ante*, 1054.

Form of declaration.

As to the form of the declaration, it is the same as in ordinary cases against a defendant who is not a prisoner, except in cases against an insolvent debtor, noticed *ante*, 1052, where the *capias* is the process commencing the action, and then the commencement of the declaration alleges the detainer, instead of stating that he was summoned.

Plea, &c.

Plea, Issue, &c.]—By *R. T.*, 3 *W.* 4, "in all actions against prisoners in the custody of the marshal or warden, [now of the keeper of the Queen's Prison], or of the sheriff, *the defendant shall plead to the declaration at the same time, in the same manner, and under the same rules, as in actions against defendants who are not in custody.*" *As to the time for pleading, &c., see ante, Vol.* 1, *p.* 208.

Notice to plead.

The notice to plead is indorsed on the copies of the declaration, in the same way as in ordinary cases, *Vol.* 1, *p.* 212. According to a decision of the Common Pleas, if the defendant, a prisoner, has been served with a rule to plead, this notice is not requisite (*g*).

Rule to plead.

As regards the rule to plead, see this already noticed, *ante*, 213; as to the necessity for it in general, and what will be a waiver of it, and other matters relating to it, see *Vol.* 1, *p.* 213.

Demand of plea.

A demand of plea should be made as in ordinary cases (see *Vol.* 1, *p.* 215, *see the rule of T. T.*, 3 *W.* 4, *supra*). It is usually indorsed on the declaration.

Issue, &c., how made up.

The issue, notice of trial, or inquiry, is the same as in ordinary cases, except where the action is *commenced* by writ of *capias*, and then that is stated in the issue, instead of the

(*z*) *James* v. *Dawson*, 7 Dowl. 394; 5 M. & W. 234, *S. C.*

(*a*) Fost. 61: *Farnworthy's case*, 2 L. Raym. 848; 7 Mod. 153; 3 Salk. 500, *S. C.*

(*b*) *Gibb* v. *King*, 14 Law J., N. S., 88, C. P.

(*c*) *Pepper* v. *Bowden*, Cas. Pr. C. P. 31. And see *Rose* v. *Christfield*, 1 T. R. 591: *Williams* v. *Scudamore*, 1 Chit. Rep. 368: Tidd, Prac., 9th ed., 345.

(*d*) *Pletwood* v. *Turty*, Prac. Reg. 325: *Allgood* v. *Howard*, Cas. Pr. C. P. 27.

(*e*) *Bonafous* v. *Schoole*, 4 T. R. 316.

(*f*) *Whitehead* v. *Barber*, 1 Str. 948.

(*g*) *Clementson* v. *Williamson*, 1 Bing. N. S. 356; 1 Scott, 267, *S. C.*

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summons. It is delivered to the turnkey for the defendant, or to the defendant himself, if he have appeared in person (*h*).

Trial or final judgment. In what time.

Trial or final Judgment.]—By a general rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 1, *s.* 85 (*i*), "the plaintiff shall proceed to trial or final judgment against a prisoner within three terms inclusive after declaration, and shall cause the defendant to be charged in execution within two terms inclusive after such trial or judgment, of which the term in or after which the trial was had shall be reckoned one." Also, by prior rules, in cases where the defendant is not a prisoner at the time of declaring, if he afterwards be rendered in discharge of his bail, then the plaintiff must proceed to trial or final judgment against him within three terms after such render and notice thereof given, the term of the notice and render being deemed one; otherwise the defendant shall be discharged by *supersedeas* (*k*). The plaintiff may be excused from proceeding within the time above limited by the defendant entering into some negotiation with him (*l*); or by the defendant giving notice of his intention to petition the Insolvent Court for his discharge (*m*); or by the defendant's estate being vested in the provisional assignee of that Court, as noticed *post*, 1058, 1063. The rule applies only where the defendant is a prisoner at the suit of the plaintiff (*n*).

Proceeding to trial.

If the declaration be delivered, or the render made in vacation, the preceding term would not, it is apprehended, be reckoned as one of the three terms (*o*). If the plaintiff's not having proceeded in the time above limited has arisen from the default of the Court, as by the Court's deferring to give judgment on a demurrer (*p*), or from the default of the defendant, by his neglecting to plead in time, or the like; or from the assizes at which the cause was to be tried not occurring within the time limited for the plaintiff proceeding to trial (*p*); in these and the like cases the delay may be excused, and a *supersedeas* will not be granted. So, if the plaintiff gives notice of trial, and sets down his cause in the third term inclusive after declaration, he has complied sufficiently with the rule; for the delay would be the act of the Court, and not of the plaintiff (*q*); but it would be otherwise, perhaps, if in such a case the plaintiff countermanded the notice of trial, and the cause were not tried until after the term. So, if the defendant demur to plaintiff's pleadings, and there are issues in fact besides, the plaintiff will not be bound to proceed within the time limited by the rule (*r*).

"Final judgment," what.

The term "final judgment" mentioned in the rule, means a final judgment without a trial, as a judgment by default, on demurrer, or on an issue upon *nul tiel* record, and not a judg-

(*h*) *Whitehead* v. *Barber*, 1 Str. 248.
(*i*) See the former practice, Tidd, New Pract. 189.
(*k*) R. H., 26 G. 3; T., 2 G. 1, Q. B. See 4 T. R. 664, Q. B.; R. E., 8 G. 1, C. P.
(*l*) *Post*, 1058, 1063.
(*m*) R. E., 3 G. 4, Q. B.; M., 3 G. 4, C. P.
(*n*) See *Hall* v. *Wetherell*, 2 Scott, N. R., 196.
(*o*) See *Thorn* v. *Leslie*, 3 Nev. & P. 395; 8 A. & E. 195: *Colbron* v. *Hall*, 5 Dowl. 534: *Watson* v. *Dare*, 2 M. & W. 396: see *Heaton* v. *Whittaker*, 4 East, 349.
(*p*) *Huggins* v. *Bambridge*, Barnes, 383.
(*q*) *Myers* v. *Cooper*, 2 Dowl. 423.
(*r*) *Ferguson* v. *D'Arcy Mahon*, 2 Jur. 820, Q. B., Ball Court.

ment after verdict (*s*). And where two prisoners were sued jointly, and one of them pleaded to issue, and the other allowed judgment to go by default, and the jury who tried the issue against the one assessed the damages against the other: the Court held it sufficient that the plaintiff had proceeded to trial against the one who pleaded to issue within the three terms, although he had not proceeded to final judgment against the other within that time (*t*). So, where a prisoner, after being charged with a declaration in Trinity Term, 1819, absconded in the long vacation, and did not return into custody until Hilary Term, 1820, the Court of Common Pleas refused to discharge him, although the plaintiff had not proceeded to judgment against him within Hilary Term: the Court saying, that the object of the practice as to *supersedeas* is, to prevent defendant from being imprisoned longer than is necessary to enable the plaintiff to proceed in the action; and here the defendant could not complain of the laches of the plaintiff whilst he was not actually in custody (*u*).

Execution against.

Execution against.]—By rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 85, after requiring the plaintiff to proceed to trial or final judgment against a prisoner within three terms after declaration, as above mentioned, it is ordered that he "shall cause the defendant to be charged in execution within two terms inclusive after such trial or judgment, of which the term in or after which the trial was had shall be reckoned one." This rule is still applicable, notwithstanding the writ of *capias* is no longer process to commence the action (*x*). It applies only where the defendant is a prisoner at the suit of the plaintiff (*y*). Where judgment is signed for want of a plea, it is a *final* judgment within the rule, though the costs be not taxed, and the plaintiff must charge the defendant in execution in two terms after such judgment (*z*). A final judgment is complete at the time of signing it, without carrying in the roll (*z*). If the judgment be signed in term, the plaintiff has only the following term to charge the defendant in execution, and the same, perhaps, if signed in vacation; and this although the doctrine of relation to the preceding term is now put an end to by the rule of *H. T.*, 4 *W.* 4. The point, however, is not free from doubt (*a*). Where the cause is tried in vacation, the term previous to the trial is, as we have just seen, to be reckoned as one of the two (*b*). Bringing an action on the judgment within the two terms is not equivalent to charging the defendant in execution (*c*).

The above rule of *H. T.*, 4 *W.* 4, does not apply in its Where de-

(*s*) See *Heaton* v. *Whittaker*, 4 East, 369.

(*t*) *Wrigglesworth* v. *Wright*, 13 East, 167.

(*u*) *Grimes* v. *Joseph*, 2 B. & B. 35; 4 Moore, 220, *S. C.*

(*x*) *Walker* v. *De Richmont*, 14 Law J., N. S., 22, Q. B.

(*y*) *Hall* v. *Wetherall*, 2 Scott, N. R., 196. The reason is, that the plaintiff might never have known of the commitment to prison.

(*z*) *Colbron* v. *Hall*, 5 Dowl. 534.

(*a*) See *Baxter* v. *Bailey*, 3 M. & W. 415: *Thorn* v. *Leslie*, 8 Ad. & E. 195. And see *Colbron* v. *Hall*, 5 Dowl. 534: *Watson* v. *Dore*, 2 M. & W. 396.

(*b*) *Ante*, 1056.

(*c*) *Childs* v. *Prowse*, Willes, 531; Barnes, 390, *S. C.*: *Maud* v. *Branthwaite*, 2 Str. 943: *Pierson* v. *Goodwin*, 1 B. & P. 361.

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fendant surrenders.

terms to the case of a defendant becoming a prisoner by surrender after trial or final judgment; but by rules of cou previous to that rule, in case of a surrender in discharge bail after trial had or final judgment, the plaintiff shall cause t defendant to be charged in execution within two terms ne after such surrender and the notice thereof, of which tw terms the term wherein such surrender shall be made sha be taken to be one (*d*). A render in *vacation* after trial ha or judgment signed in *term*, is, it seems, to be considered as render of the preceding term; but if the trial were had judgment signed in vacation, and the render made in the sam vacation, then it would be a render as of the succeeding term (*e* The fact of the defendant being in the meantime removed b *habeas* to the prison of another court in a civil suit, makes n difference (*f*).

In what cases plaintiff not bound to proceed.

Where hindered by error, injunction, &c.

If the defendant hinder the plaintiff from proceeding b bringing a writ of error or obtaining an injunction, he wi not be entitled to a *supersedeas*, provided the plaintiff pr ceed in due time after the writ of error has been determine or the injunction dissolved (*g*). Or if one of several defen ants bring a writ of error, the plaintiff is not bound to proce against the others until the time limited after the writ of erro has been determined (*h*). So, where the assignees of a bank rupt were prevented from charging the defendant in executio by a plea put in by him to their *scire facias*, the Court refuse a *supersedeas* (*i*). Where the defendant, after rendering in di charge of his bail in an action in the Common Pleas, was com mitted to criminal custody for a misdemeanour, and so con tinued, that court refused a *supersedeas* for not charging hi in execution in due time, as they had no jurisdiction to remov him by *habeas* from the criminal custody in which he the was (*k*). In such a case, the plaintiff cannot charge him i execution until the criminal custody is over. The plaintif may also be excused from proceeding to execution within th time above limited by the defendant entering into some nego tiation with him, or by the defendant giving notice of his in tention to petition the Insolvent Court for his discharge (*l*), o by the defendant's estate being vested in the provisional assig nee of that Court, as noticed, *post*, 1063.

Custody on a criminal charge.

Defendant's insolvency.

How charged in execution when in cus-

If the defendant is in custody of the sheriff, the mode o charging the defendant in execution is by lodging a *ca. sa. wit the sheriff of the county in whose custody the defendant is, as is*

(*d*) R. H., 26 G. 3, Q. B.; R. E., 8 G. 1, C. P.; and R. T., 26 & 27 G. 2, Exch.; 3 M. & W. 416.

(*e*) *Thorn* v. *Leslie*, 3 Nev. & P. 305: 8 A. & E. 195, *S. C.*: *Colbron* v. *Hall*, 5 Dowl. 534: *Smith* v. *Jefferys*, 6 T. R. 776: *Neill* v. *Lovelace*, 3 Moore, 8: 8 Taunt. 674, *S. C.* The case of *Borer* v. *Baker*, (2 Dowl. 688; 1 A. & El. 861, *S. C.*), is an authority against the position in the text; but that case may be said to have been overruled by that of *Thorn* v. *Leslie*. The cases of *Baxter* v. *Baille*, (3 M. & W. 415); *Foulkes* v. *Burgess*, (6 Dowl. 109), decided by the Exchequer, are also against the position; but those decisions were founded on that of *Borer* v. *Baker*.

(*f*) *Morris* v. *Magrath*, 3 B. & B. 301.

(*g*) See *Garrett* v. *Mantell*, 2 Wils. 380: *Laroche* v. *Wasborough*, 2 T. R. 737: *Mal land* v. *Mazaredo*, 6 M. & Sel. 139: *Sher hurst* v. *Ramsden*, 1 B. & Ald. 676.

(*h*) *Laroche* v. *Wasborough*, 2 T. R. 737.

(*i*) *Bibbins* v. *Mantell*, 2 Wils. 378.

(*k*) *Freeman* v. *Weston*, 1 Bing. 267. And see *Altroffe* v. *Lunn*, 9 B. & Cres. 395. See *Gibb* v. *King*, 14 Law J., N. S., C. P., 85; 1 Com. B. 1, *S. C.* and cases 1054.

(*l*) R. E., 3 G. 4, Q. B.; R. M., 3 G. 4, C. P.

ordinary cases, and obtaining a warrant thereon directed to the gaoler or officer who has him in custody (*m*). *If the venue be in the county where the defendant is in custody, a ca. sa. is lodged; if in another county, a test ca. sa. must be lodged, a ca. sa. being previously issued to warrant it, the same as in other cases.* The charging in execution is then complete. It is not necessary afterwards to remove the defendant into the custody of the keeper of the Queen's Prison (*n*). And although the defendant should be afterwards removed into that custody, it is not necessary for the plaintiff to take any other steps to charge the keeper with his custody (*o*). If the defendant be in custody in the country, it will suffice to deliver the *ca. sa.* to the sheriff's agent in town; and in a case where it was so delivered within the two terms, although it did not actually reach the gaoler, in whose custody the defendant was, until after that time, it was held that the defendant was properly charged in execution (*p*). Where the defendant was in the county gaol, and a *ca. sa.* against him, at the suit of the sheriff, directed to the coroner, was handed by the coroner to the gaoler, this was held to be a sufficient charging of the defendant in execution (*q*). The plaintiff might remove the defendant from the sheriff's custody into the custody of the marshal, by a writ of *habeas corpus ad satisfaciendum*, and there charge him in execution: it is, however, wholly in the discretion of the Court to grant such writ, and, in most cases, it would be refused as unnecessary and oppressive (*r*).

How, when in Queen's prison.

If the defendant is in the custody of the keeper of the Queen's Prison at the suit of the same plaintiff (*s*), the mode of charging him in execution is thus:—*Get a side-bar rule from one of the Masters, requiring the keeper to acknowledge the defendant in his custody* (*t*); *take the rule to the keeper's office, and he will write the acknowledgment on it, paying him his fee. Next make out a committitur piece on a plain piece of parchment* (*u*), *and file it with one of the Masters who acts as clerk of the judgments. And, lastly,* (*although not essentially necessary*) (*x*), *enter the committitur in the keeper's book, which is kept in the judgment office; you will see the form of the entry there.* The keeper's acknowledgment must be of the same term the defendant is charged in execution, and not of a preceding term, otherwise the defendant will be entitled to a *supersedeas* (*y*). If the *committitur* be erroneous, the plaintiff must give the defendant notice of his having abandoned it, before he can enter a second, rectifying the mistake (*z*). Formerly, in order to

(*m*) From the case of *Poole* v. *Cook*, (Barnes, 289), it would seem, that, to render the charging in execution complete, a warrant should also be obtained, and lodged with the gaoler of the prison in which the defendant is detained in custody: and see *Astley* v. *Goodyer*, 2 Dowl. 633. But, according to Tidd, 9th ed., 363; 1 Lee, Pr. Dict. 167*b*: *Owen* v. *Owen*, 2 B. & Ad. 286; 1 Dowl. 386, *S. C.*; *Leach* v. *Johnson*, Id. 284, it seems the delivery of the *ca. sa.* to the sheriff in whose custody the defendant is, is sufficient. (*Sed quære*).

(*n*) *Owen* v. *Owen*, *supra*.

(*o*) *Sant* v. *Johnson*, 1 Dowl. 384: *Dunar* v. *Brooker*, 3 Dowl. 576; 1 H. & W. 286, *S. C.*

(*p*) *Williams* v. *Waring*, 2 C., M. & R. 354; 4 Dowl. 200; 1 Gale, 268, *S. C.*

(*q*) *Bastard* or *Burston* v. *Trutch*, 3 A. & E. 451; 5 Nev. & M. 109; 4 Dowl. 6; 1 H. & W. 321, *S. C.*

(*r*) See *Williams* v. *Jones*, 2 C. & J. 611.

(*s*) "The proceeding by side-bar rule does not operate to charge a prisoner in execution, unless he be at the time in custody in the particular suit." (See per Lord *Denman*, C. J., in *Furnival* v. *Stringer*, 5 Nev. & M. 60).

(*t*) See the form, Chit. Forms, 498.

(*u*) See the form, Chit. Forms, 498.

(*x*) MS., East. 1819.

(*y*) *Fisher* v. *Stanhope*, 1 T. R. 464.

(*z*) *Topping* v. *Ryan*, 1 T. R. 227: *Cunningham* v. *Cohen*, 10 East, 46.

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charge the defendant in execution, in the Queen's Bench was necessary to enter the proceedings of record, and to doc and file the judgment roll: but this seems no longer requisi for, by the rule of *H. T.*, 2 *W.* 4, *r.* 95, "in order to charg defendant in execution, it shall not be necessary that the p ceedings be entered of record" (*a*).

How, when in that prison at suit of third person.

If the defendant is in custody of the keeper at the suit o third person, and not of the plaintiff, the mode of charging h in execution is, to *sue out a writ of habeas corpus ad satisfa endum, as directed post, Part 5, Chap. 3, and bring the defe ant into open court thereon, in order to charge him in executio and the defendant being brought into Court in custody of the t staff, will be charged in execution* (*b*). *The writ in strictn should be delivered to the keeper two days before the defendant to be brought up. It was formerly usual to give a brief to coun to move that the defendant may be so charged; but that is longer necessary, and all that you need to do is to hand in t original habeas to the Master, and he will charge the prisone No duplicate of the habeas is necessary.* A *plaintiff* in prison the suit of a third person, may be charged in execution by th proceeding, by *habeas*, for the costs of a nonsuit, and the d fendant is not compelled to resort to an action to recove them (*c*). Although the judgment be against several, the wri of *habeas* need only be against the defendant who is in actu custody (*d*). Where a part of the debt had been levied unde a *fi. fa.*, it was held that the *habeas*, which was in fact for th residue, need not refer to or recite the *fi. fa.* and the levy mad under it (*e*). The writ is not *mesne* process within the 1 & 2 *Vict. c.* 110, *s.* 7 (*f*). It was made a question, but not de cided in a recent case, whether it might be tested on a differen day to which it issued (*g*). It would seem it ought to b tested in term time. The defendant cannot, on being brought up, set up any irregularity in the proceedings on the illegality of his arrest, in opposition to his being committed; any applcation on that ground must be made the subject of a separat application (*h*). The defendant cannot be detained a prisoner for the Court fees due on a *habeas*, which is merely a substitute for a *ca. sa.*, supposing the prisoner to have been at large (*i*).

When in that prison in an action in one of the other courts at Westminster.

If the defendant be in custody of the keeper of the Queen's Prison, charged with an action in the Common Pleas or Exchequer, the mode of charging him in execution is by means of this writ of *habeas*, by which he should be brought up to the court in which the action is pending, and there be charged in execution. In the Exchequer this is done by motion by counsel in open court; in the Common Pleas it is done without motion (*j*).

(*a*) See *Deemer* v. *Brooker*, 3 Dowl. 576; 1 H. & W. 306, *S. C.*; Tidd, New Pract., 189; Imp. K. B., 10th ed., 619; Tidd, 9th ed., 363: *Purdon* v. *Brockridge*, 2 B. & Cres. 342: *Fotterel* v. *Philby*, 3 Burr. 1941. See the form of the entry of the *committitur* on the roll, Chit. Forms, 488, 489.

(*b*) See Tidd, 9th ed., 364; and per Lord *Denman*, C. J., in *Smith* v. *Sandys*, 5 Nev. & M. 69; 1 H. & W. 377, *S. C.*

(*c*) *Fiennaul* v. *Stringer*, 3 Bing. N. C. 96; 5 Dowl. 195, *S. C.*

(*d*) *Wilson* v. *Bacon*, 1 Dowl. 194.

(*e*) *Green* v. *Foster*, 2 Dowl. 198.

(*f*) *Reynolds* v. *Simmonds*, 2 Jur. 88. Exch.

(*g*) *Newton* v. *Rowe*, 14 Law J., N. S., 73, C. P.

(*h*) *Aldridge* v. *Stamford*, 3 M. & Gr. 68.

(*i*) *Dalzell* v. *Collins*, 13 Law J., N. S., Exch., 39.

(*j*) *Re Stratford*, 1 Dowl., N. S., 18. *Quære* the necessity for this *habeas*, since the 5 & 6 Vict. c. 22.

When the defendant is in custody on a criminal account, leave of the Court or a judge is necessary before he can be charged in execution in a civil action; and as to when such leave will be granted, see *ante*, 1054. When in criminal custody.

As to a *fieri facias* against a prisoner, see *ante*, *Vol.* 1, *p.* 570. Fi. fa.

As to the effect of the death of a prisoner in execution, see *ante*, *Vol.* 1, *p.* 619. Death of prisoner.

Other Proceedings against Prisoners.]—As to an attachment against, see *post*, *Pt.* 8. As to when they must take advantage of an irregularity, see *post*, *Pt.* 5, *ch.* 16. Other proceedings against prisoners.

SECT. 2.

Proceedings, &c. by Prisoners generally.

1. *Rules and Regulations of the Prison.*
The Rules generally, 1061.
2. *Discharge of a Prisoner by Supersedeas.*
In what Cases, &c. 1063.
List of Prisoners supersedeable, &c., 1064.
How Supersedeas obtained, &c., 1065.
3. *Discharge of Prisoners under Small Debtors Act*, 1066.
4. *Discharge of Prisoners by other Means*, 1070.

1. *Rules and Regulations of the Prison.*

The Rules generally.]—Before the abolition of the Fleet and Marshalsea prisons, by the 5 & 6 *Vict. c.* 22, prisoners therein charged with civil actions merely (*k*) might have the benefit of the rules of the prison, upon entering into a bond with two sufficient sureties, as a security to the marshal or warden against escape, and upon paying him a certain percentage upon the amount of the debt for which they were detained (*l*). These rules were certain limits beyond the walls of the prison, within which prisoners who had found such sureties might have leave to reside. Besides this liberty of residing within the rules above mentioned, the prisoner might in term have a *day rule*, (that is, a permission from the Court to go out of the Liberty of the rules abolished.

(*k*) See *Jones's case*, 2 Str. 817: R. v. *Buckland*, 1 Id. 413: *R.* v. *Bailey*, 9 B. & C. 67.

(*l*) See R. H., 2 & 3 G. 4, r. 2; 5 B. & Ald. 560: *Hall* v. *Arnold*, 2 D. & R. 709.

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prison or beyond the rules of the prison, for the purpose of transacting his business), upon application to the marshal or warden, according to whose custody the prisoner was in, and signing a petition to the Court for that purpose, and upon paying some trifling fee to the clerk of the day rules. But the 5 & 6 *Vict. c.* 22, *s.* 12, abolishes this liberty of the rules, and enacts that prisoners shall be confined within the walls of the prison, and if suffered to go beyond them it shall be deemed an escape.

Prisoners' fees.

The 5 & 6 *Vict. c.* 22, *s.* 11, abolishes all fees and gratuities payable by prisoners on the entrance, commitment to, continuance in, or discharge from the Queen's Prison, except as therein provided. The prior act of 55 *G.* 3, *c.* 50, abolished the fees theretofore payable by them in other prisons.

Rules for government of Queen's prison.

The 5 & 6 *Vict. c.* 22, *s.* 16, enacts, that rules for the government of the Queen's Prison shall be made by the Secretary of State; and accordingly rules were made by him on the 28th September, 4th December, and 18th December, 1844. They are long and numerous, and it would exceed the limits of this work to insert them. The keeper gives to every prisoner on his admission a printed copy of such of them as relate to the conduct and treatment of prisoners.

Admission of attornies into.

Attornies are entitled to be admitted to the interior of the Queen's Prison, when they have occasion to go there for the benefit of clients confined in the prison, or when they are sent for by such clients. But the Court will not make a general order upon the keeper to permit an attorney to go into the interior at all times to visit his clients (*l*).

Extortion against prisoners, how punished.

By stat. 32 *G.* 2, *c.* 28, *s.* 11, all prisoners in custody of the marshal, warden, sheriff, &c., may, in *term time*, petition the court out of which the process under which they are imprisoned issued, or under whose jurisdiction the prison in which they are confined is, or in *vacation* may petition one of the judges of such court, or a judge of assize, complaining of any exaction or extortion by any gaoler or other person employed in the keeping, &c. of the prison in which they are confined, or of any other abuse whatsoever committed or done by them in their respective offices; and the Court or judge shall hear and determine the same in a summary way, and make such order for redressing the abuses complained of, and for punishing the officer, &c., and for making reparation to the parties injured, as they shall think just, together with the costs of such complaint; and such order may be enforced by attachment or otherwise, as other orders of the Court (*m*). The Court will not interfere under this act to relieve a debtor from alleged extortion, unless a *primâ facie* case of extortion is made out (*n*).

Modes of discharge from imprisonment.

The remainder of this section shall be confined to the consideration of the different modes by which a prisoner may be discharged from his imprisonment; and they shall be treated of in the following order:—

(*l*) *Re Jones & Matsaule*, 1 Nev. & M. 128; 4 B. & Ad. 365, *S. C.*

(*m*) See R. H., 80 G.

(*n*) *Ex parte Tighe*, 2 Dowl. 148.

2. Discharge by supersedeas. In what cases, &c.

In what Cases, &c.]—Before the 1 & 2 *Vict. c.* 110, if a *declaration* were not delivered, and an affidavit thereof duly made and filed in due time, (as to which, see *ante*, 1052, 1053), by the plaintiff at whose suit he was in custody, the defendant might be discharged out of custody by writ of *supersedeas*, or otherwise, upon entering a common appearance (*n*). It is, however, as we have seen, (*ante*, 1053), questionable whether this would now afford a ground for the discharge of a prisoner, and it would seem it would not. If the plaintiff do not *proceed to trial*, or (in case of judgment by default, demurrer, or issue upon *nul tiel* record) to *final judgment*, in due time, (as to which, see *ante*, 1056), the defendant may be discharged by writ of *supersedeas*, or otherwise, upon entering a common appearance (*o*). If the plaintiff do not *charge the defendant in execution in due time*, (as to which, see *ante*, 1057), the latter may be discharged out of custody by writ of *supersedeas*, or otherwise, upon entering a common appearance (*p*).

Cases where laches no supersedeas.

There are many cases in which, by the act of the Court, or of the defendant himself, the plaintiff may be excused from laches in not proceeding within the time otherwise limited for that purpose against the defendant, and in which the defendant will not, therefore, be entitled to a *supersedeas*. These have, for the greater part, been already noticed (*ante*, 1058). To these it may be added, that, if, at any time pending the action, or before the defendant is charged in execution, there be a treaty or agreement for a settlement or compromise of the matters in dispute, no laches shall be imputed to the plaintiff, nor shall the defendant be entitled to his discharge for want of prosecution pending such treaty, &c. (*q*); provided such treaty or agreement be in writing, signed by the defendant or his attorney, or some other person duly authorised by him, and it be therein expressed that proceedings are stayed at the *defendant's request* (*r*). If a defendant in custody gives the plaintiff notice of his intention to apply for his discharge under the Insolvent Act, he shall not be superseded or discharged on account of the plaintiff not proceeding against him, according to the rules and practice of the court, from the time of such notice until some rule or order shall be made in that behalf (*s*). Also, by the 1 & 2 *Vict. c.* 110, *s.* 41, "no prisoner whose estate shall by an order under this act have been vested in the said provisional assignee shall, after the making of such order, be discharged out of custody, as to any action, suit, or process for or concerning any debt, sum of money, damages, or claim, with respect to which an adjudication can, under the provisions of

(*n*) R. T., 3 W. 4; R. H., 26 G. 3.

(*o*) See the rules of court and practice, *ante*, 1056.

(*p*) See the rules of court and practice, *ante*, 1057.

(*q*) *Walter* v. *Stewart*, 3 Wils. 455; 2 W. Bl. 966, *S. C.*: *Pitt* v. *Yalden*, 4 Burr. 2060.

(*r*) R. H., 6 G. 3, Q. B.; R. H., 35 G. 3, C. P. See *Matson* v. *Hewlett*, 2 Dowl. 71; 1 C. & M. 579, *S. C.*

(*s*) R. E., 3 G. 4, Q. B.; 5 B. & Ald. 799; R. M., 3 G. 4, C. P. And see *Freeman* v. *Weston*, 1 Bing. 221; 8 Moore, 81, *S. C.*; 4 D. & R. 216, 347: *Holmes* v. *Marcott*, 1 Bing. 431; 8 Moore, 599, *S. C.*: *Gartick* v. *Ballinger*, 10 Price, 124: *Molyneaux* v. *Brown*, 2 Dowl. 84; 1 C. & M. 856, *S. C.*

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Proceedings where it is pleaded with other pleas.

But if the defendant plead either of the pleas above mentioned, and also the general issue or other plea, and the plaintiff deny *both* in his replication, the issue is then made up, as the parties proceed in the ordinary way; or if the plaintiff add the *similiter* to the general issue, and confess the plea of *plene administravit*, &c., and pray judgment of assets *in futuro*, &c. as above mentioned, then, after entering the replication in the issue, enter an award of the *venire* in this form: "*But because it is uncertain whether the defendant will be convicted upon the said issue above joined between the parties aforesaid, therefore let judgment be thereupon stayed until the trial and determination of the said issue; and in order to try the said issue, the sheriff is commanded*," &c., as in ordinary cases (*x*). In this latter case if the plaintiff have a verdict, judgment is signed, and he proceeds as in ordinary cases against an executor who has pleaded a false plea; so that, if such plea be false within his own knowledge, (as a plea of *ne unques* executor, or the like), he would be personally liable, not only for the costs, but also, it seems, for the debt, and judgment and execution might be issued against him accordingly (*y*); or if not false within his own knowledge, (as a plea that the testator did not promise, or the like), he would be personally liable for the costs, and the judgment signed against him would be of assets *quando* &c., upon which the plaintiff might afterwards, when assets came to defendant's hands, have a *scire facias*, as is above mentioned, for the debt, and immediately have a *fi. fa.* or *ca. sa.* for the costs *de bonis testatoris, et si non, de bonis propriis* (*z*).

Confessing judgment so as to prefer a creditor.

It is well settled, that, if an action be commenced against an executor or administrator for any specific debt, it must be preferred by him in payment to others of the same class: and in that case the executor or administrator would not be warranted in making any voluntary payment of such other debts to defeat the party of his remedy (*a*). Yet, although one creditor commence an action, if another creditor, in equal degree, commence a subsequent action, and first recover judgment, he must be first satisfied. Hence an executor or administrator has it in his election to give a preference, by confessing judgment in the action of the one, and pleading such judgment to the action of the other (*b*). In case, therefore, a hostile creditor bring an action, and there be not sufficient assets to divide amongst the creditors, and the executor be desirous of making an equal division, or favouring any particular creditor or creditors of the same class, in preference to the hostile plaintiff, the course adopted is, to get one or more of the friendly creditors, whose debt, or joint debts, will fully cover the assets in hand, immediately to bring a friendly action or actions, and declare therein in the common form of debt, and let defendant suffer judgment against him by default; and, on this being effected, then to plead the judgment to the declaration of the hostile creditor. If such judgment be recovered after pleading to the action by

(*x*) See form, Chit. Forms, 501.
(*y*) See *post*, 1079, 1080.
(*z*) See *Marshall* v. *Wilder*, 9 B. & C. 655; 1 Saund. 336 b, n. (10).
(*a*) 11 Vin. Abr. 296; Com. Dig., "Admin.," c. 2; Toller, 288, 289.
(*b*) See note (*a*), *supra*, 931; Off. Ex. 145.

and as to what actions (if any) they still remain not supersedeable (*d*).

Notice to keeper of cause preventing supersedeas.

By *R. H.*, 2 *W.* 4, *r.* 87, "if, by reason of any writ of error, special order of the Court, agreement of parties, or other special matter, any person detained in the *actual* custody of the marshal of the King's Bench prison, or warden of the Fleet, be not entitled to a *supersedeas* or discharge, to which such prisoner would, according to the general rules and practice of the Court, be otherwise entitled, for want of declaring, proceeding to trial or judgment, or charging in execution within the times prescribed by such general rules and practice, then, and in every such case, the plaintiff or plaintiffs at whose suit such prisoner shall be detained in custody shall, *with all convenient speed, give notice in writing* (*e*) *of such writ of error, special order, agreement, or other special matter, to the marshal or warden, upon pain of losing the right to detain such prisoner in custody, by reason of such special matter.* And the marshal or warden shall forthwith, after the receipt of such notice, cause the matter thereof to be entered in the books of the prison; and shall also present to the judges of the respective courts, from time to time, a list of the prisoners to whom such special matter shall relate, shewing such special matter, together with the list of the prisoners supersedeable" (*f*). One of the objects of requiring this notice to the marshal or warden is, that he may be better enabled to prepare the lists required by the rule, *supra*. The rule extends only to prisoners in actual custody within the walls (*g*). Where the excuse for plaintiff not proceeding arises from a demurrer, that is not a case contemplated by the rule, and plaintiff need not give notice thereof (*h*).

Discharge of supersedeable prisoners.

Also, by *R. H.*, 2 *W.* 4, *r.* 88, "all prisoners who have been or shall be in the custody of the marshal or warden [now the keeper of the Queen's Prison], for the space of one calendar month after they are supersedeable, although not superseded, shall be forthwith discharged out of the King's Bench or Fleet prison [now the Queen's Prison], as to all such actions in which they have been or shall be supersedeable." This rule was held to extend only to prisoners in actual custody within the walls (*i*), which, since the 5 & 6 *Vict. c.* 122, is always the case. The keeper of the Queen's Prison cannot be compelled to judge when a prisoner is supersedeable, in order to discharge him under this rule, but the prisoner must apply to the Court or a judge (*k*).

How supersedeas obtained.

How Supersedeas obtained, &c.]—The rules of *T.*, 3 *W.* 4, and *H.*, 26 *G.* 3, state, that the defendant shall be discharged in the several cases above mentioned, by *supersedeas* or otherwise, according to the course of the Court, upon entering a common appearance, unless, upon notice given to the plaintiff's attor-

(*d*) See the former rules in Q. B of T. T., 56 G. 3; and M. T., 57 G. 3; and 5 B. & Ad. 457.

(*e*) See form, Chit. Forms, 487.

(*f*) See the former rules in Q. B., T.T. & M. T. 1816; 5 B. & Ad. 457; 5 M. & Sel. 522.

(*g*) *Siggers* v. *Brett*, 5 B. & Ad. 453.

(*h*) *Ferguson* v. *D'Arcy Mahon*, 2 Jur. 881.

(*i*) *Siggers* v. *Brett*, 5 B. & Ad. 455. And see *Lewis* v. *Gomperts*, 6 Dowl. 124.

(*k*) *Robinson* v. *Cresswell*, 2 M. & W. 410. And see *Smith* v. *Eggington*, 2 Nev. & P. 143.

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ney, good cause be shewn to the contrary. The mode, therefore, of procuring the defendant's discharge in the several cases above mentioned, is as follows:—

If in custody of keeper of Queen's Prison.

If the defendant be in the custody of the keeper of the Queen's Prison, *get a copy of causes from the clerk of the papers at the prison; then take out a summons requiring the plaintiff's attorney to attend, at the expiration of two days or more after the taking it out, before a judge to shew cause why the defendant should not be discharged, &c.* (*l*); *and serve it upon the plaintiff's attorney or agent two days or more before it is returnable. One summons, so served, is sufficient* (*m*). *If the plaintiff's attorney consent to an order, get the consent indorsed on the summons, and the judge will make an order accordingly; or, if the plaintiff's attorney shew cause, but the cause be not deemed sufficient, the judge will make a like order; or, if the attorney do not attend, then, after waiting half an hour, make an affidavit of the service of the summons, and of your attendance, and the judge will make the order* (*n*). In town causes, this order is absolute, in the first instance; but, in country causes, it is usually only an order *nisi*, unless cause be shewn within four days, or such other time as the judge shall think reasonable, and which shall afterwards be made absolute, if no cause be shewn (*o*). Upon the order being made, *serve a copy of it upon the plaintiff's attorney, enter a common appearance, as in ordinary cases, and get a certificate from one of the Masters of your having done so. Then take this certificate and order to the keeper's office, and the prisoner will thereupon be discharged without a supersedeas, upon payment of his fees.*

Of sheriff.

But if the defendant be in custody of the sheriff, &c., *get from the gaoler a certificate of the causes the defendant is charged with* (*p*); *and make an affidavit of the gaoler having signed the same* (*q*). *Then take out a summons, and obtain and serve the order, and enter an appearance, as is above directed. Write out a præcipe for the supersedeas on plain paper, and write out the supersedeas on a plain piece of parchment* (*r*); *and take them and the certificate of the Master above mentioned to one of the Masters, who will sign the supersedeas; get it sealed. And, lastly, leave the writ with the gaoler of the prison, who will thereupon discharge the defendant, upon payment of his fees* (*s*).

3. *Discharge of Prisoners under the Small Debtors Act.*

Proceedings under stat. 48 G. 3, c. 123, s. 1.

The only case in which an insolvent prisoner can be discharged out of custody by an application to the superior courts

(*l*) See the form, Chit. Forms, 489.

(*m*) R. H., 2 W. 4, r. 89. By that rule it is ordered, that, "the order of a judge for the discharge of a prisoner on the ground of a plaintiff's neglect to declare, or proceed to trial or final judgment or execution in due time, may be obtained at the return of one summons served two days before it is returnable; such order in town causes being absolute; and, in country causes, unless cause shall be shewn within four days, or within such further time as the judge shall direct." See the former practice, Tidd, New Pract., 101.

(*n*) See the form of order, Chit. Forms, 490.

(*o*) R. H., 2 W. 4, r. 89, *supra*, n. (*m*).

(*p*) See the form, Chit. Forms, 490.

(*q*) Id. 490.

(*r*) See the form of a *supersedeas* for not declaring, Chit. Forms, 491; for not proceeding to trial or final judgment, Id. 492; the like for not charging the defendant in execution, Id. 492; the like where defendant rendered in discharge of his bail, Id. 491, 492.

(*s*) See *Jones* v. *Lander*, 6 T. R. 753.

at Westminster, is where it falls within the 48 *G.* 3, *c.* 123, commonly called the Small Debtors Act. By sect. 1 of that act, "All persons in execution upon any judgment, in whatsoever court the same may have been obtained, and whether such court be or be not a court of record, for *any debt* or *damages* not exceeding the sum of 20*l. exclusive* of the costs recovered by such judgment, and who shall have lain in prison thereupon for the space of twelve successive calendar months next before the time of their application to be discharged as hereinafter mentioned, shall and may, upon his, her, or their application for that purpose in term time, made to some one of his Majesty's superior courts of record at Westminster, to the satisfaction of such court, be forthwith discharged out of custody as to such execution by the rule or order of such court."

What cases within the act.

The statute applies only to cases where the party has been in custody upon a judgment. The judgment must be in a civil action (*x*). It does not extend to a party in execution under a writ *de contumace capiendo* (*y*), or on an attachment (*z*). It extends, it seems, to *plaintiffs* in execution for costs of a nonsuit as well as to defendants (*a*); if the costs do not exceed 20*l.* (*a*). The statute applies only to cases where the debt was of an amount not exceeding 20*l.*, or that amount precisely (*b*). But it has been held, that, where, in an action of debt, the plaintiff has recovered 20*l.*, and the jury have (as they always do in an action of debt) given one shilling nominal damages for the detention, this single shilling, which is given as a pure matter of form, to entitle the plaintiff to costs, will not prevent the statute from applying (*c*). So, though the judgment is in debt for 100*l.*, yet, if the execution against the defendant is for less than 20*l.*, he may be discharged out of custody under the above act, without reducing the judgment (*d*). But where a defendant had given a warrant of attorney for debt and costs to an amount exceeding 20*l.*, although the original claim was less, and had remained in execution for that amount twelve successive months, he was held not entitled to his discharge under the act (*e*); nor is a prisoner entitled to his discharge under the act if the debt exceeds 20*l.*, although the excess consists of interest only, which has accrued after action brought (*f*). The statute is not confined to parties in custody for *debts*, or for damages in actions on contracts; it extends to a party in custody in execution for damages recovered in an action of trover (*g*), or for an assault (*h*), or for crim. con. (*i*), or in an ejectment, though

(*x*) *R.* v. *Hubbard*, 10 East, 408: *Lewis* v. *Moreland*, 2 B. & Ald. 61: *R.* v. *Dunn*, 2 M. & Sel. 201: *R.* v. *Clifford*, 8 D. & R. 88.

(*y*) *Ex parte Kaye*, 1 B. & Ad. 632.

(*z*) *Doe Upton* v. *Beveson*, 1 Dowl. 15: *R.* v. *Hubbard*, 10 East, 408: *Pitt* v. *Lane*, 3 Dowl. 649: *R.* v. *Clifford*, 8 D. & R. 88.

(*a*) *Rayhance* v. *Hewling*, 3 M. & Selw. 182: *Bradley* v. *Webb*, 7 Dowl. 566.

(*b*) *Thompson* v. *King*, 4 Dowl. 582.

(*c*) *Fogarty* v. *Smith*, 4 Dowl. 595; 1 H. & W. 644, *S. C.*

(*d*) *Harris* v. *Parker*, 3 Dowl. 451.

(*e*) *Anon.* v. *White*, 1 Dowl. 19; Chapm. Pract. 330: *Robinson* v. *Lundell*, 6 Moore, 287. The reason, however, for such decision seems doubtful, and see *contra* on a cognovit, *Rathbone* v. *Fowler*, 6 Dowl. 81; 3 M. & W. 137, *S. C.*

(*f*) *Cooper* v. *Biles*, 2 Dowl. 749; 3 Moo. & Scott, 797, *S. C.* See *Curtis* v. *Richards*, 9 Dowl. 845.

(*g*) *Smith* v. *Preston*, 1 H. & W. 93.

(*h*) *Winter* v. *Elliott*, 3 Nev. & M. 315; 1 A. & E. 24, *S. C.*

(*i*) *Goodfellow* v. *Robinge*, 3 Bing. N. C. 1; 5 Dowl. 198, *S. C.*

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the damages be nominal (*k*). The statute extends only to persons in actual custody within the walls of the prison, and a defendant who has merely had the rules of the prison is not within it (*l*). And the imprisonment must be for twelve successive calendar months, and must be immediately previous to the application (*m*), and without any interval (*n*), unless on day rules (*o*). The twelve months are reckoned inclusive of the day the party was charged in execution (*p*). Therefore, a defendant charged in execution on the 27th November, may apply on the 26th of November in the following year (*q*). The statute contemplates cases where there might be proceedings against the *property* of the debtor (*r*). The right to be discharged under the act is not affected by the 1 & 2 *Vict. c.* 110, *s.* 41 (*s*), or *s.* 36 (*t*); nor will the discharge affect any proceeding against the prisoner which may be pending in the insolvent court (*u*).

By whom application may be made.

The party in execution can alone apply under the act, and not any third party (*v*); but his wife may apply, where the prisoner is a lunatic (*x*).

To what court, &c.

The application must be made to the superior court out of which the process issues (*y*). It cannot be entertained before a judge at chambers (*z*). If the action be in an inferior court, the application may be made to any of the courts at Westminster (*a*).

The application.

The rule is a *rule nisi*, if no notice of the intended application be first given (*b*); and the rule should be served in the same manner as the notice presently mentioned (*c*). But it may be absolute in the first instance, on an affidavit of notice given ten days before the intended application, which notice may be given before the year expires (*d*). This notice must be actually given, not only ten days before the application is actually made, but ten days before the time mentioned in the notice for the application (*e*). It should be served on the plaintiff personally (*f*), and not his attorney, whose authority ended when the judgment was signed (*g*), unless, indeed, the plaintiff cannot be found (*h*), or unless the attorney still con-

(*k*) *Doe* d. *Symons* v. *Rice*, 14 L. J., N. S., 139, Q. B.: *Doe* v. *Sinclair*, 3 Bing. N. C. 778; 5 Dowl. 615, *S. C.*: *Doe* v. *Ward*, 2 M. & W. 65: *Doe Smith* v. *Payton*, 7 Dowl. 671: but see *Doe* v. *Reynolds*, 10 B. & C. 484.

(*l*) *Barnard* v. *Symonds*, 5 Dowl. 590: *Sumption* v. *Monsant*, Ib.; 2 M. & W. 311, *S. C.*: *Gilbert* v. *Pope*, 5 Dowl. 449; 2 M. & W. 311, *S. C.*

(*m*) *Stubbing* v. *M'Grath*, 7 Dowl. 328.

(*n*) *Eiffe* v. *Jacob*, 9 Dowl. 343: *Pay* v. *Thomas*, Chapm. Prac. 330.

(*o*) *Boughey* v. *Webb*, 4 Dowl. 390.

(*p*) *Anon.*, 1 Dowl. 150.

(*q*) *Porkers* v. *Wilkins*, 7 Dowl. 152.

(*r*) *Ex parte Kaye*, 1 B. & Ad. 653.

(*s*) *Chew* v. *Lye*, 7 Dowl. 465.

(*t*) *Fuge* v. *Rogers*, 13 L. J., N. S., 38, Q. B.

(*u*) *Kitching* v. *Croft*, 12 A. & E. 596.

(*v*) *Wood* v. *Heath*, 12 Law J., N. S., 16, C. P.

(*x*) *Clay* v. *Bowler*, 6 N. & M. 814.

(*y*) *Pitt* v. *Evans*, 3 Dowl. 649.

(*z*) *Kelly* v. *Dickenson*, 1 Dowl. 546; *Jones* v. *Fitzadam*, 1 C. & M. 855. But the rule of H. T., 2 W. 4, r. 90, *supra*, seems to suppose a judge's order can be granted.

(*a*) *Short* v. *Williams*, 4 Dowl. 357.

(*b*) *Ex parte Nelson*, 7 Taunt. 37: *Magney* v. *Wilkes*, Id. 467: *Moore* v. *Clay*, 4 Dowl. 5: *Jones* v. *Fitzadams*, 1 C. & M. 855, 2 Dowl. 111, *S. C.*

(*c*) *Bolton* v. *Allen*, 1 Dowl., N. S., 467.

(*d*) R. H., 2 W. 4, r. 90. See *Davies* v. *Rogers*, 2 B. & Cres. 804; 4 D. & R. 361, *S. C.* See form of notice, Chit. Forms, 498.

(*e*) *Bolton* v. *Allen*, 1 Dowl., N. S., 309.

(*f*) *George* v. *Fry*, 4 Dowl. 273. See *Biddulph* v. *Gray*, 5 Dowl. 406.

(*g*) *Johnson* v. *Routledge*, 5 Dowl. 579: *Gordon* v. *Twine*, 4 Id. 580: *Kelly* v. *Dickenson*, 1 Id. 546.

(*h*) See *Percival* v. *Russell*, 7 M. & Gr. 448: *Bradley* v. *Webb*, 7 Dowl. 588: *Wilson* v. *Mohler*, 1 Dowl. 549: *Minshull* v. *Soame*, 8 Law J., N. S., Exch., 44: *Jones* v. *Boddington*, 13 L. J., N. S., 204, Q. B. But see *Charter* v. *Goulden*, 10 Law J., N. S., 357, Q. B.

times his agent (*i*). Service on one of several plaintiffs, or lessors of the plaintiff, is sufficient (*k*). The name of the cause stated in the notice must correspond with the name of that in which he is in execution (*l*). It is usual, but not absolutely necessary, on serving the notice, to leave also a copy of the affidavit on which it is intended to make the application (*m*). Before making the application, *obtain from the keeper of the prison in which the defendant is confined a certificate of his commitment, with a copy of the causes* (*n*). *The signature to the gaoler's certificate, unless the certificate of the keeper of the Queen's Prison, must be verified by affidavit* (*o*). *Make also an affidavit of service of the ten days' notice on the plaintiff; and, in the Common Pleas, there must be an affidavit of the prisoner's signature to it* (*p*). *The defendant must also make an affidavit, clearly showing* (*q*) *that the debt or damages for which he is confined in the action do not exceed 20l., exclusive of the costs, and that he has been confined in prison thereon for the space of twelve calendar months. The affidavit must be intitled in the original action* (*q*). *It will suffice though sworn the day before the application is made* (*r*). *Give the gaoler's certificate and the affidavits, with a brief, for counsel to move for the defendant's discharge, and he will make the motion accordingly. The rule will be absolute in the first instance, where such notice has been given.* Where a defendant had remained in custody more than twelve months on *two* judgments for 10*l.* each, at the suit of the same plaintiff, it was holden that there must be a separate motion in each case (*s*). The prisoner is entitled to his discharge as a matter of right, if the Court are satisfied as to the fact of his imprisonment in actual custody for twelve months, &c. (*t*) Where the rule is only a rule *nisi*, the Court have no power to order cause to be shewn at chambers (*u*). If notice of application was given, and the application be successfully opposed in the first instance, no costs are allowed to the opposing creditor (*v*).

Proceedings where discharge improperly obtained.

If the prisoner's discharge be unduly or fraudulently obtained, by a statement to the Court, which, if true, would entitle him to be discharged under the act, he is liable to be again taken in execution, and remanded by rule of Court; but the sheriff or keeper of the prison who may have discharged him under a rule so obtained, is not to be liable to an action for an escape in consequence of such discharge (*x*). If, there-

(*i*) *Granger* v. *Wilcox*, 14 Leg. Obs. 116: *Silcock* v. *Passmore*, 7 C. & P. 289: *Wilson* v. *Mahir*, 1 Dowl. 549: *George* v. *Fry*, 4 Dowl. 273. If not served on the plaintiff when it might have been, the defendant may still obtain a rule *nisi* for his discharge, to be served on the plaintiff. *Johnson* v. *Routledge*, 5 Dowl. 579). Where the plaintiff is dead, it is necessary to shew that there is no personal representative, before service of notice on the plaintiff's attorney will be deemed sufficient. (*Ex p. Richer*, 4 Dowl. 275; 1 H. & W. 518, *S. C.*) Where it appeared that the plaintiff had died intestate, and that no administration had been taken out, but that his wife was living, a rule *nisi* was granted to be served on the wife and the attorney in the cause, which was afterwards made absolute. (Ib.)

(*k*) *Harris* v. *Turtle*, 6 M. & W. 258: *Faulkner* v. *Haslar*, 9 Dowl. 138: *Doe Smith* v. *Peyton*, 7 Dowl. 671.

(*l*) *Kelly* v. *Dickenson*, 1 Dowl. 546.

(*m*) *Wilcox* v. *Lemon*, 8 Dowl. 144.

(*n*) Chapm. Pract. 327.

(*o*) See *Short* v. *Williams*, 4 Dowl. 397.

(*p*) *Randall* v. *Sweet*, 10 Law J., N. S., 132, C. P.

(*q*) *Clapperton* v. *Monteath*, 13 Law J., N. S., C. P., 114. See the form, Chit. Forms, 493.

(*r*) *Fuge* v. *Rogers*, 13 Law J., N. S., 38 Q. B.

(*s*) *Anon.*, 3 Leg. Obs. 76.

(*t*) *Stacey* v. *Fieldsend*, 1 Dowl. 700; *ante*, 868.

(*u*) *Jones* v. *Fitz Adams*, 2 Dowl. 111; 1 C. & M. 855; 3 Tyr. 934, *S. C.*

(*v*) *Anon.*, 1 Dowl. 148.

(*x*) 48 G. 3, c. 123, s. 1.

PART IV.

fore, a prisoner obtain his discharge fraudulently, an application must be made to the Court for "liberty to sue out a new *ca. sa.* against the defendant." This must be supported by an affidavit of facts, to shew in what manner the discharge was improperly obtained. Give a brief to counsel, with the affidavit to move for the rule: it is a rule *nisi*, and must be served on the defendant, but does not require personal service. Make an affidavit of service, and give a brief to counsel to move to make the rule absolute. If the rule be made absolute, then sue out the *capias ad satisfaciendum* in the usual way (*y*).

4. *Discharge of Prisoners by other Means.*

Where attorney disclaims writ.

A prisoner will be entitled to his discharge, if the attorney whose name is indorsed on the writ declares that it was not issued by him, or with his authority or privity (*z*).

Defect in writ, &c.

As to what defects in an affidavit to hold to bail, or in a writ of *capias*, will entitle the prisoner to his discharge, see *Vol.* 1, 652, 681, 695.

By perfecting bail.

A prisoner shall be discharged upon putting in and perfecting bail at any time before judgment (*a*).

On termination or compromise of action.

A prisoner shall also be discharged when the action is abated, discontinued, or decided in his favour. So, if the prisoner or any one settle or compromise the debt with the plaintiff, the plaintiff (or more properly his attorney) shall give the defendant a discharge in writing; and upon this being lodged with the keeper or gaoler, the prisoner shall be discharged (*b*). Or, if, after judgment, he or any one for him pay the amount of it to the plaintiff or his attorney, the Court upon application will discharge him (*c*). Indeed, they are bound at their peril to discharge him; and where a defendant in execution tendered the amount of the judgment to the plaintiff and to his attorney, and required them to sign his discharge, which they refused to do unless he would also satisfy a demand they had on him for costs on another account, the Court held that the defendant might maintain an action on the case against them for his subsequent detention (*d*). Or, if the plaintiff give a written discharge to the keeper or sheriff in whose custody the debtor may be, he should discharge him; but an order by the plaintiff's attorney is, it seems, not sufficient, unless the debt have been actually paid, or unless the plaintiff have authorized the attorney to give the discharge (*e*). As the attorney, in strictness, has a lien on the judgment for the amount of his costs (*f*), the discharge, more properly, should be given by him, as above mentioned; but a discharge by either will be sufficient. And where a plaintiff, having his debtor in execution for 500*l.*, entered up satisfaction on the roll by a different attorney from that he had employed in the cause, upon the defendant agreeing to pay him 120*l.* at a future time, upon a motion to discharge the defendant,

(*y*) Chapm. Pract. 330.
(*z*) Vol. 1, 78.
(*a*) See Vol. 1, 738.
(*b*) See Vol. 1, 614. See *Butt* v. *Conant*, 3B. & B. 3; 6 Moore, 65, S. C.
(*c*) *Reinmer* v. *Turner*, 3 Dowl. 601.
(*d*) *Crosse* v. *Pilling*, 6 D. & R. 129; 4 B. & C. 26, S. C.
(*e*) See *Savery* v. *Chapman*, 11 Ad. & E. 832.
(*f*) See Vol. 1, 108.

which was opposed by the plaintiff's attorney, on the ground of his *lien*, the Court held, that, although there appeared to be a fraudulent collusion between the plaintiff and the defendant, they had no power to detain the defendant in prison after satisfaction was entered up on the record (*g*). If the prisoner be in execution at the time of his discharge, his discharge amounts to a satisfaction of the debt, even though he was discharged upon giving a security, which, on account of an informality, afterwards became unavailable (*h*); but otherwise if he were in custody upon *mesne* process merely (*i*).

In case of bankruptcy.

If a prisoner become bankrupt, and obtain his certificate, if the debt for which he is in custody be provable under his fiat, he shall be discharged out of custody upon application to a judge at chambers (*k*). Even before he obtains his certificate, if the plaintiff elect to prove under the fiat, he must first discharge the defendant out of custody, before he will be permitted to prove (*l*).

In case of insolvency.

If the prisoner become discharged under the Insolvent Act, he may obtain an order to discharge him out of custody, &c. (*See Vol.* 1, *p.* 610).

After death of the plaintiff.

In a case where the wife of a prisoner became administratrix to the plaintiff, the Court ordered the defendant to be discharged (*m*); and the Court of Common Pleas have gone so far as to discharge a prisoner in execution after the plaintiff's death, upon service of a rule *nisi* upon the next of kin, and no cause shewn, it appearing that the next of kin did not intend to administer (*n*). But that Court refused to discharge a defendant out of custody in execution at the plaintiff's suit, although the application was not made until eighteen months after the death of the latter, it appearing that he had appointed executors, who were still alive and had not assented to the discharge (*o*). And where administration had been taken out, that Court refused, without the authority of the administratrix, to discharge the defendant out of execution after the death of the plaintiff, although his administratrix and assignees disclaimed all interest in the action (*p*).

(*g*) *Marr* v. *Smith*, 4 B. & Ald. 466; *ante*, Vol. 1, 169.

(*h*) *Ante*, Vol. 1, 630: *Jaques* v. *Withy*, 1 T. R. 557.

(*i*) MS., H., 1822; *ante*, Vol. 1, 645.

(*k*) 5 & 6 Vict. c. 122, s. 42; 6 G. 4, c. 16, s. 126: *ante*, Vol. 1, 610.

(*l*) 6 G. 4, c. 16, s. 80. See *post*, 1105.

(*m*) *Pyne* v. *Erle*, 8 T. R. 407.

(*n*) *Parkinson* v. *Horlock*, 2 New Rep. 240: *Broughton* v. *Martin*, 1 B. & P. 176: *Gore* v. *Wright*, 1 Dowl., N. S., 864: and see *R.* v. *Davis*, 1 B. & P. 336. But see *Holmes* v. *Marcott*, 1 Bing. 431; 8 Moore, 589, *S. C.*

(*o*) *Dunsford* v. *Gouldsmith*, 8 Moore, 145.

(*p*) *Fothergill* v. *Walton*, 4 Bing. 711; 1 Moo. & P. 743, *S. C.*

CHAPTER VIII.

ACTIONS BY AND AGAINST EXECUTORS OR ADMINISTRATORS.

SECT. 1.

Actions by Executors or Administrators.

PART IV. Limitation of actions by.

Limitation of Actions by.]—IF the time limited by the statute have not expired before the death of the testator or intestate, the executor or administrator may bring the action at any time within a year after the death (*a*); or, if the time limited have not expired within the year after the death, at any time before the expiration of such limited time. And if the executor bring an action, and die before judgment, his executor may bring a fresh action within a reasonable time afterwards (*b*). So, where a party brings an action and dies before judgment, the six years being then expired, his executor or administrator may bring a new action, provided he does it recently or within a reasonable time, and which time is generally considered to be a year (*c*).

In an action by an administrator upon a bill of exchange payable to the intestate, but accepted *after his death*, it was holden that the statute began to run from the grant of the letters of administration, and not from the time the bill became due, there being no cause of action while there is no party capable of suing (*d*). But that case would have received a different decision, had the bill been due in the lifetime of the testator (*e*). By the 3 & 4 *W.* 4, *c.* 42, *s.* 2, executors and administrators may bring an action for an injury to the real estate of the testator or intestate, provided the injury was committed within six months before the death of the testator or intestate, and provided the action be brought within a year after his death (*f*).

Parties plaintiffs.

Parties.]—If there are several executors or administrators, all should join in bringing the action (*g*), though one be within the age of seventeen years (*h*), or have not proved the

(*a*) *Carver* v. *Innes*, Bull. N. P. 150. See 2 Will. Exors. 1376, &c.

(*b*) Ib. See *Knight* v. *Bate*, Cowp. 738; 11 Mod. 455, S. C.

(*c*) *Matthews* v. *Phillips*, 2 Salk. 424: *Kinsey* v. *Hayward*, 1 Lutw. 260; 2 Saund. 63, n. (*g*); 2 Will. Exors. 1337. And see *Adam* v. *Inhabitants of Bristol*, 2 A. & E. 389; 4 N. & M. 144, *S. C.*

(*d*) *Murray* v. *East India Company*, 5 B. & Ald. 204. And see *Douglas* v. *Forrest*, 1 Moo. & P. 663; 4 Bing. 686, *S. C.*: *post*, 1076.

(*e*) See *Rhodes* v. *Smethurst*, 4 M. & W. 63. And see in equity, *Franke* v. *Cranefeldt*, 3 M. & C. 499; *post*, 1076.

(*f*) See *Powell* v. *Rees*, 7 A. & E. 426: 2 Nev. & P. 571, *S. C.*

(*g*) *Smith* v. *Smith*, Yelv. 130.

(*h*) *Brooks* v. *Stroud*, 1 Salk. 3.

ill (*i*), or have even refused before the ordinary (*i*). The on-joinder, however, of a co-executor or administrator can-ally be taken advantage of by plea in abatement after craving yer of the probate or letters of administration (*k*). It may e added, that one of several executors may alone maintain an ction on a sale of goods made by him after the death, not aming himself executor (*l*). So, one of several executors ay sue for goods taken out of his possession (*m*).

Process, &c.]—Though the plaintiff sue as executor or administrator, the process need not describe him as such; but e practice in the Common Pleas, in bailable cases, before e 2 *W.* 4, *c.* 39, was different (*n*); and to avoid any doubt a the question, it is best in that court to describe him in the rocess as executor or administrator. An executor or administrator, in proceeding to arrest the defendant, may swear the debt according to his belief: he is not obliged to swear sitively to it, as he would be if he were not suing *in autre vit* (*o*). Executors who have holden a party to bail without reasonable or probable cause, for a debt alleged to be due their testator, are within the 43 *G.* 3, *c.* 46, *s.* 3 (*p*). If e plaintiff in an action, after having arrested the defendant, , such arrest is no bar to a fresh arrest in an action by the ecutors (*q*).

Before the 6 & 7 *Vict. c.* 93, *s.* 37, it was not necessary for e executor or administrator of an attorney, before the commencement of an action, to deliver a bill of costs for business ne by his testator or intestate; but this is now otherwise, d such delivery is necessary (*r*).

Process, &c.

Declaration and subsequent Proceedings.]—The declaration filed or delivered in the same manner as in ordinary cases. may be observed, that, if the plaintiff describes himself in e declaration as executor or administrator, and it appears at the cause of action is in his own right, it will be no obction, for the calling himself as such is but surplusage (*s*).

Declaration and subsequent proceedings.

The plea is delivered as in ordinary cases. The defendant ay crave oyer of the probate or letters of administration. y rule of *H. T.*, 4 *W.* 4, *r.* 21, "In all actions by and gainst assignees of a bankrupt or insolvent, or executors, administrators, or persons authorised by act of Parliament to sue be sued as nominal parties, the character in which the laintiff or defendant is stated on the record to sue or be ued, shall not in any case be considered as in issue, unless pecially denied." The defendant may bring money into ourt, as in ordinary cases (*t*).

Plea.

(*i*) *Bowtell's case*, 9 Coke, 37 *a*; 1 Saund. 291 *l*; 2 Will. Exors. 1398.

(*k*) 1 Saund. 291 *l*; Selw. N. P. 784.

(*l*) *Brassington* v. *Ault*, 2 Bing. 177; 2 Will. Exors. 1327.

(*m*) Godolp., pt. 2, ch. 16, s. 1.

(*n*) See Vol. 1, p. 674.

(*o*) *Ante*, Vol. 1, p. 655. See form of affidavit to hold to bail by executor or administrator, Chit. Forms, 207.

(*p*) Post, Chap. 31: *Feeley* v. *Reed*, 5 B. & Ald. 515 *a*: *Drewfield* v. *Archer*, Id. 513; 1 D. & R. 67, S. C.

(*q*) *Mellin* v. *Evans*, 1 C. & J. 82.

(*r*) *Ante*, Vol. 1, p. 86. As to taxing the bill, see Id. 92.

(*s*) *Hornsey* v. *Denoiche*, 1 Vent. 119: *Aspinall* v. *Wake*, 10 Bing. 51; 3 M. & Sc. 425, *S. C.*: Com. Dig. "Pleader," (D. 2). As to the form of the declaration in general, and joinder of counts, &c., see 2 Will. Exors. 1328.

(*t*) *Crutchfield* v. *Scott*, 2 Str. 796.

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Security for costs.

If the plaintiff reside abroad, he may be compelled to give security for costs, as in other cases (*u*).

Judgment as in case of nonsuit.

Judgment as in case of a nonsuit may be obtained against the plaintiff (*x*).

Other proceedings.

The subsequent proceedings, together with the verdict, *postea*, judgment, and execution, are also the same as in ordinary cases (*y*). As to *scire facias* by an executor, &c., to revive a judgment obtained by his testator, &c., see *ante*, 1013.

Costs.

Costs.]—If the judgment be for the plaintiff, he is of course entitled to costs, as in ordinary cases. Previously to the statute 3 & 4 *W.* 4, *c.* 42, *s.* 31, if the verdict were given for the defendant, the plaintiff in such case was not liable to costs (*z*), unless the cause of action, or any part of it (*a*), accrued after the testator's or intestate's death (*b*), and the plaintiff might have brought the action in his own right (*c*). Also, previously to that act, the plaintiff was not liable to the costs of a nonsuit, unless the action were such that he might have brought it in his own right (*d*); nor to costs on judgment as in case of a nonsuit (*e*). He was always, even before that act, liable to the costs of a *non pros.* (*f*); and to costs upon a discontinuance (*g*), or for not proceeding to trial according to notice (*h*), if he had knowingly brought a wrong action, or been guilty of a wilful default (*i*); otherwise not (*k*). And now, by that act, "in every action brought by an executor or administrator in right of the testator or intestate, such executor or administrator shall (unless the court in which such action is brought, or a judge of any of the said superior courts, shall otherwise order) be liable to pay costs to the defendant in case of being nonsuited or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right and upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner." As a general rule, since this statute, executors plaintiffs are liable to costs where they do not succeed; and it is incumbent on them to shew some facts which may satisfy the Court that they should be exempt in the particular case; and it is not enough to shew hardship in the case of the plaintiff, unless it be shewn that it was occasioned by the misconduct of the defendant; for the

(*u*) *Chevalier* v. *Finnis*, 3 Moore, 602; 1 B. & B. 277, *S. C.*

(*x*) *Howard* v. *Rathbone*, Willes, 316.

(*y*) See Chit. Forms, 495.

(*z*) *Jones* v. *Williams*, 6 M. & Selw. 178: *Nicholas* v. *Killigrew*, 1 L. Raym. 436: *Martin* v. *Norfolk*, H. Bl. 598: *Wilson* v. *Hamilton*, 1 B. & P. 445. The reason of their not being liable was on account of the form of the statute which first gave the defendant costs not having included executors: see per *Tindal*, C. J., in *Wilkinson* v. *Edwards*, 1 Scott, 174; 3 Dowl. 130; and see *Southgate* v. *Crowley*, 1 Scott, 378.

(*a*) *Doodbiggin* v. *Harrison*, 9 B. & Cres. 695: *Jobson* v. *Foster*, 1 B. & Ad. 6: *Slater* v. *Lawson*, Id. 893: *Cockerill* v. *Kynaston*, 4 T. R. 277.

(*b*) *Bellard* v. *Spencer*, 7 T. R. 358: *Hollis* v. *Smith*, 10 East, 293.

(*c*) *Goldthwaite* v. *Petrie*, 5 T. R. 234: *Cockerill* v. *Kynaston*, 4 T. R. 277: *Coabe* v. *Lucas*, 2 East, 395. And see cases in note (*p*), *post*, 1075.

(*d*) See *Hollis* v. *Smith*, 10 East, 293: *Cockerill* v. *Kynaston*, 4 T. R. 277: *Barnard* v. *Higdon*, 3 B. & Ald. 213.

(*e*) *Pickup* v. *Wharton*, 2 Dowl. 389; 2 C. & M. 401, *S. C.*: *Booth* v. *Holt*, 2 H. Bl. 277: *Bennett* v. *Coker*, 4 Burr. 1998.

(*f*) *Higgs* v. *Warry*, 6 T. R. 554: *Hanes* v. *Saunders*, 3 Burr. 1584.

(*g*) *Malbeish* v. *Maunder*, 2 New Rep. 72; 1 Chit. Rep. 639, n.

(*h*) *Nunez* v. *Modigliani*, 1 H. Bl. 217: *Ogle* v. *Moffatt*, Barnes, 107.

(*i*) *Harris* v. *Jones*, 1 W. Bl. 451; 3 Burr. 1451, *S. C.*

(*k*) *Bennett* v. *Coker*, 4 Burr. 1997.

being made for the benefit of defendants, the Court will take away that benefit, unless they see clearly that the fendant has forfeited his claim to it (*l*). The fact, that the intiffs were advised by counsel that a point of law, which s ultimately decided against them, was in their favour, or, all events, that there was sufficient doubt to make it proper r the plaintiffs to take the opinion of a court of law upon it, not sufficient (*ss*). The conduct of the defendant in the rse of the action, as, that there was greater prolixity of ading than necessary, &c., will not be considered by the urt in exercising their discretion as to relieving the execu- s from costs (*n*). But *mala fides* or misconduct on the part the defendant in general will be considered (*o*). The dis- tion as to costs in actions by executors, given to the Court a judge by the above enactment, applies to those cases only here an executor, before the act, was exempt from costs (*p*); d therefore, in *assumpsit* on promises to an executor, the fendant on a nonsuit is entitled to his costs as of course der the 23 *H.* 8, *c.* 15 (*p*). The application by the plaintiff be relieved from the costs should be made before the taxa- n; otherwise, if granted, it will only be on payment of the sts of the application (*q*). The decision of a single judge as the costs may be reviewed by the Court (*r*).

SECT. 2.

Actions against Executors or Administrators.

imitation of Actions, 1075.
rties, 1076.
rocess, &c., 1076.
leclaration, 1077.
Pleas and Subsequent Proceedings, 1077.
Judgment, 1079.
Costs, 1080.
Execution, Devastavit, &c., 1081.
Other Proceedings, 1082.

Limitation of Actions against.]—An action cannot be maintained against an executor, until he has taken upon himself to act as such, or proved the will. Therefore, where a testator died abroad more than six years before the commencement of the suit, but his executors in this country had not proved the

Limitation of actions against.

(*l*) Godson v. Freeman, 2 C., M., & R. 786; 4 Dowl. 643; 1 Tyr. & Gr. 35; 1 Gale, 329, S. C.: *Farley* v. *Bryant*, 6 Law J., N. S., 67; 3 A. & E. 839, S. C.: Brown v. Croley, 3 Dowl. 386: *Southgate* v. Crowley, 1 Hodges, 1; 1 Bing. N. C. 518; 1 Scott, 394, S. C.: *Wilkinson* v. *Edwards*, 2 Dowl. 127; 1 Bing. N. C. 301, S. C.: *Lakin* v. *Massie*, 4 Dowl. 239; 1 Gale, 270, S. C., Exch.: *Ingler* v. *Twisden*, 2 Bing. N. C. 353; 4 Dowl. 330: *Prats* v. *Wiggins*, 3 Bing. N. C. 236; 3 Scott, 607, S. C.

(*m*) *Farley* v. *Briant*, 3 A. & E. 839.

(*n*) Ib.; *supra*, n. (*l*).

(*o*) See *Southgate* v. *Crowley*, *Brown* v. Croley, Godson v. *Freeman*, *supra*.

(*p*) *Ashton* v. *Poynter*, 1 C., M., & R. 739; 3 Dowl. 465; 1 Gale, 57, S. C. The decision in *Lyons* v. *Barrow*, 4 Moo. & Sc. 463; 10 Bing. 553, *S. C.*, cannot, it seems, be supported. See per *Parke*, B., 3 Dowl. 471: 1 C., M., & R. 740: *Spence* v. *Albert*, 4 Nev. & M. 385; 2 A. & E. 785; 1 H. & W. 7, *S. C.*: *Woolley* v. *Shaper*, 3 Moo. & Sc. 248; 2 Dowl. 208, *S. C.*

(*q*) *Ashton* v. *Poynter*, 1 Gale, 57; 1 C., M., & R. 738; 5 Tyr. 392; 3 Dowl. 465, *S. C.*

(*r*) *Lakin* v. *Massie*, 4 Dowl. 239; 1 Gale, 270, S. C., Exch.; *semble* overruling *Maddox* v. *Phillips*, 1 H. & W. 251; 5 Nev. & M. 370; 3 A. & E. 198, *S. C.*

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will, nor in any manner acted as executors, until within six years, the Court of Common Pleas held that the Statute of Limitations was no bar (*s*). But when the debtor died *after the statute had begun to run*, and (in consequence of litigation as to the right to probate) an executor of his will was not appointed until after the expiration of the six years, it was held that the debt was barred, and that the creditor was not entitled to a reasonable time after grant of probate within which to bring his action (*t*).

Writ by journeys accounts.

Although, where the plaintiff dies, a writ by journeys accounts cannot be brought by his executor (*u*), yet, if a defendant dies, the plaintiff may pursue this writ against the personal representative, provided the action be of a nature such as will survive against an executor or administrator (*x*); and in such case, if the defendant pleads the Statute of Limitations, the plaintiff may reply a writ newly brought by journeys accounts (*y*); and the executor of an executor must plead that he had fully administered on the day of the first writ purchased (*z*).

Actions for torts.

By the 3 & 4 *W.* 4, *c.* 42, *s.* 2, actions of tort may be brought against executors or administrators for any wrong done by the testator or intestate within six calendar months of his death to the property, real or personal, of another; provided the actions be brought within six calendar months after they have taken upon themselves the administration of his estate, and the damages recovered are to rank as simple-contract debts. Where an action *ex contractu* will lie, it may still be brought (*a*).

Parties to suit.

Parties to Suit.]—If there be several executors, it is necessary only to sue such of them as have administered (*b*). If a married woman be executrix, her husband must be joined as a defendant, and both must plead (*c*). If she and a stranger be executors, the action must be against her and her husband, and the stranger (*d*). If one of the executors dies, the action must be against the survivor only, and not against the executors of the deceased executor (*e*). If there be several executors defendants, who plead *plene administravit* jointly, the plaintiff may succeed against one only, who is shewn to have assets (*f*).

Process.

Process.]—Executors or administrators need not be described as such in the process (*g*). They cannot be holden to bail, unless in cases where they have promised in writing to pay the debt of their testator or intestate, or when they have been guilty of a *devastavit* (*h*).

In what court.

Executors and administrators, when sued, are not, unless expressly named, within the statutes by which courts of conscience

(*s*) *Douglas* v. *Forrest*, 1 Moo. & P. 663; 4 Bing. 686, *S. C.* And see *Murray* v. *East India Company*, 5 B. & Ald. 204; *ante*, 1072.
(*t*) *Rhodes* v. *Smethurst*, 4 M. & W. 63; affirmed in Exch. Chamb., 6 M. & W. 351. And see in equity, *Freake* v. *Cranefeldt*, 3 Myl. & Cr. 499.
(*u*) 2 Will. Exors. 1337, 1338. See *Davies* v. *Lowndes*, 7 M. & Gr. 762.
(*x*) *Kinsey* v. *Heywood*, 1 L. Raym. 432.
(*y*) Com. Dig. "Abatement," (P.)
(*z*) *Spencer's case*, 6 Coke, 10 b.
(*a*) *Powell* v. *Rees*, 7 A. & E. 426; 2 Nev. & P. 571, *S. C.*
(*b*) *Hilbert* v. *Lewis*, Freem. 268; 2 Will. Exors. 1378.
(*c*) Com. Dig. "Administration," (D.): *Aplewarth* v. *Fearn*, Freem. 351.
(*d*) Com. Dig. "Abatement," (F. 20).
(*e*) 1 Roll. Ab. 928, "Executors."
(*f*) 1 Saund. 336, n.; 2 Will. Exor. 1218: *Parsons* v. *Hancock*, 1 M. & Malt. 330.
(*g*) *Ante*, Vol. 1, 146.
(*h*) *Ante*, Vol. 1, 641.

ave been established (*i*); and, consequently, they may be sued n the superior court, however trifling the cause of action may e. Also, it may be necessary to remark, if the defendant be n attorney, or officer of the court, yet he is not entitled to his sual privileges when sued as an executor, &c. (*j*).

Declaration.

Declaration.]—The declaration is filed or delivered as in ordinary cases. In an action against an executor or administrator as such, he must be named executor or administrator. But if upon the whole matter the plaintiff has declared against he defendant as executor, the judgment may well be *de bonis testatoris*, although the defendant is not named as executor at he beginning of the declaration (*k*).

Plea and subsequent proceedings.

Plea and subsequent Proceedings.]—If the defendant allow judgment to go by default, or expressly confess the action, this is deemed a confession of assets, and he will be estopped from denying it afterwards in an action on the judgment suggesting a *devastavit* (*l*). He should, therefore, take care to plead regularly to the action, unless he wish to acknowledge assets (*m*). If he dispute his being executor or administrator, he should plead it specially (*n*). The plea of *plene administravit*, or *ne unques* executor, need not, in the Queen's Bench or Exchequer, be signed by counsel (*o*). On account of costs, it is not advisable to plead any false plea (*p*). Where a defendant, being under terms of pleading issuably, pleaded *plene administravit* and his own bankruptcy, it was held the plaintiff might sign judgment as for want of a plea, on the ground that the plea of bankruptcy could not possibly be good if the plea of *plene administravit* were true (*q*). If in an action against several executors one of the defendants pleads severally *ne unques* executor, the plaintiff may enter a *nol. pros.* as to him, and proceed against the others (*r*). The plaintiff may recover against one only, on such a plea by all, or on a plea of *plene administravit* by all (*s*).

Proceedings upon plene administravit pleaded alone.

If the defendant plead *plene administravit* or *plene administravit præter* alone, the plaintiff in his replication may either deny it, or he may confess it, and pray judgment of assets *in futuro*, upon the former plea (*t*); or, upon the latter, take judgment presently of the assets acknowledged to be in the hands of the defendant, and of assets *in futuro* for the residue. In the latter case the plaintiff may sign judgment of assets *quando acciderint*, &c. (*u*), after executing a writ of inquiry when necessary (*v*); and when assets afterwards come to the hands of the executor, he may proceed against him by *scire facias*, as directed, *ante*, 1021.

(*i*) *Abbay* v. *Burrows*, Doug. 263: Webb v. Brown, 5 T. R. 535.
(*j*) Newton v. Rowland, 1 Salk. 2; 1 Ld. Raym. 733, *S. C.*
(*k*) Dean of *Bristol* v. *Gwyes*, 1 Saund. 2: 2 Will. Exors. 1521. And see further as to the declaration, Id.
(*l*) Skelton v. *Hawding*, 1 Wils. 258. But see Bird v. *Cubner*, Hob. 179.
(*m*) 1 Saund. 219 b: *Leonard* v. *Simpson*, 2 Bing. N. S. 176; 2 Scott, 335, *S. C.*; 2 Will. Exors. 1532.
(*n*) R. H., 4 W. 4, r. 21, *ante*, 1073.
(*o*) *Read* v. *Spurr*, 2 M. & W. 76; 5 Dowl. 830, *S. C.*
(*p*) See *post*, 1079, 1080.
(*q*) *Serle* v. *Bradshaw*, 2 C. & M. 148; 2 Dowl. 289, *S. C.*
(*r*) 1 Saund. 207, n. (*a*).
(*s*) *Ante*, 1076.
(*t*) See a form, Chit. Forms, 496.
(*u*) See *Mara* v. *Quin*, 6 T. R. 1.
(*v*) See *ante*, 896, 901.

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Proceedings where it is pleaded with other pleas.

But if the defendant plead either of the pleas above mentioned, and also the general issue or other plea, and the plaintiff deny *both* in his replication, the issue is then made up, and the parties proceed in the ordinary way; or if the plaintiff add the *similiter* to the general issue, and confess the plea of *plene administravit*, &c., and pray judgment of assets *in futuro*, &c., as above mentioned, then, after entering the replication in the issue, enter an award of the *venire* in this form: "*But because it is uncertain whether the defendant will be convicted upon the said issue above joined between the parties aforesaid, therefore let judgment be thereupon stayed until the trial and determination of the said issue; and in order to try the said issue, the sheriff is commanded*," &c., as in ordinary cases (*x*). In this latter case, if the plaintiff have a verdict, judgment is signed, and he proceeds as in ordinary cases against an executor who has pleaded a false plea; so that, if such plea be false within his own knowledge, (as a plea of *ne unques* executor, or the like), he would be personally liable, not only for the costs, but also, it seems, for the debt, and judgment and execution might be issued against him accordingly (*y*); or if not false within his own knowledge, (as a plea that the testator did not promise, or the like), he would be personally liable for the costs, and the judgment signed against him would be of assets *quando* &c., upon which the plaintiff might afterwards, when assets came to defendant's hands, have a *scire facias*, as is above mentioned, for the debt, and immediately have a *fi. fa.* or *ca. sa.* for the costs *de bonis testatoris, et si non, de bonis propriis* (*z*).

Confessing judgment so as to prefer a creditor.

It is well settled, that, if an action be commenced against an executor or administrator for any specific debt, it must be preferred by him in payment to others of the same class: and in that case the executor or administrator would not be warranted in making any voluntary payment of such other debts to defeat the party of his remedy (*a*). Yet, although one creditor commence an action, if another creditor, in equal degree, commence a subsequent action, and first recover judgment, he must be first satisfied. Hence an executor or administrator has it in his election to give a preference, by confessing judgment in the action of the one, and pleading such judgment to the action of the other (*b*). In case, therefore, a hostile creditor bring an action, and there be not sufficient assets to divide amongst the creditors, and the executor be desirous of making an equal division, or favouring any particular creditor or creditors of the same class, in preference to the hostile plaintiff, the course adopted is, to get one or more of the friendly creditors, whose debt, or joint debts, will fully cover the assets in hand, immediately to bring a friendly action or actions, and declare therein in the common form of debt, and let defendant suffer judgment against him by default; and, on this being effected, then to plead the judgment to the declaration of the hostile creditor. If such judgment be recovered after pleading to the action by

(*x*) See form, Chit. Forms, 501.
(*y*) See *post*, 1079, 1080.
(*z*) See *Marshall* v. *Wilder*, 9 B. & C. 655; 1 Saund. 336 b, n. (10).
(*a*) 11 Vin. Abr. 296; Com. Dig., "Admin.," c. 2; Toller, 288, 289.
(*b*) See note (*a*), *supra*, 931; Off. Ex. 145.

the hostile creditor, and before trial, he may plead it within eight days after such judgment recovered (*c*).

Warrant of attorney by one, bad.

If a warrant of attorney be given by one of several executors, to confess a judgment against all, the Court will order it to be delivered up, &c. (*d*)

Verdict.

The verdict is in the affirmative or negative of the issue, as in ordinary cases (*e*).

Judgment in general.

Judgment.]—The judgment on demurrer, on issue of *nul tiel* record, by confession or *nil dicit*, is interlocutory or final, as in other cases. If interlocutory, it is the same as in ordinary cases; after which follow the award of the inquiry, return, and final judgment, as stated *ante*, 900. The final judgment after a writ of inquiry, or on a verdict against an executor or administrator, when he pleads a plea admitting his representative character, and the plaintiff takes issue on it or replies, is, that the debt, damages, and costs, or the damages and costs, shall be levied of the goods of the testator in the hands of the defendant, if he have so much thereof in his hands to be administered; and if not, then the costs to be levied of his own goods (*f*). Even where *non assumpsit* and *plene administravit* were pleaded, and the plaintiff confessed the plea of *plene administravit*, and took judgment of assets *quando acciderint* on that plea, and joined issue and obtained a verdict on *non assumpsit*, he was held entitled to judgment for his damages and costs, to be levied of the goods of the testator if sufficient, and if not, then the costs to be levied of the defendant's own goods (*g*).

On false plea.

If the defendant plead a plea which is false within his own knowledge, (as *ne unques* executor or administrator, or the like), and it be found against him, the judgment is *de bonis testatoris si &c., et si non &c. de bonis propriis*, or perhaps unconditionally *de bonis propriis* (*h*).

On plea of judgments outstanding.

If an executor plead judgments obtained against *himself*, and any one or more of them be avoided by the plaintiff's pleading, the plaintiff shall have judgment against the executor *de bonis propriis* (*i*). But if he had pleaded judgments obtained against the testator, and that he had not sufficient to satisfy them or any of them; if any one or more of the judgments be avoided, still there ought not to be a general judgment against the executor, or at least not until so many of the judgments are avoided as to leave assets in the executor's hands (*k*).

In action suggesting devastavit.

In an action against an executor or administrator, suggesting a *devastavit*, the judgment against the defendant shall be *de bonis propriis* (*l*). But where the action is brought against the executor of an executor, suggesting a *devastavit* by the

(*c*) *Lattleton* v. *Cross*, 5 D. & R. 175; 3 B. & C. 317, *S. C.*: *Prince* v. *Nicholson*, 5 Taunt. 655; 1 Marsh. 280, *S. C.*: *Kitchen* v. *Bartsch*, 7 East, 53.

(*d*) *Elwell* v. *Quash*, 1 Str. 20; *ante*, 882.

(*e*) See form of *postea*, for plaintiff, Chit. Forms, 501; for defendant, Id. 502.

(*f*) 1 Saund. 336. And see *Rouse* v. *Etherington*, 1 Salk. 312; 2 L. Raym. 870, *S. C.* See forms, Chit. Forms, 495 to 502.

(*g*) *Marshall* v. *Wilder*, 9 B. & C. 655.

(*h*) Bro. Executors, 34: *Bull* v. *Wheeler*, Cro. Jac. 647; 1 Saund. 336 b.

(*i*) 1 Saund. 337 a, n. See *Marshall* v. *Wilder*, 9 B. & C. 655.

(*k*) Id. But see several cases cited there to the contrary.

(*l*) 1 Saund. 336 c, n. (1).

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former executor, the judgment against the defendant will be *de bonis testatoris* (*m*).

Against executor as assignee.

Where an executor or administrator is charged and made liable as assignee, the judgment is of course *de bonis propriis* (*n*).

As to the judgment of assets *quando* &c., it has already been sufficiently treated of, *ante*, 1077 (*o*).

Costs.

For defendant.

Costs.]—If there be a verdict for the defendant, he is entitled to costs as in ordinary cases. And the statutes by which costs are recoverable by a defendant in replevin, extend to avowries by an executor (*p*). So, if the defendant plead several pleas, and issue be taken on any one of them which is a total bar to the action, (as *plene administravit*, or the like), and the verdict thereon be found for the defendant, he will, as in other cases, be entitled to the general costs of the cause (*q*).

Against defendant on judgment of assets in futuro.

When the defendant pleads *plene administravit*, or judgments outstanding, and *plene administravit præter*, and the plaintiff, admitting the truth of the plea, takes judgment of assets *in futuro*, the defendant is not liable to costs (*r*). Nor does he seem liable thereto when he pleads *plene administravit præter*, and the plaintiff admitting the truth of the plea, takes judgment of the assets admitted in part, and for the residue of assets *in futuro* (*s*). It was formerly the practice in these cases not to allow the plaintiff his costs, even out of the future assets; but, in a modern case, the Court held that the plaintiff was entitled to them out of such assets, and that judgment might be entered for them accordingly (*t*).

On pleading a false plea.

If an executor or administrator plead a plea which is false within his own knowledge, (as *ne unques* executor or administrator, or a release to himself, or a judgment recovered against himself, or the like), he is liable to costs to be levied *de bonis propriis* absolutely; or if he plead a plea which is false, but not so within his own knowledge, (as that the testator or intestate did not promise, or a judgment recovered against the testator, or the like), he is liable to costs to be levied *de bonis propriis* conditionally, provided there be not goods of the testator sufficient to satisfy them (*u*). Where the defendant pleads a false plea and *plene administravit*, if the plaintiff take judgment of assets *in futuro* upon the latter plea, and go to trial upon the other plea, he will be entitled to costs if he obtain a verdict; and, therefore, in such case, it is usual for the

(*m*) 1 Saund. 219 e, n. (1).

(*n*) *Tilny* v. *Norris*, 1 Salk. 309; 1 L. Raym. 553, *S. C.* See as to rent, *Rubery* v. *Stevens*, 4 B. & Ad. 241: and as to repairs, *Tremeere* v. *Morison*, 1 Bing. N. C. 19.

(*o*) See forms of entries of judgment of assets *quando*, &c., Chit. Forms, 496 to 499. And see form of *scire facias* on judgment *quando*, Id. 505.

(*p*) *Farnell* v. *Keightley*, 2 Rol. Rep. 457; Tidd, 887, 976.

(*q*) *Iggulden* v. *Terson*, 2 Dowl. 277: *Edwards* v. *Bethel*, 1 B. & Ald. 254: *Rueg* v. *Wells*, 8 Taunt. 129: *Marshall* v. *Wilder*, 2 B. & C. 657: *Hogg* v. *Graham*, 4 Taunt. 135. And see *Hurt* v. *Cuthbush*, 2 Dowl. 456: *Probert* v. *Phillips*, 5 Dowl. 473: 2 M. & W. 40, *S. C.*

(*r*) Tidd, 9th ed., 960; 1 Saund. 336 b: *Hindsley* v. *Russell*, 12 East, 232.

(*s*) Id.: Rast. Ent. 323; 8 Co. 134: 1 Saund. 226.

(*t*) *De Tastet* v. *Andrade*, 1 Chit. Rep. 629, 630, n.: *Butt* v. *Deschamps*, Tidd, 9th ed., 980: *Cox* v. *Peacock*, 4 Dowl. 132: 2 Will. Exors. 1414.

(*u*) *Ante*, 1078: *Howard* v. *Jemmett*, 3 Burr. 1368; 1 W. Bl. 490, *S. C.*; 2 Will. Exors. 1412.

defendant to apply to a judge to withdraw the false plea, which he will be permitted to do on payment of costs (*x*).

Execution, devastavit, &c.

Execution, Devastavit, &c.]—On an ordinary judgment against an executor or administrator, (that is, a judgment that the plaintiff do recover the debt and costs to be levied out of the assets of the testator if the defendant have so much, but if not, then the *costs* out of the defendant's own goods), the usual writ of execution against him, for the recovery of the *debt*, is a *fieri facias de bonis testatoris* (*y*); but if the sheriff return to this writ *nulla bona testatoris nec propria*, and a *devastavit* (*z*), the plaintiff may immediately sue out a *fieri facias de bonis propriis* (*a*), or an *elegit* (*b*), or a *capias ad satisfaciendum* (*c*), against the property or person of the executor or administrator, in as full a manner as in an action against him in his own right (*d*). You cannot, however, sue out these writs of execution against the property or person of the executor or administrator, upon a judgment *de bonis testatoris*, (which is the only one here intended), unless the sheriff have returned a *devastavit* (*e*). Therefore, if the sheriff return *nulla bona* merely, the plaintiff, if he can prove a *devastavit*, and of which the sheriff's return is evidence (*f*), may either proceed by action of debt upon the judgment, suggesting a *devastavit*; and if the plaintiff succeed in that action, he may have execution against the defendant personally as in ordinary cases (*g*): or he may sue out a *scire fieri* inquiry (*h*), commanding the sheriff, that in case there shall be no goods of the testator remaining in the hands of the executor, he shall summon a jury to inquire if the defendant have wasted the goods of the testator; and if a *devastavit* be found (*i*), that he shall warn the defendant that he be in court upon a day mentioned, to shew cause why the plaintiff should not have a *fieri facias de bonis propriis* against him (*k*). The same notice must be given of executing a *scire fieri* inquiry, as in the case of a common writ of inquiry (*l*). Formerly, as no costs were recoverable in this proceeding by *scire fieri* inquiry, unless the executor appeared and pleaded to it, it was seldom adopted; but the usual remedy was by action of debt on the judgment, suggesting a *devastavit*, as above mentioned (*m*). But now, since, by the 3 & 4 *W.* 4, *c.* 42, *s.* 34, such costs are recoverable, whether the executor appear and plead to the *scire facias* or not, the remedy by *scire facias* may become more usual (*n*). See more particularly as to these

Action on judgment.

Scire fieri inquiry.

(*x*) Dearne v. *Grimp*, 2 Bl. Rep. 1275: Marshall v. *Wilder*, 9 B. & C. 655.

(*y*) See the form, Chit. Forms, 503.

(*z*) See the form of such returns, Chit. Forms, 504: and of entry thereof upon the roll, with award of *fi. fa.* or *ca. sa.*, Id. 504.

(*a*) Doct. Plac. 169. And see forms, Chit. Forms, 505.

(*b*) 1 Crom. 346; Tidd, 9th ed., 1034; 3 Bl. Comm. 414.

(*c*) 2 H. 6, c. 12; Bro. Executors, 12. See the form, Chit. Forms, 505.

(*d*) See Rast. 323 b, 326 a, pl. 6.

(*e*) *Ward* v. *Thomas*, 2 Dowl. 87; 1 C. & M. 522, S. C.

(*f*) *Lenard* v. *Simpson*, 1 Hodg. 251: *Cooper* v. *Taylor*, 13 Law J., N. S., 52, C. P.: *Dawson* v. *Gregory*, 14 Law J., N. S., Q. B., 286.

(*g*) 1 Saund. 219 a.

(*h*) See form, Chit. Forms, 506.

(*i*) See form of return and inquisition, Chit. Forms, 507. It is not traversable, *Crawford* v. *Kebore*, 1 H. & J. 1.

(*k*) See 1 Saund. 219, n. (8), 303. *Morfoot* v. *Chivers*, 1 Str. 631; 2 L. Raym. 1395, *S. C.*: *Ward* v. *Thomas*, 2 Dowl. 87.

(*l*) *Biron* v. *Phillips*, 1 Str. 235: *Stead* v. *Lateward*, Id. 623; 2 L. Raym. 1832, *S. C.*

(*m*) 2 Saund. 219 a.

(*n*) See *Palmer* v. *Fletcher*, 5 Dowl. 315.

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two modes of proceeding, and what shall be evidence of a *devastavit*, 2 *Saund.* 219, n. (8); 2 *Williams' Executors*, 3*rd ed.*, 1562, &c.

Form of execution for debt and costs.

On a judgment against an executor or administrator, that the plaintiff do recover both the *debt* and *costs* in the first place *de bonis testatoris si &c. et si non &c.*, *de bonis propriis*, (and which judgment is usually given where the defendant pleads a plea which is false in his own knowledge, see *ante*, 1079, 1080), the execution pursuing the terms of the judgment is a *fi. fa.* both as to the debt and costs, *de bonis testatoris et si non de bonis propriis;* and on a return of *nulla bona nec testatoris nec propria*, then it seems a *ca. sa.* may be issued; or, if the judgment be unconditionally *de bonis propriis*, then, it would seem, the execution might, following the judgment, also be unconditionally *de bonis propriis.* (See *ante*, 1078). If an executor or administrator be charged and made liable as assignee, the execution would be against him *de bonis propriis* (*o*).

For costs only.

The usual writ of execution against an executor for costs on a judgment for the debt *de bonis testatoris*, is a *fi. fa. de bonis testatoris si &c.*, *et si non &c. de bonis propriis* (*p*), or on a return of *nulla bona nec testatoris nec propria*, then a *ca. sa.* may be issued. The execution for the debt and costs is usually included in one writ.

Other proceedings by or against executors, &c.

Other Proceedings by or against Executors, &c.]—The proceedings upon a writ of error by or against executors will be found under the title "*Error*," in the first Volume. As to executing a writ of execution on a judgment obtained against the testator, see *Vol.* 1, *p.* 528. As to *scire facias* to revive a judgment against an executor or administrator, see *ante*, 1013 to 1019; and as to *scire facias* upon a judgment of assets *quando &c.*, see *ante*, 1021 (*q*).

(*o*) *Ante*, 1080.
(*p*) See the form, Chit. Forms, 503.
(*q*) See the form, Chit. Forms, 505.

CHAPTER IX.

ACTIONS AGAINST AN HEIR OR DEVISEE ON THE BOND, &c. OF ANCESTOR.

SECT. 1.

Actions against Heirs.

Liability of heirs.

Liability of.]—AN heir is compellable to pay the judgment and specialty debts (*a*) of his ancestor, to the extent of the assets which have come to him by descent (*b*). Even if he alien the property which has descended to him, before action brought, he is still liable to the extent of the value of the property so descended (*c*). The debt is so far considered the debt of the heir, that he is sued in the *debet* and *detinet*, and not in the *detinet* only, though the omission of the *debet* would be aided by verdict (*d*). For simple contract debts, and debts by specialty, in which the heirs are not expressly bound, heirs or devisees are not liable *at law;* but, by the 3 & 4 *W.* 4, *c.* 104, all real estate of the debtor, not charged with or devised subject to the payment of his debts, is made assets, to be administered in equity for payment of such debts after payment of debts by specialty in which the heirs are bound.

Process.

Process.]—If there be no devisee, the action should be against the heir only. If there be a devisee and heir, the action should be against them jointly (*e*). If there be no heir, then the action should be against the devisee only (*f*). There is no occasion to describe the defendant as heir or devisee in the process (*g*). The defendant cannot be holden to bail (*h*).

The declaration.

Declaration.]—The declaration is filed or delivered as in ordinary cases (*i*).

(*a*) It does not seem, from the wording of the 11 G. 4 & 1 W. 4, c. 47, s. 6, that that act gives any remedy against the heir or devisee for breaches of covenant, where the damages are *unliquidated*, and the breach is subsequent to the death of the covenantor. (See *Farley* v. *Briant*, 3 Ad. & El. 839).

(*b*) As to what are to be considered assets by descent, see 2 Saund. 8 d, &c.

(*c*) 11 G. 4 & 1 W. 4, c. 47, s. 6, (Sir E. Sugden's Act), which act repeals the 3 & 4 W. & M. c. 14; 6 & 7 W. 3, c. 14; and 47 G. 3, c. 74.

(*d*) Com. Dig., "Pleader," 2 E. 2; *Hope* v. *Bagus*, 3 East, 2.

(*e*) 11 G. 4 & 1 W. 4, c. 47, s. 3; 2 Saund. 7, n. (4).

(*f*) Id., s. 4. And see *Wilson* v. *Knubley*, 7 East, 128, 133.

(*g*) *Ante*, Vol. 1, p. 146.

(*h*) See Vol. 1, p. 641.

(*i*) See as to the form, &c., 2 Saund. 7 d.

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debts of his ancestor, to the amount of the lands aliened, by stat. 11 *G.* 4 & 1 *W.* 4, *c.* 47, *s.* 6. If in such a case he plead *riens per descent* at the time of the writ brought, and the plaintiff reply assets before the writ brought, the jury shall find the value of the lands, and the plaintiff can have judgment and execution for debt and costs only to that extent (*m*), and not a general judgment against the heir, as at common law (*n*); or the plaintiff, instead of replying according to the statute, may take issue on the plea of *riens per descent*, and, if found for him, may have judgment, either general or special, as before mentioned (*o*). But, although the defendant have not aliened the lands, the plaintiff may, if he wish, reply according to the statute, and have judgment accordingly (*p*); though, indeed, this would be an indiscreet mode of proceeding, if the value of the lands would not amount to the debt and costs.

Execution.

Execution.]—We have just seen that the judgment for plaintiff is general or special. If it be general, the plaintiff may sue out a *fieri facias*, *elegit*, or *ca. sa.*, as in ordinary cases, and as if the action were against the defendant in his own right (*q*). But if the judgment be special, that the debt be levied of the lands descended, and be not on a verdict upon which the jury (as they must have done) have already found the value of the lands descended, the plaintiff in such a case must sue out a special writ, in nature of an extent, commanding the sheriff to inquire by a jury of the lands descended, and to deliver them to the plaintiff, to hold until the debt, &c., be thereof fully levied (*r*). It seems, also, that the plaintiff, upon a general judgment, may have this special writ, if he prefer it to the general writs of execution, upon suggesting that the heir has particular lands by descent, and praying execution of the whole of them (*s*).

Scire facias on judgment against the ancestor, &c.

Scire Facias on Judgment against the Ancestor, &c.]—What has now been stated, has, of course, reference only to actions against the heir; if the action were against the ancestor, and the judgment revived by *scire facias* against the heir and terretenants, the execution is by *elegit* (*t*); and, consequently, before the stat. 1 & 2 *Vict. c.* 110, a moiety only of the ancestor's freehold could have been taken against the heir, even though he had pleaded a false plea (*u*); but now, by *s.* 11 of that statute, which has been already fully noticed in treating of execution by *elegit* (*x*), the execution extends to all the land, and to many other descriptions of real property not liable before that act, except, indeed, in certain cases already noticed, as against purchasers, mortgagees, and creditors. As to *scire facias* to revive a judgment against an heir and terretenants,

(*m*) 11 G. 4 & 1 W. 4, c. 47, s. 7.
(*n*) *Brown* v. *Shuker*, 2 C. & J. 311; 2 Tyr. 390; 10 Law J. 82 Exch., *S. C.*: *Radshaw* v. *Heather*, Carth. 354; 2 Saund. 8 n.
(*o*) *Matthews* v. *Lee*, Barnes, 444; 2 Saund. 8 a.
(*p*) 2 Saund. 8 n.
(*q*) See the form, Chit. Forms, 509.
(*r*) See 2 Saund. 8 n: 3 Bac. Abr. 25. See the forms, Chit. Forms, 508.
(*s*) *Bowyer* v. *Rivett*, W. Jon. 87; 2 Ra. Abr. 71, 72, D. pl. 3.
(*t*) See Vol. 1, 600.
(*u*) See *Anon.*, Dyer, 271 a; 3 Bac. Abr. 25.
(*x*) Vol. 1, p. 600.

s. 10 (*b*), the parol is prohibited demurring, and, consequently, the defendant must plead.

Replication.

Replication.]—If the defendant plead *riens per descent* at the time of the writ brought, the plaintiff may by statute reply that the defendant had lands &c. from his ancestor before the writ brought; and, if issue be thereon joined, and found for the plaintiff, the jury shall then inquire of the value of the lands, &c. so descended, and the plaintiff shall have judgment of them (*c*); in which case the execution must, both for the debt and costs, be confined to the value of the lands descended (*d*). But if the plaintiff have judgment by confession, (without confessing the assets), or on demurrer or *nil dicit*, it shall be for the debt and damages, without any inquiry of the value of the lands descended (*e*). Or, instead of replying in this manner, the plaintiff may take issue on the plea of *riens per descent*, and, if he have a verdict, he may have a general judgment and execution at common law, as above mentioned (*f*). Or, it seems that, instead of replying, the plaintiff may confess the truth of the plea, and take judgment of assets *quando acciderint*.

Issue, &c.

Issue, &c.]—The issue is made up, and the subsequent proceedings to judgment are the same as in ordinary cases. On an issue as to the value of the lands, the jury should of course find such value (*g*).

Judgment in general.

Judgment.]—If the defendant have pleaded *non est factum*, or have confessed the action and shewn with certainty the assets descended, the judgment is *special*, that the plaintiff recover his debt, damages, and costs, to be levied of the lands descended (*h*); but, if he have pleaded *riens per descent*, and the plaintiff have taken issue thereon at common law, and it be found against defendant, or judgment be given against defendant on demurrer, or by default, *nil dicit*, or by confession, (without shewing the assets descended), or upon any other matter or ground whatsoever, the judgment may be *general*, in the same manner as if the action had been brought against the defendant for his own debt (*i*); or it may be special, as above mentioned, at the option of the plaintiff, if he think it more advantageous than the general judgment (*k*). Also, if the plaintiff shew that the heir has already received profits from the estate to the amount of the debt, and the defendant do not deny it, he may have a general judgment and execution presently (*l*).

When the heir has aliened before action.

If the heir have aliened the lands previously to the suing out of the writ, he is expressly rendered liable for the specialty

(*b*) As to the construction of this section, see *Price* v. *Carver*, 3 Myl. & Cr. 157: *Emonds* v. *Cook*, 1 Drury & W. 280.

(*c*) 11 G. 4 & 1 W. 4, c. 47, s. 7.

(*d*) *Brown* v. *Shuker*, 10 Law J., 89, Exch.: 2 C. & J. 311, *S. C.*

(*e*) Id. And see *Radshaw* v. *Heather*, Comb. 354; Comb. 344, *S. C.*: 2 Saund. 8 a. And see the form of the replication, Ib.

(*f*) *Matthews* v. *Lee*, Barnes, 444.

(*g*) *Brown* v. *Shuker*, 1 C. & J. 583; 1 Tyr. 400: 1 Price, N. R., 1, S. C.

(*h*) 2 Saund. 7 a, c, (n.). See the form, Chit. Forms, 508.

(*i*) 2 Saund. 7 a, b, (n.): *Brown* v. *Shuker*, 10 Law J. 89; 2 C. & J. 311, S. C.: Tidd, New Pract., 546.

(*k*) 2 Saund. 7 c.

(*l*) *Henningham's case*, Dy. 344 b.

CHAPTER X.

ACTIONS BY AND AGAINST INFANTS.

SECT. 1.

Actions by Infants.

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The process.

Process.]—THE process is to be sued out in the name of the infant, and not at the suit of the *prochein amy* or guardian. It is the same as in ordinary cases (*a*). It may be sued out before any *prochein amy* or guardian is appointed.

Of suing by guardian or prochein amy.

Of Suing by Guardian or Prochein Amy.]—An infant cannot prosecute an action either in person or by attorney, and therefore it is that he cannot sue as an informer on a penal statute (*b*); for an informer must exhibit his suit in proper person, and prosecute it either in person or by attorney (*c*). But he may sue either by *prochein amy* (*d*), or by guardian (*e*), either being admitted by the Court for that purpose; usually the former. If he sue by attorney, although this cannot now be assigned as error (*f*), yet the defendant may plead it in abatement (*g*), or perhaps the declaration might be set aside or the proceedings stayed till a *prochein amy* or guardian be appointed; or if he sue in person, perhaps it would be error. There was, before the stat. 3 & 4 *W.* 4, *c.* 42, *s.* 12, *ante*, 875, one exception to this, namely, where several executors, suing as such, were plaintiffs, and one of them was an infant; in such a case, all the plaintiffs might sue by attorney, and those who were of age might appoint the attorney for themselves and for the infant (*h*). It may be questionable, however, whether this exception is not taken away by that statute, which makes plaintiffs suing as executors liable to costs, their former exemption from which was the principal reason for the exception.

Who and how appointed.

If an infant sue by *prochein amy*, as is most usual, still the legal guardian is considered, as a general rule, to be the proper party to be appointed such *prochein amy;* and unless there be circumstances against it, he is usually appointed as such (*i*). If he refuses his concurrence, then another person will be appointed (*k*). If he sue by guardian, the guardian, it seems,

(*a*) See Chit. Forms, 510.
(*b*) *Anon.*, Say. 51.
(*c*) 18 Eliz. c. 5; B. N. P. 166.
(*d*) Stat. Westm. 7, c. 48; Westm. 2, c. 15.
(*e*) 2 Inst. 261: *Goodwin* v. *Moore*, Cro. Car. 161.
(*f*) 21 J. 1, c. 13, s. 2; 4 & 5 A. c. 16, s. 2: *Finlay* v. *Jowle*, 13 East, 6.
(*g*) 2 Saund. 211, 213, n. (5).
(*h*) 1 Ro. Abr. 286, pl. 3: *Rutland* v. *Rutland*, Cro. El. 378; 2 Saund. 213, n. (6).
(*i*) 2 Inst. 261.
(*k*) See *Claridge* v. *Crawford*, 1 D. & R. 13.

must have a *warrant;* if by *prochein amy*, a *warrant* is unnecessary; but both guardian and *prochein amy* must be admitted by the Court before the plaintiff can proceed in the action (*l*). *Let the person intended as prochein amy or guardian, if willing and able so to do, attend with the infant before a judge at chambers, who will grant his fiat for one of the Masters to draw up the rule* (*m*). *In the Common Pleas he will at once grant the admission. In the Queen's Bench and Exchequer, draw up the rule with one of the Masters* (*n*). *In the Common Pleas, take the admission to the Master's Office, and get it entered on the remembrance roll* (*o*), *and leave the admission there. Annex a copy of the rule* (*or, in the Common Pleas, of the admission*) *to your declaration if delivered, or to the notice of declaration if filed, before you deliver it.* If the *prochein amy* or guardian and infant cannot or is not willing to attend, *write out a petition to be signed by the infant, directed to the Chief Justice of the Court, praying to be admitted to prosecute &c. by A. B.* (*p*); *and at the foot of it write a consent, to be signed by the prochein amy, &c.* (*p*); *and, lastly, make an affidavit of the signing of the petition and consent* (*q*). *Let these be presented to a judge at chambers, who will thereupon grant his fiat,* (*or, in the Common Pleas, the admission*), *and you proceed to draw up the rule, &c., as is above directed.* Under particular circumstances the judge might, in his discretion, dispense with the signature of the infant to the petition for suing by a *prochein amy* (*r*); and in a recent case the petition was allowed to be signed by the *prochein amy* on his behalf, where the infant was too young to sign it himself (*s*). It was formerly considered by the Queen's Bench, that a special admission of a guardian for an infant to appear in one cause would serve for others (*t*): but by rule of *H. T.*, 2 *W.* 4, *r.* 2, "a special admission of *prochein amy* or guardian to prosecute or defend for an infant, shall not be deemed an authority to prosecute or defend in any but the particular action or actions specified" (*u*).

Admission in one action will not do for another.

The infant cannot afterwards, during his infancy, without leave of the Court or a judge, remove his guardian, nor can he disavow the action or authority of his *prochein amy*, who is in effect an officer appointed by the Court (*v*); but he may have a writ out of Chancery to remove him, or (which is more usual) he may make an application to the Court, or perhaps to a judge, for that purpose (*x*). On the infant coming of age, the guardian's or *prochein amy's* authority ceases, and the infant may remove him and appoint an attorney to continue the action (*y*). If he does not remove him, and the action be continued in his name, no advantage can be taken of it (*z*). If the *prochein amy* or guardian be not a responsible person, the Court or a judge may order the appointment to be revoked,

Change of prochein amy.

(*l*) F. N. B. 63, J.; 2 Inst. 261: *Young v. Young*, Cro. Car. 86. In *Morgan v. Thorne*, 7 M. & W. 400; 9 Dowl. 226, *S. C.*, it was held that no appointment or subsequent ratification by the infant of the *prochein amy* was necessary.

(*m*) See the form, Chit. Forms, 511.

(*n*) See form of rule, Chit. Forms, 511.

(*o*) But this is not perhaps absolutely necessary: *Rawlyns's case*, 4 Coke, 53 b.

(*p*) See form, Chit. Forms, 510.

(*q*) Id. 511.

(*r*) See *Morgan v. Thorne*, 7 M. & W. 400.

(*s*) *Eades v. Booth*, 15 Law J., N. S., 263, Q. B.

(*t*) *Archer v. Frowde*, 1 Str. 305: *Simpson v. Jackson*, Cro. Jac. 640.

(*u*) See form of admission, Chit. Forms, 511.

(*v*) F. N. B. 63 K; 2 Saund. 117 *f*. See *Morgan v. Thorne*, 7 M. & W. 408.

(*x*) F. N. B. 63 K.: Style, 456: *Goodwin v. Moore*, Cro. Car. 161.

(*y*) Bac. Ab., Infancy, K. 2.

(*z*) *Stone v. Marsh*, Bula. 24.

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or stay the proceedings till security be given to the defendant for his costs (*a*). If the guardian or *prochein amy* be removed pending the suit, an entry thereof, it seems, should be made upon the roll (*b*).

Discovering place of residence of prochein amy.

The court or a judge may compel the infant, or his attorney, to give the opposite party a particular of the place of residence of the *prochein amy* or guardian (*c*).

Declaration and subsequent proceedings.

Declaration and subsequent Proceedings.]—In the commencement of the declaration it should be stated that the plaintiff is an infant, and that he sues by A. B., who is admitted by the Court to prosecute for him as his next friend, &c. (*d*) If it do not state that the *prochein amy* is admitted by the Court, it is error (*e*); but, if it be stated in the declaration, the want of an entry of it on the roll will not be error (*f*); and the Court, if in fact there be such an admission, will allow it to be entered on the record at any time (*g*). The declaration in other respects is the same, and is delivered or filed as in ordinary cases. *A copy of the rule of admission, or, in the Common Pleas, of the admission itself, is delivered with the declaration, or with the notice of declaration if filed, as above directed;* for, until the rule is served, the defendant is not compellable to plead (*h*).

Parol cannot demur

By the 11 *G.* 4 & 1 *W.* 4, *c.* 47, *s.* 10, the parol can no longer, as formerly, demur in actions by or against infants (*i*).

Evidence of guardian, &c.

Before the 6 & 7 *Vict. c.* 85, the guardian (*k*) or *prochein amy* (*l*) could not be a witness, for he is liable to the costs of the defence, should the action fail; but since that act he may be a witness (*m*). It has been held, in an action for slander, by an infant suing by guardian, that declarations made by the guardian on the subject are not admissible in evidence against the defendant (*n*); but this may be doubted (*o*).

Security for costs.

Security for Costs.]—In ejectment, if the lessor of plaintiff be an infant, the defendant, after pleading, may move to stay proceedings, until a guardian or *prochein amy* be appointed for the infant, in order to answer costs (*p*), provided the plaintiff be not a real and substantial person (*q*). And in other actions, if the guardian or *prochein amy* be not a responsible person, the Court or a judge may, in their discretion, if a better guardian or *prochein amy* can be procured, order the appointment to be revoked, and another to be appointed in his stead, and that the proceedings be stayed in the meantime (*r*). And in a recent case the Court of Exchequer revoked the appointment

(*a*) *Infra.*
(*b*) *Davies* v. *Locket*, 4 Taunt. 765.
(*c*) *Tomlin* v. *Brookes*, 1 Wils. 246.
(*d*) See the form, Chit. Forms, 512.
(*e*) *Combers* v. *Watton*, 1 Lev. 224. See *Bird* v. *Pegg*, 5 B. & Ald. 418.
(*f*) 4 Co. 53 b; Id. 54 a: *Swift* v. *Nott*, 1 Sid. 173.
(*g*) *Young* v. *Young*, Cro. Car. 86: Hutton, 92: *Combers* v. *Watton*, 1 Lev. 224.
(*h*) 2 Sellon, 66.
(*i*) *Ante*, 1084.
(*k*) *Clutterbuck* v. *Lord Huntingtower*, 1 Str. 506.
(*l*) *Hopkins* v. *Neal*, 2 Id. 1026.
(*m*) *Sinclair* v. *Sinclair*, 13 M. & W. 640.
(*n*) *Cowling* v. *Ely*, 2 Stark. 366.
(*o*) *James* v. *Hatfield*, 1 Stra. 548.
(*p*) *Nokes* v. *Windham*, 1 Str. 694: *Throgmorton* v. *Smith*, 2 Id. 932: *Throughout* v. *Percival*, Barnes, 193. And see *Maddon* d. *Baker* v. *White*, 2 T. R. 159. See a form, Chit. Forms, 386.
(*q*) *Anon.*, 1 Cowp. 128. Where the infant lessor was a pauper, the Court discharged a rule calling on him to find security on the terms that the infant's father should be substituted for the nominal plaintiff. (*Doe* v. *Roberts*, 6 Dowl. 556).
(*r*) *Watson* v. *Fraser*, 8 M. & W. 69: *Turner* v. *Turner*, 2 Str. 708. But see *Squirrell* v. *Squirrell*, 2 P. Wms. 297, n.: *Anon.*, 1 Marsh. 4: *Yarworth* v. *Mackel*, 2 D. & Ry. 423: *Anon.*, 2 Chit. Rep. 338.

of the father of the infant plaintiff as *prochein amy*, on an affidavit that it had been discovered since the appointment that the father had been insolvent some years before, and had not since carried on any business, it not being satisfactorily shewn that he had used due diligence to procure some other responsible person connected with the plaintiff to be the *prochein amy*; but at the same time the Court gave the plaintiff liberty to apply by summons, to be served on the defendant's attorney, either to re-appoint the father, or substitute some other person in his stead, with a stay of proceedings in the meantime (*s*). Where the *prochein amy* or guardian cannot be found at the address of which he is described in the plaintiff's petition, the proper course is to take out a summons before a judge at chambers for a stay of proceedings, until his address is given by the plaintiff's attorney; and in a case where the defendant, under such alleged circumstances, applied to the Court for a stay of proceedings until security for costs should be given, the Court discharged the rule (*t*).

Costs.

Costs.]—The guardian or *prochein amy* is considered to undertake the conduct of the action at his own personal risk, with regard to costs, and he is liable for the costs accordingly; and if the defendant be entitled to them, he may proceed for them against him by attachment (*u*). It seems also that the defendant may sue out execution, even a *ca. sa.*, against the infant himself, whether he have sued by *prochein amy* (*x*) or not (*y*); though it seems otherwise if he sue by guardian (*z*). It may be doubtful, however, whether the infant is liable for them; and although the Court will not interfere to set aside an execution against him, still perhaps he might bring a writ of error (*a*).

Liability for costs of prochein amy to attorney.

The *prochein amy* or guardian, who appears to be such on record, is *primâ facie* liable to the payment of the attorney's bill, though he did not interfere in the conduct of the action, nor was in any way interested in the event (*b*).

SECT 2.

Actions against Infants.

Process, &c.

Process, &c.]—The process against an infant is the same as in ordinary cases. He should not be holden to bail for any debt or other matter, where the plea of infancy would be a legal bar to the action. If holden to bail, however, the Court would not discharge him on entering a common appearance, but would put him to plead his infancy (*c*).

(*t*) *Duckett* v. *Satchwell*, 12 M. & W. 779; 1 Dowl. & L. 980. *S. C.* And see *Ikins* v. *Burthen*, 4 M. & P. 215.

(*u*) *Hayes* v. *Carr*, 3 M. & Gr. 852; 1 Dowl., N. S., 522, *S. C.*

(*x*) *James* v. *Hatfield*, 1 Str. 548: *Slaughter* v. *Talbot*, Barnes, 128; Ca. Pr., C. B., 32: *Evans* v. *Davis*, 1 C. & J. 460.

(*y*) *Gardiner* v. *Holt*, 2 Str. 1217: *Dow* v. *Clark*, 1 C. & M. 860; 2 Dowl. 303, *S. C.*

(*z*) *Finley* v. *Jowle*, 13 East, 6.

(*a*) *Grave* v. *Grave*, Cro. Eliz. 33: *Turner* v. *Turner*, 2 P. Wms. 296; 1 Str. 706, *S. C.*

(*a*) See *Grave* v. *Grave*, Cro. Eliz. 33.

(*b*) *Murnell* v. *Pickmore*, 2 Esp. 473.

(*c*) *Madox* v. *Eden*, 1 B. & P. 480. *Ante*, Vol. 1, 641.

PART IV.

Outlawry of.

An infant may be outlawed, if above the age of twelve years (*d*); or even under that age, if a female.

Appearance must be by guardian.

Appearance.]—An infant, even when sued *en autre droit* (*e*), or with other defendants (*f*), can appear and defend by guardian only, and not in person or by attorney (*g*) or *prochein amy* (*h*).

Appearance, how enforced.

If the defendant neglect to appear, a common appearance (*see stat.*) cannot be entered for him by the plaintiff (*i*); if it were, the defendant might bring a writ of error, or get the appearance set aside and all subsequent proceedings, even after an inquiry executed, though without costs (*j*). When the defendant, after a personal service, neglects to enter an appearance, a judge, upon an ex parte application without summons, will make an order, "that, unless the infant appear within a given time (usually six days after personal service of the order), the plaintiff may assign John Doe for his guardian, and enter a common appearance for the defendant;" and, if the infant do not appear by guardian, then, upon affidavit of the service of this order, and shewing the original, the judge will make the order absolute. An admission of John Doe is then drawn up, &c., and a common appearance entered as in ordinary cases (*k*). If an attorney undertake to appear for an infant, he must appear for him in the proper way, by guardian (*l*).

Guardian, how appointed or removed.

The guardian is appointed in the same manner as is mentioned, *ante*, 1088 (*m*). As to the removal of the guardian, *see ante*, 1089.

Consequences of not appearing by guardian.

If the infant appear in person, or by attorney, or by *prochein amy*, excepting in ejectment (*n*), and judgment be given against him, it may be reversed on error (*o*); but not so where judgment is given for him (*p*). The plaintiff may and should apply to the Court or a judge for an order to set aside the appearance with costs as irregular, and for the defendant to appear by guardian (*q*). And this, it seems, may be done at any time before judgment (*r*): but the plaintiff may not get the costs of the application, where it is not made until a late stage of the proceedings (*s*); and, with a view to get costs, the plaintiff, before making the application, had

(*d*) Co. Litt. 128. a.

(*e*) See *Hindmarsh* v. *Chandler*, 7 Taunt. 488; 1 Moore, 250, *S. C.*

(*f*) *Bird* v. *Orme*, Cro. Jac. 289: *King* v. *Marborough*, Id. 303; 1 Ro. Abr. 776, pl. 9: *Cox* v. *Louther*, 1 Ld. Raym. 600: *Frescobaldi* v. *Kynaston*, 2 Str. 783.

(*g*) Co. Litt. 135. b.: *Frescobaldi* v. *Kynaston*, 2 Str. 784. The infant may sue his guardian if he lose the cause by mispleading, Com. Dig. Pleader, 2 c. 2.

(*h*) 2 Inst. 261: *Fitzgerald* v. *Villiers*, 3 Mod. 236: *Simpson* v. *Jackson*, Cro. Jac. 640.

(*i*) Tidd, 9th ed., 99: *Roberts* v. *Spurr*, 3 Dowl. 555.

(*j*) See *Nunn* v. *Curtis*, 4 Dowl. 739: *Stephens* v. *Lowndes*, 14 Law J., N. S., C. P., 229. Such an appearance is not a *nullity*.

(*k*) 2 Sellon, 68. See *Stone* v. *Atwell*, 2 Str. 1076; 2 Saund. 117 f: *Gladman* v. *Bateman*, Barnes, 418.

(*l*) *Power* v. *Jones*, 1 Str. 445: *Stratton* v. *Burgis*, Id. 114: *ante*, Vol. 1, p. 76.

(*m*) See the forms, Chit. Forms, 512.

(*n*) *Goodright* v. *Wright*, 1 Str. 33.

(*o*) Vol. 1, p. 490; 1 Ro. Abr. 227, pl. 1, 2; 747, pl. 13; 8 Co. 58 b; 9 Co. 30 b: *Simpson* v. *Jackson*, Cro. Jac. 640: *Castlemaine* v. *Monday*, 4 B. & Ad. 90: *Brown* v. *Cheshire*, 3 Dowl. 70.

(*p*) *Bird* v. *Pegg*, 5 B. & Ald. 418. *See* Lil. Ent. 555, &c.

(*q*) *Hindmarsh* v. *Chandler*, 7 Taunt. 488; 1 Moore, 250, *S. C.*: *Gladman* v. *Bateman*, Barnes, 418. And see *Bye* v. *Edmonds*, 2 Chit. Rep. 29: *Pegg* v. *Thompson*, 3 Bing. 609; 11 Moore, 504, *S. C.*: *Brown* v. *Cheshire*, 3 Dowl. 7.

(*r*) See *Nunn* v. *Curtis*, 4 Dowl. 739; 1 T. & G. 500, *S. C.*: *Shipman* v. *Stevens*, 2 Wils. 50: *Kerry* v. *Cade*, Barnes, 413: *Stephens* v. *Lowndes*, *supra*.

(*s*) *Shipman* v. *Stevens*, 2 Wils. 50.

better request the defendant to name a guardian and appear by him (*t*).

Declaration, plea, and replication.

Declaration, Plea, and Replication.]—The declaration is the same, and is delivered or filed, as in ordinary cases. If the defendant intends availing himself of his infancy as a defence, he must plead it specially in bar (*u*). We have seen, (*ante*, 1090), that, by the 11 *G.* 4 & 1 *W.* 4, *c.* 47, *s.* 10, in an action by or against an infant on the bond of his ancestor, he can no longer, as formerly, pray that the parol may demur until he shall be of age. Even before this statute, if judgment were given that the parol demur, and error were brought on the judgment, the defendant could not plead his nonage in that court of error, and again pray the parol to demur (*x*). In an action against several persons, the defence of infancy, being personal, should be pleaded separately (*y*). Infancy may be pleaded with *non assumpsit* or *nunquam indebitatus*, or, generally speaking, with any other plea (*z*). It is an issuable plea (*a*); and the Court have allowed it to be pleaded, even after setting aside a regular judgment (*b*). The plea must state the admission by the Court of the guardian (*c*). It requires counsel's signature (*d*). It is within the rule of *T. T.*, 1 *W.* 4, *ante*, *Vol.* 1, *p.* 259, as to rules to plead double. On delivering the plea, annex a copy of the rule for the admission (or, in the Common Pleas, a copy of the admission) of the guardian to it (*e*).

Payment into court by.

The payment of money into Court with a plea of infancy is not an admission of the plaintiff's right of action beyond the sum paid in (*f*).

Replication, &c.

Where the plaintiff declares on a joint contract against two defendants, and one of them pleads infancy, the plaintiff cannot enter a *nolle prosequi* as to him and proceed against the other defendant in that action, but must commence a fresh action against the adult only (*g*). Where the defendant in *assumpsit* or debt pleads infancy to a declaration, consisting of several counts or demands, the plaintiff may reply, as to part of his demand, that it was for necessaries; to other part, that the defendant was of full age at the time of the contract; and to the other part, that he confirmed it after he came of age.

Warrant of attorney. Cognovit.

Warrant of Attorney.—Cognovit.]—An infant cannot bind himself by a warrant of attorney or *cognovit* (*h*). And if a warrant of attorney or *cognovit* be obtained from one, the Court or a judge will order it to be given up and cancelled, or judgment and execution thereon to be set aside, (*ante*, 861).

(*t*) *Shipman* v. *Stevens*, 2 Wils. 50.
(*u*) *Ante*, Vol. 1, p. 226.
(*x*) *Aland* v. *Mason*, 2 Str. 861.
(*y*) 1 Chit. Pl. 598, 5th ed. See in ejectment after error brought, *Goodright* v. *Wright*, 1 Str. 33. But *see contra*, in other actions, *Penner* v. *Jones*, 1 Str. 445.
(*z*) See Tidd, 9th ed., 656.
(*a*) *Delafield* v. *Tanner*, 5 Taunt. 856; 1 Marsh. 301, S. C.
(*b*) Id.
(*c*) *Cowbare* v. *Walton*, 1 Lev. 294: *Simpson* v. *Jackson*, Cro. Jac. 640.
(*d*) Vol. 1, p. 247.
(*e*) See the form of the plea, Chit. Forms, 43.
(*f*) *Hitchcock* v. *Tyson*, 2 Esp. 482, n.; *post*, Pt. 5, ch. 8.
(*g*) *Chandler* v. *Parkes*, 3 Esp. 76: *Jaffray* v. *Frebain*, 5 Id. 47: *Noke* v. *Ingham*, 1 Wils. 89. Query, if, since the new rules altering the effect of the general issue, this may not be done, see Lush, Pract., 78, citing *Moravia* v. *Glass*, 2 M. & S. 444. But *semble* not.
(*h*) *Oliver* v. *Woodroffe*, 7 Dowl. 166.

PART IV.

Costs.

Costs.]—An infant defendant is liable for costs, although a guardian have been appointed (*i*). There does not appear to be any authority for shewing that the guardian is liable for them; and, it would seem, he is not. As to the guardian's liability to the attorney for costs, see *ante*, 1091.

Execution.

Execution.]—The execution is the same as in ordinary cases. The infant may be arrested on a *ca. sa.* (*k*). The Court of Common Pleas refused to discharge an infant in an action of slander from execution for damages and costs, although the Insolvent Court had refused to relieve him, because, on account of his infancy, he was unable to make the assignment of property required by 7 *G.* 4, *c.* 57 (*l*).

Error.

Error.]—Upon error brought by or against an infant, he should have a *prochein amy* or guardian appointed, as above directed. The assignment of errors must be by *prochein amy* or guardian, or there will be a new ground of error; and the Court would set aside the assignment if not made by him (*m*).

(*i*) *Anderson* v. *Warde*, Dyer, 104: *Gardiner* v. *Holt*, 2 Str. 1217: *Dow* v. *Clark*, 1 C. & M. 860; 2 Dowl. 302, *S. C.*

(*k*) Vol. 1, p. 609.

(*l*) *Defries* v. *Davis*, 3 Dowl. 629; 1 Hodges, 103; 1 Scott, 394; 1 Bing. N. C. 699, *S. C.*

(*m*) *Bevan* v. *Cheshire*, 3 Dowl. 70.

CHAPTER XI.

ACTIONS BY AND AGAINST HUSBAND AND WIFE.

SECT. 1.

Actions by Husband and Wife.

When to sue jointly or not.

THERE are but few peculiarities in actions by husband and wife, and these have been already incidentally noticed in the course of the Work. In general, wherever the cause of action would survive to the wife, she and her husband ought to be joined in the action (*a*). Where, however, the cause of action arises during coverture, the husband is frequently allowed to bring the action in his own name, or in the joint names of himself and his wife (*a*). If a wife sue alone, the defendant may plead the coverture in abatement (*b*), or the coverture may be assigned by the husband (*c*) for error upon a writ of error *coram nobis* or *coram vobis* (*d*). And if she marry after writ, and before plea, her coverture must be pleaded in abatement (*e*). So, if a *feme sole* plaintiff in error marry pending the writ, the writ is thereby wholly abated (*f*). If she marry after plea, the coverture should be pleaded *puis darrein continuance* (*g*). If she sue alone, without having any legal interest whatever, she would be nonsuited (*h*). If she sue jointly with her husband, when she ought not to have done so, the defendant may demur (*i*), or arrest the judgment (*j*), or bring error (*k*), if the defect appear on the pleadings, or, it should seem, nonsuit the plaintiffs at the trial if it do not. If the husband sue alone, when the wife ought to be joined, the defendant may demur, move in arrest of judgment, or bring error if the defect appear on the pleadings (*l*), or plead the defence specially, if it does not (*m*). Where the plaintiff declared for an injury to his reversionary interest, and it appeared that he held the premises under a lease made to himself and wife, and had underlet them, it was objected that the wife ought to have joined in the action; but the Court held that there was no ground for the objection, and that, even were it valid, it should have been taken by plea in

(*a*) *Dunston* v. *Burrell*, 1 Wils. 294: *Bentham* v. *Vincent*, 2 Id. 227: *Galers* v. *Madeley*, 6 M. & W. 423; 1 Chit. Pl., 6th ed. 72. See form of affidavit to hold to bail by *feme*, in an action brought by baron and *feme*, Chit. Forms, 206.

(*b*) It cannot be pleaded in bar: *Lynford* v. *Sutton*, C. P., 27th May, 1846. And see *Bundle* v. *Wakeman*, 12 M. & W. 97; 1 D. & L. 430, *S. C.*

(*c*) The disability of a *feme covert* is founded on the privilege of the husband, and it is necessary that he should sanction the writ of error. See Bac. Abr., Error, B.

(*d*) *Milner* v. *Milnes*, 3 T. R. 631; *ante*, Vol. 1, p. 478.

(*e*) *Morgan* v. *Painter*, 6 T. R. 265; *Walker* v. *Salling*, 11 M. & W. 78; 1 Chit. Pl., 6th ed., 33. See *Hollis* v. *Freer*, 2 Bing. N. C. 719.

(*f*) Vol. 1, p. 485.

(*g*) Tidd, 9th ed., 849.

(*h*) *Candell* v. *Shaw*, 4 T. R. 361.

(*i*) *Buckley* v. *Collier*, 1 Salk. 114: *Rose* v. *Bowler*, 1 H. Bl. 108: *Sperres* v. *Dodd*, 2 New Rep. 405.

(*j*) *Abbott* v. *Blofield*, Cro. Jac. 644; when not, see *Bowin* v. *Mattaire*, Selw. N. P. 250; Bull. N. P. 50; *France* v. *White*, 1 M. & Gr. 731.

(*k*) *Bidgood* v. *Way*, 2 Bl. Rep. 1236.

(*l*) *Alebury* v. *Walby*, 1 Str. 229: *Abbott* v. *Blofield*, Cro. Jac. 644.

(*m*) *Ante*, Vol. 1, 226, n. (*s*): *Anon.*, 1 Salk. 282: *Rumsey* v. *George*, 1 M. & Sel. 280.

PART IV.

Proceedings where it is pleaded with other pleas.

But if the defendant plead either of the pleas above mentioned, and also the general issue or other plea, and the plaintiff deny *both* in his replication, the issue is then made up, and the parties proceed in the ordinary way; or if the plaintiff add the *similiter* to the general issue, and confess the plea of *plene administravit*, &c., and pray judgment of assets *in futuro*, &c., as above mentioned, then, after entering the replication in the issue, enter an award of the *venire* in this form: "*But because it is uncertain whether the defendant will be convicted upon the said issue above joined between the parties aforesaid, therefore let judgment be thereupon stayed until the trial and determination of the said issue; and in order to try the said issue, the sheriff is commanded,*" &c., as in ordinary cases (*x*). In this latter case, if the plaintiff have a verdict, judgment is signed, and he proceeds as in ordinary cases against an executor who has pleaded a false plea; so that, if such plea be false within his own knowledge, (as a plea of *ne unques* executor, or the like), he would be personally liable, not only for the costs, but also, it seems, for the debt, and judgment and execution might be issued against him accordingly (*y*); or if not false within his own knowledge, (as a plea that the testator did not promise, or the like), he would be personally liable for the costs, and the judgment signed against him would be of assets *quando* &c., upon which the plaintiff might afterwards, when assets came to defendant's hands, have a *scire facias*, as is above mentioned, for the debt, and immediately have a *fi. fa.* or *ca. sa.* for the costs *de bonis testatoris, et si non, de bonis propriis* (*z*).

Confessing judgment so as to prefer a creditor.

It is well settled, that, if an action be commenced against an executor or administrator for any specific debt, it must be preferred by him in payment to others of the same class: and in that case the executor or administrator would not be warranted in making any voluntary payment of such other debts to defeat the party of his remedy (*a*). Yet, although one creditor commence an action, if another creditor, in equal degree, commence a subsequent action, and first recover judgment, he must be first satisfied. Hence an executor or administrator has it in his election to give a preference, by confessing judgment in the action of the one, and pleading such judgment to the action of the other (*b*). In case, therefore, a hostile creditor bring an action, and there be not sufficient assets to divide amongst the creditors, and the executor be desirous of making an equal division, or favouring any particular creditor or creditors of the same class, in preference to the hostile plaintiff, the course adopted is, to get one or more of the friendly creditors, whose debt, or joint debts, will fully cover the assets in hand, immediately to bring a friendly action or actions, and declare therein in the common form of debt, and let defendant suffer judgment against him by default; and, on this being effected, then to plead the judgment to the declaration of the hostile creditor. If such judgment be recovered after pleading to the action by

(*x*) See form, Chit. Forms, 501.
(*y*) See *post*, 1079, 1080.
(*z*) See *Marshall* v. *Wilder*, 9 B. & C. 655; 1 Saund. 336 b, n. (10).
(*a*) 11 Vin. Abr. 296; Com. Dig., "Admin.," c. 2; Toller, 288, 289.
(*b*) See note (*a*), *supra*, 931; Off. Ex. 145.

the hostile creditor, and before trial, he may plead it within eight days after such judgment recovered (*c*).

Warrant of attorney by one, bad.

If a warrant of attorney be given by one of several executors, to confess a judgment against all, the Court will order it to be delivered up, &c. (*d*)

Verdict.

The verdict is in the affirmative or negative of the issue, as in ordinary cases (*e*).

Judgment in general.

Judgment.]—The judgment on demurrer, on issue of *nul tiel* record, by confession or *nil dicit*, is interlocutory or final, as in other cases. If interlocutory, it is the same as in ordinary cases; after which follow the award of the inquiry, return, and final judgment, as stated *ante*, 900. The final judgment after a writ of inquiry, or on a verdict against an executor or administrator, when he pleads a plea admitting his representative character, and the plaintiff takes issue on it or replies, is, that the debt, damages, and costs, or the damages and costs, shall be levied of the goods of the testator in the hands of the defendant, if he have so much thereof in his hands to be administered; and if not, then the costs to be levied of his own goods (*f*). Even where *non assumpsit* and *plene administravit* were pleaded, and the plaintiff confessed the plea of *plene administravit*, and took judgment of assets *quando acciderint* on that plea, and joined issue and obtained a verdict on *non assumpsit*, he was held entitled to judgment for his damages and costs, to be levied of the goods of the testator if sufficient, and if not, then the costs to be levied of the defendant's own goods (*g*).

On false plea.

If the defendant plead a plea which is false within his own knowledge, (as *ne unques* executor or administrator, or the like), and it be found against him, the judgment is *de bonis testatoris si &c., et si non &c. de bonis propriis*, or perhaps unconditionally *de bonis propriis* (*h*).

On plea of judgments outstanding.

If an executor plead judgments obtained against *himself*, and any one or more of them be avoided by the plaintiff's pleading, the plaintiff shall have judgment against the executor *de bonis propriis* (*i*). But if he had pleaded judgments obtained against the testator, and that he had not sufficient to satisfy them or any of them; if any one or more of the judgments be avoided, still there ought not to be a general judgment against the executor, or at least not until so many of the judgments are avoided as to leave assets in the executor's hands (*k*).

In action suggesting devastavit.

In an action against an executor or administrator, suggesting a *devastavit*, the judgment against the defendant shall be *de bonis propriis* (*l*). But where the action is brought against the executor of an executor, suggesting a *devastavit* by the

(*c*) Lethieullier v. Cross, 5 D. & R. 175; 3 B. & C. 317, S. C.: Prince v. Nicholson, 5 Taunt. 333; 1 Marsh. 280, S. C.: Kitchen v. Barnes, 7 East, 53.

(*d*) Elwell v. Quash, 1 Str. 20; *ante*, 382.

(*e*) See form of *postea*, for plaintiff, Chit. Forms, 501: for defendant, Id. 502.

(*f*) 1 Saund. 336. And see *Rouse* v. Elderton, 1 Salk. 312; 2 L. Raym. 870, S. C. See forms, Chit. Forms, 495 to 502.

(*g*) *Marshall* v. *Wilder*, 9 B. & C. 655.

(*h*) Bro. Executors, 34: *Bull* v. *Wheeler*, Cro. Jac. 647; 1 Saund. 336 b.

(*i*) 1 Saund. 337 a, n. See *Marshall* v. *Wilder*, 9 B. & C. 655.

(*k*) Id. But see several cases cited there to the contrary.

(*l*) 1 Saund. 336 c, n. (1).

PART IV.

Execution.

As to the cases in which property belonging to the wife may or may not be taken in execution for the debt of the husband, see *Vol.* 1, 581. As to taking a *feme covert* upon a *ca. sa.*, and as to when she will be discharged out of custody on a judgment against both, see *ante*, 609. If the husband die before execution, and the action survive against the wife, she may be taken in execution, in the same manner as if the action were originally brought against her alone as a *feme sole* (*o*). If an action be brought against a *feme sole*, and pending it she marry, and judgment is obtained against her, as it may be by her maiden name, she may be taken on a *ca. sa.*, and the Court will not discharge her, even though she has no separate property (*p*); or, in such a case, the plaintiff may sue out a *scire facias*, in order to make the husband a party, and then issue execution against both (*q*). On a *fieri facias* against the wife who married pending the action, it is irregular to take the goods of the husband (*r*).

Costs.

In an action against a husband and wife, if they succeed, they will be entitled to costs, as in ordinary cases. In an action against a *feme covert* alone, in which she must appear and defend in person, if she plead her coverture, and succeed upon it, it is open to doubt as to what costs she is entitled to; whether to costs out of pocket only, or to costs generally. According to the practice of the Queen's Bench, she is entitled only to the former.

On a judgment for a feme defendant.

If judgment be given for a *feme*, on a plea of coverture or otherwise, where the husband is not joined as defendant, she may have execution for the costs in her own name: the husband could not have execution for them in his name without a *scire facias* (*s*).

Other proceedings.

As to a writ of error by *feme covert*, see *Vol.* 1, *p.* 478; and as to the abatement of a writ of error, by the marriage of a *feme sole*, plaintiff or defendant, see *Vol.* 1, *p.* 485. As to *scire facias* upon the marriage of a *feme sole* defendant, see *ante*, 1024; *post*, *Pt.* 5, *Ch.* 33. And as to warrants of attorney by a *feme covert*, or by a *feme sole* who marries before judgment, see *ante*, 862.

(*o*) 1 Ro. Abr. 890; 2 Bac. Abr., Execution, G. 4.

(*p*) *Rayner* v. *Jones*, 6 June, 1846, Exch.: *Thorpe* v. *Argles*, 1 D. & L. 831: *Evans* v. *Chester*, 2 M. & W. 847; 6 Dowl. 140, *S. C.*: *Dopley* v. *White*, Cro. Jac. 323: *Cooper* v. *Hunchin*, 4 East, 521; *King* v. *Jones*, 2 Str. 811.

(*q*) In *Evans* v. *Chester*, 2 M. & W. 847; 6 Dowl. 140, *S. C.*, *Parke*, B., is reported to have intimated, that the husband may bring a writ of error on a judgment obtained under such circumstances against the wife.—It is submitted, however, that this observation of the learned Baron applies only to cases where the defendant was married at the time of commencing the action, and not to cases where she marries pending it, for, in the latter class of cases, the only way in which the plaintiff can have execution against the husband seems to be by proceeding to judgment against the wife, and then suing out a *sci. fa. quare executionem non*, against the husband and wife (*ante*, 1019); but if the judgment be erroneous, he may be defeated of execution against either, by the voluntary act of the defendant in marrying pending the suit, which would be manifestly unjust. (See *per Curiam*, *King* v. *Jones*, 2 Str. 811. And see 2 Saund. 72).

(*r*) *Doe Taggart* v. *Butcher*, 3 M. & Sel. 557, 559.

(*s*) See *Wortley* v. *Rayner*, 2 Dowl. 637; 2 Saund. 72 k, l.

CHAPTER XII.

ACTIONS BY AND AGAINST BANKRUPTS OR THEIR ASSIGNEES.

SECT. 1.

Actions by Bankrupts or their Assignees.

In whose Name to be brought, 1099.
Process, &c., 1101.
Declaration and subsequent Proceedings, 1101.
Costs, &c., 1103.

In whose Name to be brought.]—For any debt due to the bankrupt previous to the bankruptcy, or for any other cause of action which passes to the assignees, the action should be brought in their names (*a*). The consent of the creditors is not necessary to enable the assignees to sue (*b*). All of them should sue, otherwise the defendant may plead in abatement, or perhaps nonsuit the plaintiff (*c*) in actions *ex contractu*, though in actions *ex delicto* he could plead in abatement only (*d*). Before assignees have been appointed by the creditors, it would seem that the official assignee may sue (*e*). By the 5 & 6 *Vict. c.* 122, *s.* 31, if a bankrupt, at the time of his bankruptcy, be a member of a firm, the Court authorised to act in the prosecution of the fiat may authorise the assignee, upon his application, to commence or prosecute any action or suit in the name of such assignee and of the remaining partner, against any debtor of the partnership, and such judgment, decree, or order, may be obtained therein, as if such action or suit had been instituted with the consent of such partner; and if such partner shall execute any release of the debt or demand for which such action or suit is instituted, such release shall be void, provided that every such partner shall have notice given him of such application, and be at liberty to shew cause against it; and if no benefit is claimed by him by virtue of the said proceedings, he shall be indemnified against the payment of any costs in respect of such action or suit, in such manner as such court, upon his application, shall direct; and the

In whose name to be brought.

Consent of creditors not necessary.

All should sue.

Where one of several partners bankrupt.

(*a*) Upon what contracts entered into with the bankrupt the assignees are entitled to sue, see *Drake* v. *Beckham*, 11 M. & W. 315; *Gibson* v. *Carruthers*, 8 M. & W. 321; *Whitmore* v. *Gilmour*, 12 M. & W. 838; *Sherrington* v. *Yates*, *ante*, 896.
(*b*) *Bunn* v. *Williams*, 2 Y. & J. 475.
(*c*) *Smithgrove* v. *Hunt*, 2 Stark. 424; 1 Chit. Rep. 71, *S. C.*: *Allbritt* v. *Kittridge*, 6 Moore. 569.
(*d*) 1 Chit. Pl., 6th ed., 66.
(*e*) *Dunn* v. *Hill*, 11 M. & W. 470; 2 Dowl., N. S., 1062, *S. C.*; 5 & 6 Vict. c. 122, s. 48. See *Page* v. *Baner*, 4 B. & Ald. 345.

PART IV.

Court, upon the application of such partner, may direct that he may receive so much of the proceeds of such action or suit as such Court shall direct. Before this act, when one of several partners became bankrupt, the action might be brought in the name of the solvent partner and the assignees of the bankrupt (*f*); and, upon petition, the assignees might have been authorised to use the name of the solvent partner without his consent, provided such partner, if no benefit was claimed by him by virtue of the proceedings, was indemnified against costs; and upon petition it might have been ordered that he should receive his share of the proceeds of the action (*g*).

When new appointment, &c.

When a new appointment of assignees has been ordered, the new assignees are to sue (*h*). When an assignee dies, or a new assignee is chosen, the action will not be thereby abated; but the Court may, upon the suggestion of such death or removal and new choice, allow the name of the surviving or new assignee to be substituted in the place of the former; and the action may be prosecuted in the name of the said surviving or new assignee, in the same manner as if he had originally commenced it (*i*).

When bankrupt to sue.

But if the bankrupt, at the time of his bankruptcy, had no beneficial interest in the debt, as if he had assigned all his interest in it to a third person, and for other causes of action which do not pass to the assignees, the action should be in the bankrupt's name (*k*). It may be stated, that a right of action for an injury to the body or feelings of a trader arising from a tort independent of contract does not pass to his assignees; *ex. gr.* for an assault and battery, or for slander, or for the seduction of a child or servant: and the same may be said of some personal injuries arising out of breaches of contracts, such as contracts to cure or to marry (*l*). And it may also be added, that a bankrupt has a good title to all property acquired, and a good right to sue on all contracts made with him between the fiat and the allowance of his certificate; and also after the allowance of his certificate under a second fiat against him, under which his estate has not paid fifteen shillings in the pound, unless his assignees interfere and claim the property, or the benefit of such contracts (*m*).

Bankruptcy pending action.

Where an action has been commenced by a party who afterwards becomes bankrupt, the defendant may defeat the action by pleading specially the bankruptcy, fiat, and assignees' ap-

(*f*) *Thomason* v. *Frere*, 10 East, 418: *Eckhardt* v. *Wilson*, 8 T. R. 140: *Anon.*, 12 Mod. 446.

(*g*) See 6 G. 4, c. 16, s. 89.

(*h*) 6 G. 4, c. 16, s. 66. See *Bloxam* v. *Hubbard*, 5 East, 407; 6 Moore, 569: *Snellgrove* v. *Hunt*, 1 Chit. Rep. 71: *De Cosson* v. *Vaughan*, 10 East, 61.

(*i*) Where the assignee of a bankrupt estate has died, and another assignee has been appointed in his stead, the rule to enter a suggestion of such death upon the record is absolute in the first instance; (*Westall* v. *Sturgess*, 4 Moo. & P. 217); and when he has entered the suggestion on the record, he may recover a penalty as well as his predecessor. Per *Tindal*, C. J.: "Nothing can be more clear or comprehensive than the language of this section; it conveys every right to the new assignee, for he is to sue in the same manner as if he had originally commenced the action." (*Bates* v. *Sturges*, 7 Bing. 585; 5 Moo. & P. 868, *S. C.*)

(*k*) *Winch* v. *Keeley*, 1 T. R. 619: *Carpenter* v. *Marnell*, 3 B. & P. 40: *Dangerfield* v. *Thomas*, 1 Per. & D. 287. See *Mogg* v. *Baker*, 3 M. & W. 195: *Tibbits* v. *George*, 6 Nev. & M. 804: *Parnham* v. *Hurst*, 8 M. & W. 743: *D'Arnay* v. *Chesneau*, 13 M. & W. 796.

(*l*) *Drake* v. *Beckham*, 11 M. & W. 319, *per Cur.*: *Brewer* v. *Dew*, 1 D. & L. 333; 11 M. & W. 625: *Howard* v. *Crowther*, 8 M. & W. 601. See *Spence* v. *Rogers*, 2 Dowl., N. S., 999; 11 M. & W. 191, (an action of trespass *qu. cl. fr.*): *Rogers* v. *Spence*, 13 M. & W. 571.

(*m*) *Herbert* v. *Sayer*, 2 D. & L. 49; 13 Law J., N. S., Q. B., 209; 5 Q. B. 965, *S. C.*: *Fyson* v. *Chambers*, 9 M. & W. 460: *Drayton* v. *Dale*, 2 B. & C. 293.

pointment, and the assignees may be compelled to proceed *de novo* in their own names (*n*). It seems that it is no answer to such a plea, that the assignees consent to the action being continued for the benefit of the creditors, and that it is so continued with their consent and on their behalf as such assignees (*o*). If no such plea be pleaded, and the assignees are thus allowed to continue the action already brought, they must proceed in the bankrupt's name to judgment, when, and not before, they can make themselves parties to the record, by *scire facias*, as mentioned *ante*, 1020. So, if error be brought by or against a trader who afterwards becomes bankrupt pending the writ, the assignees must proceed in his name to judgment (*p*). The assignees, however, should sue out a *scire facias* to revive the judgment, and make themselves parties to the record, before they issue execution (*q*). Where the assignees thus continue the suit, they may be compelled to give security for all the costs (*r*); and where the plaintiff became bankrupt after issue joined, and the assignees refused to interfere, and the defendant obtained a rule for judgment as in case of a nonsuit, the Court refused to discharge it on a peremptory undertaking, unless the plaintiff also gave security for costs (*s*).

Assignees under Irish Commission.

It may be as well here to mention, that both the real and personal estate of a bankrupt in this country and in Scotland, and also debts contracted with him in either of those countries, pass to the assignees under an Irish commission of bankrupt, issued under the 6 & 7 *W.* 4, *c.* 14 (*t*); therefore, such assignees may recover debts contracted with the bankrupt here, &c. (*t*), and a certificate obtained under the above statute, operates as a bar to debts due from him in England or Scotland, as well as to those incurred by him in Ireland (*t*). It seems, also, that the real and personal estate of a bankrupt in Scotland and Ireland, and also debts contracted with him in either of those countries, pass to his assignees under an English fiat of bankrupt (*t*); therefore assignees under such a fiat may sue either in Scotland or Ireland to recover debts contracted with the bankrupt there, &c. (*t*). The English and Irish bankrupt acts are very similar.

Process, &c.

Process, &c.]—The process is the same as in ordinary cases. It need not, at least in the Queen's Bench or Exchequer, describe the plaintiffs as assignees (*u*). As to the affidavit to hold to bail by assignees of a bankrupt, see *Vol.* 1, *p.* 655 (*x*).

Declaration, and subsequent proceedings.

Declaration, and subsequent Proceedings.]—The declaration

(*n*) Swann v. *Sutton*, 10 A. & E. 623: *Hillary* v. *Morris*, 5 C. & P. 6: *Biggs* v. *Cox*, 4 B. & C. 920; 7 D. & R. 409, *S. C.*: *Kinnear* v. *Tattersall*, 15 East, 622. See *Dunn* v. *Hill*, 11 M. & W. 470; 2 Dowl., N. S., 1089, where the plea was held bad for not shewing that the official assignee was appointed after the last pleading, and within eight days before the plea.

(*o*) Swann v. *Sutton*, 10 A. & E. 623. See *Guinness* v. *Carroll*, 1 B. & Ad. 459.

(*p*) *Ante*, Vol. 1, 495.

(*q*) *Ante*, Vol. 1, 494. See the form, Chit. Forms, 499.

(*r*) See *post*, Pt. 3, ch. 13.

(*s*) *Taylor* v. *Meningue*, 2 M. & W. 358. See *Solomon* v. *Leek*, 9 Dowl. 361. See *Outcherlony* v. *Gibson*, 6 Scott, N. R., 577, where, after a fiat issued against the plaintiff, he proceeded in the action without the consent of the assignees, (who were not appointed till after verdict); and the Court, under particular circumstances, stayed proceedings upon payment of costs up to date of fiat.

(*t*) *Fergusson* v. *Spencer*, 2 Scott, N. R., 229; 1 M. & G. 987. And see *Tronson* v. *Callons*, 1 Hudson & Brooke, 113, (K. B., Ireland): and *Rogers* v. *Love*, 1 Hudson & Brooke, 484, n. (Exch., Ireland).

(*u*) *Ante*, Vol. 1, p. 146.

(*x*) See the form, Chit. Forms, 514.

PART IV.

and other pleadings are filed or delivered as in ordinary cases (*y*).

What must be pleaded specially.

By *R. H.*, 4 *W.* 4, *r.* 21, *ante, Vol.* 1, 225, if the plaintiffs sue as assignees, and defendant intends disputing their being such, he must plead the defence specially. A plea denying that the plaintiffs are assignees of the estate and effects of the bankrupt, puts in issue not merely the plaintiffs' appointment as assignees, but also the petitioning creditor's debt, act of bankruptcy, &c. (*z*)

Notice of disputing bankruptcy, &c.

In actions by assignees, no proof shall be required at the trial of the petitioning creditor's debt, and of the trading and act of bankruptcy, unless the defendant, "at or before pleading," shall give notice to such assignee that he intends to dispute some and which of such matters (*a*). This section applies to actions brought to trial by assignees acting under commissions which were issued before the passing of the act (*b*), and to actions of ejectment by an assignee (*c*); but not to a feigned issue (*d*). This notice must be given notwithstanding defendant pleads a plea expressly disputing the bankruptcy, &c. (*e*)

Form of.

It must specify which of the three matters, trading, petitioning creditor's debt, or act of bankruptcy, is intended to be disputed. Where a notice to dispute the latter was given, and, at the trial, one act of bankruptcy only was proved, it was held that the plaintiffs were not bound to prove the existence of a good petitioning creditor's debt at the date of the act of bankruptcy (*f*).

Service of, &c.

Notice to dispute "the bankruptcy" is too general (*g*). The notice does not require personal service. Serving it on the attorney of the assignees is sufficient; but a delivery of it to a maid-servant at the house of the assignee is not (*h*). It has, however, been held sufficient that the notice was served on the clerk of the assignee at his counting-house (*i*). It must be served either at the time of pleading, or before it; if he plead without giving the notice, he cannot afterwards, even before his time for pleading has expired, again plead with notice, until he have first obtained leave to withdraw his former plea (*k*). And where the clerk of the defendant's attorney delivered a plea of the general issue, but without notice to dispute the bankruptcy, and on the same day obtained back the plea under the pretence of correcting a mistake, and delivered another plea with the notice attached, it was held insufficient; the defendant ought to have moved to withdraw his plea (*l*). The Court sitting at *Nisi Prius* will not, it seems, enter into the question, whether the plaintiff's attorney has or has not undertaken to accept of notice after plea pleaded, if the fact is disputed (*m*). It is not

(*y*) See the form, Chit. Forms, 514.

(*z*) *Butter* v. *Hobson*, 4 Bing. N. C. 290: *Buckton* v. *Frost*, 1 Per. & D. 102; 8 Ad. & E. 844, *S. C.*

(*a*) 6 G. 4, c. 16, s. 90. See *Lott* v. *Melville*, 3 Scott, N. R., 346; 9 Dowl. 882, *S. C.* See the form, Chit. Forms, 514.

(*b*) *Doe Johnson* v. *Liversedge*, 11 M. & W. 517.

(*c*) Ib.

(*d*) See *ante*, 809.

(*e*) *Moon* v. *Raphael*, 7 C. & P. 115.

(*f*) *Porter* v. *Walker*, 1 Scott, N. R., 868.

(*g*) *Trimlay* v. *Unwin*, 6 B. & C. 537.

(*h*) *Howard* v. *Ramsbottom*, 3 Taunt. 526.

(*i*) *Widger* v. *Browning*, 2 C. & P. 523; 1 M. & M. 27, *S. C.*

(*k*) *Poole* v. *Ball*, 1 Stark. 398: *Radmore* v. *Gould*, 1 Wightwick, 80: *Gardner* v. *Slack*, 6 Moore, 489.

(*l*) *Lawrence* v. *Crowder*, 3 C. & P. 229; 1 Moo. & P. 511, *S. C.* And see *Poole* v. *Ball*, 1 Stark. 398; 6 B. & C. 537, n.; *post*, 1105.

(*m*) *Fulton* v. *Scudder*, 3 C. & P. 232.

considered as a part of defendant's case at a trial, but he may prove the service of it, as soon as the assignees attempt to make out a *primâ facie* case, by producing the fiat &c. (*n*). If the notice be of an intention to dispute the act of bankruptcy only, and depositions are read to prove the trading and petitioning creditor's debt, this does not put the whole file of proceedings in evidence; but if the opposite party wish to inspect other depositions, or have them read, he must call for them as part of his case (*o*).

Payment into court where action brought within time allowed to dispute fiat.

By the 5 & 6 *Vict. c.* 122, *s.* 26, "If the assignees commence any action or suit for any money due to the bankrupt's estate before the time allowed by this act for the bankrupt to dispute the fiat shall have elapsed, any defendant in any such action or suit shall be entitled, after notice given to the assignees, to pay the same or any part thereof into the court in which such action or suit is brought; and all proceedings with respect to the money so paid into court shall thereupon be stayed until the time aforesaid shall have elapsed; and if within that time the bankrupt shall not have commenced such action, suit, or other proceeding as aforesaid, and prosecuted the same with due diligence, the money shall be paid out of court to the assignees, but otherwise shall abide the event of such action, suit, or other proceeding as aforesaid, and upon such event shall be paid out of court, either to the assignees or the person adjudged bankrupt, as the Court shall direct; and that, after such payment so made into court, it shall not be lawful for the person so adjudged bankrupt to proceed against the defendant for recovery of the same money."

Costs.

Costs.]—The costs are the same as in ordinary cases (*p*), excepting that, by 6 *G.* 4, *c.* 16, *s.* 90, if the notice above-mentioned be served, and the matter so disputed be proved or admitted at the trial, the judge may, if he see fit, grant a certificate thereof; and the assignee shall thereupon be entitled to such costs (to be taxed) as were occasioned by such notice, to be added to his own costs if he succeed, or to be deducted from the costs, &c. of the other party, should he obtain a verdict (*q*). If a cause be referred by order of *Nisi Prius*, the judge or Court cannot certify under this statute (*r*). It seems questionable, whether the costs of inrolling the proceedings under a fiat are properly costs in the cause (*s*). At all events, they are not so where the inrolment takes place after the defendant has pleaded without giving notice to dispute the bankruptcy, even though he subsequently, under a leave to plead *de novo*, delivers such notice (*s*).

Judgment and execution.

Judgment and Execution.]—The judgment and execution are the same as in ordinary cases.

(*n*) *De Charms* v. *Waine*, 2 Camp. 324.
(*o*) *Black* v. *Thorn*, 4 Camp. 191.
(*p*) See *Andrews* v. *Sealey*, 8 Price, 212.
(*q*) See *Atkins* v. *Seaward*, 1 B. & B. 275; 3 Moore, 601, *S. C.*: *Ward* v. *Abrahams*, 1 B. & Ald. 367.
(*r*) *Barthrop* v. *Anderton*, 1 M. & Scott, 361; 8 Bing. 268, *S. C.*
(*s*) *Butcher* v. *Addison*, 1 Scott, N. R., 175.

Sect. 2.

Actions against Bankrupts or their Assignees.

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PART IV.

Assignees, when liable, and how sued.

Assignees, when liable, and how sued.]—Assignees cannot be sued as such at law; but they may be sued in their individual capacity for any cause of action arising to others from their acts, which they cannot justify under the fiat and their appointment. They cannot, however, be sued by action for the amount of dividends; the proper remedy is by petition (*t*). Where the bankrupt held his assignee to bail in an action for money had and received, instituted with a view to try the validity of the fiat, the Court discharged the assignee upon a common appearance (*u*).

Process, &c.

Arrest.

Process, &c.—As to the cases in which a bankrupt can be holden to bail, and under what circumstances he is privileged from arrest, see *ante, Vol.* 1, 637—691. If bail have been put in for a defendant, and he afterwards become a bankrupt, and obtain his certificate before the bail are fixed, the bail will be thereby discharged; and an *exoneretur* may be entered on the bail-piece, upon application to the Court in term, or to a judge in vacation (*x*). And see, as to how far the bankruptcy of the defendant will discharge the sheriff or the bail below, *ante, Vol.* 1, 728. As to a judge or commissioner of the Court of Bankruptcy giving to a party a protection from process against his person or property, see *Vol.* 1, 531.

The declaration.

The Declaration.]—The declaration is filed or delivered as in ordinary cases.

The plea, &c.

The Plea, &c.]—The general plea of bankruptcy need not be signed by counsel (*y*); but a special plea of bankruptcy and certificate must (*z*).

Where one of several pleads bankruptcy.

If one of the several defendants plead bankrupcy, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the others (*a*), whether the action be upon contract or in *tort*; upon which *nolle prosequi* the plaintiff will be liable to the costs of that defendant (*b*). Such defendant need not have been joined in the action, if his certificate was obtained before action brought. (See *ante*, 815).

General issue by assignees.

In actions against assignees, they may plead the general

(*t*) Arch. Bkt. L. 214; 6 G. 4, c. 16, s. 111.
(*u*) *Chambers* v. *Bernasconi*, 4 Moo. & P. 218; 6 Bing. 498, *S. C.*
(*x*) *Ante*, Vol. 1, p. 781. See the forms, Chit. Precedents by Pearson, 257, 268.
(*y*) Vol. 1, p. 947.
(*z*) See Arch. Bkt. L. 281. 282.
(*a*) *Noke* v. *Ingham*, 1 Wils. 89.
(*b*) 3 & 4 W. 4, c. 42, s. 32.

issue, and give the special matter in evidence (*c*). The words "by statute" should be inserted in the margin of the plea, otherwise it will have only the same effect as in ordinary cases (*d*).

Notice of disputing bankruptcy, &c.

In actions against assignees, if the plaintiff intend to dispute the petitioning creditor's debt, the trading, or act of bankruptcy, he must "*before issue joined*" give notice to the defendants of his intention to dispute some and which of such matters, otherwise no proof shall be required at the trial of the facts above mentioned (*e*). Service of this notice at the time of delivering the issue will not be sufficient (*f*). The Court sitting at *Nisi Prius* will not enter into the question, whether the defendant's attorney has or has not undertaken to accept of notice after issue joined, if the fact be disputed (*g*). Other points as to this notice have been already stated *ante*, 1102.

The issue is made up, and the other proceedings to judgment are the same, as in ordinary cases.

Proof of debt, how far a discontinuance of action, &c.

Proof of Debt, how far a Discontinuance of Action, &c.]— By statute 6 *G.* 4, *c.* 16, *s.* 59, it is enacted "that no creditor who has brought any action or instituted any suit against any bankrupt, in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the commission against such bankrupt, shall prove a debt under such commission, or have any claim entered upon the proceedings under such commission, without relinquishing such action or suit; and in case such bankrupt shall be in prison or custody at the suit of or detained by such creditor, he shall not prove or claim as aforesaid, without giving a sufficient authority in writing for the discharge of such bankrupt; and the proving or claiming a debt under a commission (*h*) by any creditor shall be deemed an election by such creditor to take the benefit of such commission, with respect to the debt so proved or claimed: provided that such creditor shall not be liable to the payment to such bankrupt or his assignees of the costs of such action or suit so relinquished by him; and that where any such creditor shall have brought any action or suit against such bankrupt, jointly with any other person or persons, his relinquishing such action or suit against the bankrupt shall not affect such action or suit against such other person or persons: provided also, that any creditor who shall have so elected to prove or claim as aforesaid, if the commission be afterwards superseded, may proceed in the action as if he had not so elected, and in bailable actions shall be at liberty to arrest the defendant *de novo*, if he has not put in bail below or perfected bail above, or, if the defendant has put in or perfected such bail, to have recourse against such bail, by requiring the bail below to put in and perfect bail above within the first eight days in term, after notice in the *London Gazette* of the superseding such commission, and by suing the bail upon their recognisance if the condition thereof is broken."

Creditor restored to his former rights if first superseded.

If the plaintiff prove for part of a judgment debt, it is the

Proving for part of debt.

(*c*) 6 G. 4, c. 16, s. 44; Arch. Bkt. L. 234. See *Wurtz* v. *Babb*, 2 B. & Ad. 177; 1 Dowl. 238, S. C.: *Carruthers* v. *Pepper*, 3 Bing. 276; 2 Moo. & P. 499, S. C.: *Edge* v. *Parker*, 8 B. & C. 697.

(*d*) R. T., 1853, *ante*, Vol. 1, 246.

(*e*) 6 G. 4, c. 16, s. 90. See the form, Chit. Forms, 514.

(*f*) *Richmond* v. *Heapy*, 4 Camp. 207.

(*g*) *Folks* v. *Scudder*, 3 C. & P. 332.

(*h*) See *Whitaker* v. *Mason*, 4 Bing. N. C. 303.

same as if he proved for the whole (*h*). But if a creditor have two debts, perfectly distinct in their nature, or due in different rights, and he prove one of them, this will not prevent him from bringing an action against the bankrupt for the recovery of the other (*i*), although the debt upon which the action is brought was due and provable at the time of proving the other debt (*j*), for the statute does not apply to actions for distinct demands brought subsequently to the proof or claim (*k*).

No need of formal discontinuance before proof.

There is no need of a formal discontinuance of the action before the plaintiff proves his debt, or has his claim entered on the proceedings under the fiat (*l*). But the plaintiff, to bring himself within the act, must either so prove his debt, or have his claim so entered (*m*); therefore, until one or the other has been done, he cannot discontinue his action without payment of costs. The defendant is, it seems, entitled to have a suggestion of the fact of the plaintiff having proved or made his claim entered upon the record in the action; before which the action is not legally terminated, so as to render further proceedings in it by either party irregular (*n*). If a creditor, however, who has proved his debt, were afterwards to bring an action for it, or proceed in an action already brought, although his election could be pleaded in bar, yet the Court in which such action was brought might, upon application, stay the proceedings in it, or an application might be made to the Court of Bankruptcy to expunge the proof (*o*). The mere fact of the plaintiff being assignee to the estate, unless he be also a creditor, and have proved his debt, has been holden to be no election within the meaning of the enactment (*p*). Yet where a creditor, who had the bankrupt in custody upon *mesne* process, petitioned to be admitted to prove, and an order was made accordingly, the bankrupt was holden to be entitled to his discharge *instanter* upon the making of the order (*q*); and lodging a detainer against a bankrupt in custody, and afterwards proving under the commission, will entitle the bankrupt to his discharge as to the costs of the creditor (*r*). Even petitioning that the commission may be superseded, or, if found valid, that the party may be admitted to prove, or the like, will be deemed to be within the equity of the statute, so as to induce the Court of Bankruptcy, under circumstances, to injoin the creditor from proceeding at law (*s*), or to make him discharge the bankrupt out of custody before the petition can be entertained (*t*). Where the plaintiff, after being nonsuited, took out a fiat against the

Proceedings after proof.

What not an election.

Where fiat taken out nonsuit.

(*h*) *Gelkie* v. *Hewson*, 5 Scott, N. R., 484; 4 M. & G. 618: *Woodward* v. *Meredith*, 13 Law J., N. S., 332, Q. B., where the debt was proved, but not the costs.

(*i*) *Watson* v. *Mados*, 1 B. & Ald. 121: *Harley* v. *Greenwood*, 5 Id. 95: *Dally* v. *Wolferston*, 3 D. & R. 271: *Ex p. Butterill*, 1 Atk. 109: *Ex p. Matthews*, 3 Atk. 817.

(*j*) *Bridgett* v. *Mills*, 12 Moore, 92.

(*k*) *Ex p. Glover*, 1 Glyn & J. 271: *Ex p. Edwards*, 1 Mon. & M'A. 129: *Ex p. Sly*, 2 Glyn & J. 173: *Ex p. Edwards*, 1 Mon. & M'A. 116: *Ex p. Schlesinger*, 2 Glyn & J. 392.

(*l*) *Adams* v. *Bridger*, 8 Bing. 314; 1 M. & Scott, 438. S. C.: *Ex p. Woolley*, 1 Rose, 394: *Ex p. Glover*, 1 Glyn & J. 271: *Ex p. Frith*, Id. 165.

(*m*) *Augarde* v. *Thompson*, 2 M. & W. 617: *Thompson* v. *Percival*, 5 B. & Ad. 925. And see *ante*, 826, as to the plaintiff discontinuing without payment of costs, where the defendant pleads his bankruptcy and certificate *puis darrein continuance*.

(*n*) *Kemp* v. *Potter*, 6 Taunt. 549.

(*o*) *Woodward* v. *Meredith*, *supra*: *Berley* v. *Greenwood*, 5 B. & Ad. 95. But see *Ramsford* v. *Barry*, 7 Dowl. 807.

(*p*) *Ex p. Ward*, 1 Atk. 153.

(*q*) *Ex p. Irving*, Buck, 423.

(*r*) *Ex p. Cross*, 2 Glyn & J. 100.

(*s*) *Ex p. Bonnemett*, 1 Rose, 181: *Ex p. Hardinburgh*, Id. 204. And see *Ex p. Joseph*, Id. 184: *Ex p. Dickson*, Id. 93.

(*t*) See *Ex p. Blagden*, 1 Glyn & J. 178: *Ex p. Lord*, 2 Rose, 422; and see further, Arch. Bkt. L. 189, 190.

defendant, the Court refused to allow the proceedings to be stayed without costs under the above enactment (*v*).

Staying proceedings where defendant has obtained his certificate.

Staying Proceedings where Defendant has obtained his Certificate.]—If the defendant obtain his certificate after action brought, and be unable to plead it *puis darrein continuance*, the Court will, upon motion, stay the proceedings in the action (*x*). The affidavit in support of such a motion should state that the certificate has been duly inrolled (*y*).

Costs.

Costs.]—By 6 *G.* 4, *c.* 16, *s.* 44, in every action brought against any person for anything done in pursuance of that act, if there be a verdict for the defendant, or if the plaintiff be nonsuit, or discontinue his action after appearance, or if upon *demurrer* judgment be given against the plaintiff, the defendant shall recover double costs: but see the 5 & 6 *Vict. c.* 97, *s.* 2, *post*, *Pt.* 5, *ch.* 31, repealing all provisions giving double costs, and giving a full indemnity against costs in lieu thereof. This provision does not apply to the cases of *assignees* defendants, or those acting under their authority (*z*).

See 5 & 6 *Vict. c.* 122, *s.* 19, *post*, *Pt.* 5, *ch.* 31, as to a defendant being entitled to costs, when the plaintiff does not recover the amount sworn to in his affidavit of debt filed against the defendant under this act.

Judgment.

The Judgment.]—Is the same as in ordinary cases.

Execution, &c.

Execution, &c.]—As to a *ca. sa.* against a bankrupt, and his privilege from arrest, see *Vol.* 1, 610, 637, 691. As to a *fi. fa.* see *Vol.* 1, 584. And as to an *elegit*, it is clear that a judgment obtained even before the bankruptcy of a defendant cannot be executed after it, upon lands in his *seisin* at the time of the bankruptcy (*a*). But if he had sold the lands previously to his bankruptcy, and after signing of the judgment, the plaintiff might still extend them under an *elegit* (*b*).

Liability of future estate and effects.

Formerly, if the defendant had been twice a bankrupt, and had not paid 15*s.* in the pound under his second commission, his estate and effects acquired subsequently to such commission might be taken in execution to satisfy a judgment obtained previously thereto. But by the 6 *G.* 4, *c.* 16, *s.* 127, if a person who has before been a bankrupt, and has obtained his certificate, or has compounded with his creditors, or has been discharged by an insolvent act, becomes bankrupt, and obtains his certificate, unless his estate produce (after all charges) sufficient to pay every creditor under the commission 15*s.* in the pound, such certificate will only protect his *person* (*c*) from arrest and imprisonment; but his *future* estate and effects (except his tools of trade, and necessary household furniture, and the wearing apparel of himself, his wife, and children) will rest in *the assignees* under the commission, who will be entitled

(*v*) *Ellis* v. *Nokes*, 4 M. & Scott, 868; 1 Bing. N. C. 69; 2 Dowl. 880, *S. C.*

(*x*) *Sharp* v. *D'Almaine*, 8 Dowl. 664: *Sadler* v. *Conner*, 7 Bing. 769; 5 Moo. & P. 788, *S. C.*; 6 G. 4, c. 16, ss. 121, 126; 5 & 6 Vict. c. 122, s. 42.

(*y*) *Sharp* v. *D'Almaine*, *supra*. See *post*, 1108.

(*z*) *Worth* v. *Bubb*, 2 B. & Ad. 177; 1 Dowl. 328, *S. C.*; *Carruthers* v. *Payne*, 5 Bing. 270; 2 Moo. & P. 429, *S. C.* See *Edge* v. *Parker*, 8 B. & C. 697, as to what cases are not within the first part of the 44th section of 6 G. 4, c. 16, as to the limitation of actions.

(*a*) See Tidd, 936; 1 P. Wms. 739.

(*b*) Tidd, 936.

(*c*) See *Carew* v. *Edwards*, 2 Dowl. 613.

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to seize the same in like manner as they might have seized property of which such bankrupt was possessed at the issuing of the commission. It has been held, that, as this section protects the person of the bankrupt, and vests the property in the assignees under the commission, no action will lie against the bankrupt for a debt due prior to the second (*e*). The bankrupt, notwithstanding this section, has a right to such future estate and effects as against all the world but his assignees (*f*). The above 127th section does not apply where both bankrupteies and certificates were prior to the passing of the statute (*g*). But it does apply if the second certificate was subsequent to the 2nd May, 1825, when the act took effect as to certificates (*h*).

Discharge on obtaining certificate.

By the 5 & 6 *Vict. c.* 122, *s.* 42, if any bankrupt who has obtained a certificate of conformity, as mentioned in this act, which has been confirmed, shall be taken in execution or detained in prison for any debt, claim, or demand provable under the fiat, when judgment has been obtained before the confirmation of his certificate, it shall be lawful for any judge of the court wherein judgment has been so obtained, on such bankrupt producing his certificate, to order any officer who shall have such bankrupt in custody by virtue of such execution, to discharge such bankrupt without exacting any fee, and such officer is thereby indemnified for so doing (*i*). In order to obtain such a discharge, *take out a summons before a judge, and after that* (*if not attended to*) *a second summons; and upon producing the certificate, which must have been duly inrolled* (*j*), *and an affidavit that the debt accrued before the bankruptcy, that the certificate has been obtained without fraud, and that it has been duly inrolled* (*k*), *the judge will make an order for the defendant's discharge.* The rule or order should be drawn up on reading the inrolment (*l*). The bankrupt will be entitled to his discharge though the judgment was signed on a *cognovit* (*m*).

Certificate under Irish commission.

A certificate obtained by a bankrupt under an Irish commission, issued against him under the 6 & 7 *W.* 4, *c.* 14, has the same effect upon his liabilities in this country as a certificate obtained by him under an English fiat of bankruptcy, and *vice versâ* (*n*).

Other points as to.

Other Points as to.]—As to proceedings against members of Parliament subject to the bankrupt laws, see *ante*, 1035; and against traders subject to the bankrupt laws, *post*, 1125. By stat. 3 & 4 *W.* 4, *c.* 42, *s.* 9, *ante*, 815, in the case of a joint demand, where one of the parties has become bankrupt and obtained his certificate, there is no occasion to join him in the action as a defendant.

(*e*) *Eike* v. *Nokes*, 1 M. & M. 303. And see *Robertson* v. *Score*, 3 B. & Ad. 338.

(*f*) See *Herbert* v. *Sayer*, 2 D. & L. 49: *Fyson* v. *Chambers*, 9 M. & W. 460: *Young* v. *Rushworth*, 8 Ad. & E. 470: *Mackay* v. *Wood*, 9 Dowl. 278.

(*g*) *Benjamin* v. *Belcher*, 11 A. & E. 350: *Carew* v. *Edwards*, 4 B & Ad. 351: *Ex p. Hawley*, 2 Mont. & Ayr. 426; *Baggaley* v. *Nicholls*, 11 A. & E. 366, n. And see the numerous cases cited in the first of the above cases.

(*h*) *Benjamin* v. *Belcher*, *supra*: *Robertson* v. *Score*, 3 B. & A. 338: *Elston* v. *Braddick*, 2 Cr. & M. 435: *Young* v. *Rushworth*, 8 A. & E. 470: *Butler* v. *Hobson*, 4 N. C. 296; 5 N. C. 128.

(*i*) See Vol. 1. p. 610: *Hanson* v. *Blakey*, 1 M. & P. 281; 4 Bing. 483, *S. C.*: *Lester* v. *Mandell*, 1 B. & P. 427. The 126th section of the 6 G. 4, c. 16, is similar to the above 42nd sect. of 5 & 6 Vict. c. 122.

(*j*) *Sharp* v. *D'Almaine*, 3 Dowl. 624: *Osborne* v. *Williamson*, 1 M. & W. 556.

(*k*) See *Jacob* v. *Phillips*, 2 Dowl. 716: *Sharp* v. *D'Almaine*, 3 Dowl. 624.

(*l*) *Osborne* v. *Williamson*, *supra*.

(*m*) *Oswald* v. *Williams*, 5 Dowl. 158.

(*n*) 6 & 7 W. 4, c. 14, s. 144: *Fergusson* v. *Spencer*, 2 Scott, N. R., 228. And see *Tronson* v. *Calkin*, 1 Hudson & Brooke, 113, (K. B., Ireland); and *Bayne* v. *Love*, 1 Hudson & Brooke, 494, n. (Exch., Ireland).

CHAPTER XIII.

ACTIONS BY AND AGAINST IDIOTS OR LUNATICS.

Arrest of.

Idiots and lunatics may be held to bail, and arrested, in the same manner and under the same circumstances as other persons; and the court will not discharge them out of custody on account of their insanity (*a*), even although the fact of their insanity have been established by a commission of lunacy previously to the arrest (*b*). Nor will the court allow an *exoneretur* to be entered on the bail-piece, merely on account of the insanity of the principal (*c*); but the bail must render him in their discharge (*d*). It would seem that they may be arrested or detained on a *ca. sa.*

Proceedings, &c. by or against idiots.

An idiot plaintiff must appear in person, and then any one who prays to be admitted as his friend to sue for him may be allowed to do so (*e*). So, if defendant, he must appear in person, and any one who can make a better defence may be admitted to defend for him (*e*). Where a plaintiff had been delirious, and, on apparently recovering, he brought an action against his bankers to recover money belonging to him in their hands, the Court would not oblige him to give an indemnity to them, on payment by them to him of the sum for which the action was brought (*f*).

By lunatics.

A lunatic sues and defends in the same manner as other persons: if of age, either in person or by attorney (*g*); if under age, he must sue by *prochein amy* or guardian, and defend by guardian, as mentioned *ante*, 1088, 1092.

Distringas against.

Where the defendant was confined in a lunatic asylum, and the party employed to serve the *distringas* went to the asylum on three several occasions, and saw the keeper, who refused to let him see the defendant, for the purpose of serving him with a writ, and told him that such was the rule of the establishment, and that if he called twenty times he would not be permitted to see the defendant, and, on the last occasion, such party left a copy of the *distringas* with the keeper; the Court directed that an appearance should be entered for the defendant, on production to the Master of an affidavit of notice to the keeper, of the plaintiff's intention to enter an appearance for the defendant, and that he should proceed thereon to judgment and execution (*h*). The Court granted a *distringas* to compel an appearance, where, on application, on two occasions, at the residence of the defendant, who was a lunatic, the deponent was informed that he could see neither the defendant nor the keeper;

(*a*) *Nutt* v. *Verney*, 4 T. R. 121: *Kersant* v. *Norman*, 2 Id. 390.
(*b*) *Ante*, Vol. 1, p. 641: *Steel* v. *Alan*, 2 B. & P. 362.
(*c*) *Ante*, Vol. 1, p. 797: *Ibotson* v. *Lord Galway*, 6 T. R. 133.
(*d*) *Ante*, Vol. 1, p. 782.
(*e*) *Beverley's case*, 4 Co. 124. See Co. Litt. 135; and *ante*, Vol. 1, p. 64.
(*f*) *Hope* v. *Watson*, 2 Leg. Obs. 413, per Pattesen, J.; Tidd, New Pract., 265.
(*g*) *Beverley's case*, 4 Coke, 124: *Humphreys* v. *Griffiths*, 6 M. & W. 89, per *Parke*, B.
(*h*) *Humphreys* v. *Griffiths*, 6 M. & W. 89. See *Spiller* v. *Benson*, 12 M. & W. 425; 1 D. & L. 650, *S. C.*: *Dotson* v. *Warne*, 1 Dowl., N. S., 848: *Lambert* v. *Hayward*, 2 D. & L. 406: *Jones* v. *Evans*, 8 Dowl. 425: *Rawson* v. *Moss*, 8 Dowl. 412; 6 M. & W. 420, *S. C.*: *Starkie* v. *Skilbeck*, 6 Dowl. 54.

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the deponent, on the last occasion, having explained the purpose of his visit, and left a copy of the writ with the servant (*i*).

Right to sue in lunatic's name.

The wife of a lunatic, who has no committee, has, it seems, a sufficient implied authority to sue in his name for debts due to him (*k*); or to apply for his discharge under the Small Debtors Act (*l*); and it seems, that, where no committee have been appointed, any person, the next friend of a lunatic, may bring an action for him, or defend one.

Error.

As to the limitation of a writ of error, see *ante*, *Vol.* 1, 476.

Ejectment.

As to the service of an ejectment in case of lunacy, see *ante*, 928.

(*i*) *Bamfield* v. *Darell*, 2 D. & L. 4; 13 Law J., N. S., 202, Q. B., *S. C.*

(*k*) *Rock* v. *Slade*, 7 Dowl. 22. The Court ordered the amount of the debt to be paid into court, and all proceedings stayed till further order; and afterwards, on application by the wife, ordered the money to be paid out to her, observing that their rule would sufficiently protect the defendant from any future proceeding.

(*l*) *Clay* v. *Bowler*, 6 Nev. & M. 814.

CHAPTER XIV.

ACTIONS AGAINST JUSTICES OF PEACE, CONSTABLES, REVENUE OFFICERS, &c.

Limitation of action.

Limitation of Action.]—Actions against justices of peace (*a*) for anything done by them in the execution of their office (*b*), or against constables, headboroughs, or other persons acting by their orders or in their aid, must be commenced within six calendar months after the cause of action has accrued (*c*). The six months are to be reckoned exclusive of the day of committing the act (*d*); for instance, if the imprisonment or cause of action ends on the 14th of December, it is a sufficient commencement of the action if the writ issue on the 14th of June (*e*). In case of a continuing imprisonment, a justice is liable to answer for such part of it suffered under his warrant as was within six calendar months before the action commenced (*f*). In case of an action for a distress for church-rate, the three months limited for bringing the action are to be reckoned from the time at which the distress was sold (*g*).

Against justices, constables, &c.

Against police magistrates.

An action brought against one of the magistrates of the police courts of the metropolis for anything done in pursuance of the 10 *G.* 4, c. 44, and 2 & 3 *Vict. c.* 71, though within the ordinary province of a county justice (*h*), must be commenced within three calendar months after the act committed, and the *venue* must be laid in the county of Middlesex.

Special constables.

By 1 & 2 *W.* 4, *c.* 41, *s.* 19, intituled "An Act for amending the laws relative to the appointment of special constables, and for the better preservation of the peace," all actions to be commenced against any person for anything done in pursuance of this act, shall be commenced within six calendar months after the fact committed, and not otherwise &c. (*i*)

Against officers of Excise and Customs, &c.

By the 3 & 4 *W.* 4, *c.* 53, *s.* 107, any action or suit against any officer of the army, navy, marines, customs, or excise, or against any person acting under the direction of the commissioners of his Majesty's customs, for anything done in the execution of or by reason of his office, must be brought or commenced within six (*k*) months next after the cause of action shall have arisen (*l*), and not afterwards (*m*).

(*a*) See fully, Burn's J., 29th ed., tits. "Justices," "Constables."

(*b*) See cases cited in note (*n*), *infra*.

(*c*) 24 G. 2, c. 44, s. 8. And see 7 & 8 G. 4, c. 29. s. 75; 7 & 8 G. 4, c. 30, s. 41. See the former statute and cases cited in Burn's J., 29th ed., tits. "Justice," "Constable."

(*d*) *Clarke* v. *Darcy*, 4 Moore, 465.

(*e*) *Hardy* v. *Ryle*, 9 B. & C. 603; 4 M. & R. 285; *ante*, 130.

(*f*) *Massey* v. *Johnson*, 12 East, 67.

(*g*) *Collins* v. *Rose*, 5 M. & W. 194; 7 Dowl. 796, *S. C.*

(*h*) See *Hazeldine* v. *Grove*, 3 Q. B. 997; 3 G. & D. 210; 12 Law J., N. S., 54, M. C., *S. C.*

(*i*) See *Jones* v. *Nicholls*, 2 D. & L. 425.

(*k*) See *Crook* v. *M'Tairsh*, 1 Bing. 347; 8 Moore, 265, *S. C.*

(*l*) See *Saunders* v. *Saunders*, 2 East, 254; *Godin* v. *Ferris*, 2 H. Bl. 14.

(*m*) See 6 G. 4, c. 108, s. 97; 7 & 8 G. 4, c. 53, s. 115; 28 G. 3, c. 27, s. 23.

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Notice of action, &c. against justices.

Notice of Action, Demand of Warrant, &c.]—Before an action can be commenced against a justice of peace (*n*) for anything done (*o*) by him in the execution of his duty (*p*), the attorney or agent for the plaintiff (*q*) must, one calendar month (*r*) at least previously to his suing out any writ against any such justice, or causing him to be served with process, deliver to him a notice in writing of such intended writ, &c., or leave such notice at his usual place of abode; in which notice the cause of action shall be clearly and explicitly stated (*s*) and the name of such attorney or agent, and his place of abode shall be indorsed thereon (*t*); and the attorney or agent shall be entitled to the fee of 20*s.* for preparing and serving such notice, and no more. And if the plaintiff fail to prove such notice at the trial, the justice shall recover a verdict and costs (*u*); and the plaintiff shall not give evidence of any cause of action except that mentioned in the notice (*x*). It seems that a magistrate is not within the protection of this clause unless he *bonâ fide* believed that the act complained of was done by him in the execution of his duty as a magistrate, and had reasonable ground for such belief (*y*). Whether the magistrate acted *bonâ fide* is a question for the jury, and the plaintiff, if he contend that the magistrate did not so act, should demand at the trial that the question of *bona fides* be put to the jury (*z*). Where the act in question has not been done in the capacity of a justice, and cannot be referred to that character, notice is not required (*a*). Thus, it is not required in an action against a justice for not being duly qualified (*b*). And a party making a wrongful distress for two causes, as to one of which he is entitled to notice of action, is nevertheless liable in trespass as to the other (*c*). The statute extends only to

(*n*) See the 24 G. 2, c. 44. And as to who is a justice within it, see *Jones* v. *Williams*, 3 B. & C. 762; 5 D. & R. 654, *S. C.*: *Morgan* v. *Palmer*, 2 B. & C. 729: *Briggs* v. *Evelyn*, 2 H. Bl. 114: *Entinck* v. *Carrington*, 2 Wils. 275; 3 Burn's J., tit. "Justice," 29th ed. As to notice of action against metropolitan police magistrates, see 2 & 3 Vict. c. 71, s. 53.

(*o*) *Wright* v. *Horton*, Holt, C. N. P., 458. See *Fletcher* v. *Greenwood*, 1 Gale, 34: *Charlesworth* v. *Rudgard*, 1 Gale, 42.

(*p*) What acts entitle a justice to this notice, see 3 Burn's J., tit. "Justice," 29th ed., and cases there collected; Rose. 475: *Basheay* v. *Sides*, 9 B. & C. 909: *Parton* v. *Williams*, 3 B. & Ald. 330: *Wedge* v. *Berkeley*, 1 Nev. & P. 665: *Hazeldine* v. *Grove*, 3 Q. B. 997; 3 G. & D. 210, *S. C.*

(*q*) As to notice of action by an attorney for an infant, see *De Goudesnie* v. *Lewis*, 2 Per. & D. 283.

(*r*) See 5 & 6 Vict. c. 97, s. 4; *post*, 1115. The statute 5 & 6 W. 4. c. 50, s. 109, (the Highway Act), requiring twenty-one days' notice of action against justices or others for anything done under that act, does not impliedly repeal the privilege of a justice of the peace to have a month's notice under the above act. (*Rix* v. *Burton*, 12 A. & E. 470).

(*s*) As to the form of such notice, see 3 Burn's J., tit. "Justice," 29th ed., and cases there collected; Chit. Forms. 517. It need not state the form of the action, it is sufficient to state the cause of it: *Prickett* v. *Gratrex*, 15 Law J., N. S. 145, M. C. It must specify the place at which the act complained of occurred. (*Martin* v. *Upcher*, 3 Q. B. 662). It is not enough that it names the day. (*S. C.*) The omission is not cured by the magistrate pleading a tender of amends under sect. 2. (*S. C.*) See *Jones* v. *Nicholls*, 2 D. & L. 426; 13 M. & W. 361, *S. C.*: *Breese* v. *Bradley*, 2 G. & D. 720.

(*t*) As to the indorsements, &c., see 3 Burn's J., 29th ed., tit. "Justices." See *Morgan* v. *Leech*, 10 M. & W. 582; 2 Dowl., N.S., 522; 12 Law J., N. S., M.C., 4, where the notice was signed by the plaintiff himself, but indorsed by his attorney, and it was held that the notice was sufficient, the indorsement by the attorney being all the statute requires.

(*u*) 24 G. 2, c. 44, s. 3.

(*x*) Id. 55.

(*y*) *Cann* v. *Clipperton*, 10 A. & E. 582: *Rudd* v. *Scott*, 2 Scott, N. R., 631: *Hazeldine* v. *Grove*, *supra*: *Thomas* v. *Williams and Bowyer*, 1 D. & L. 694. And see *Wedge* v. *Berkeley*, 1 Nev. & P. 665.

(*z*) *Hazeldine* v. *Grove*, *supra*, n. (*t*).

(*a*) *James* v. *Saunders*, 10 Bing. 625; 4 Moo. & Scott, 316, *S. C.*: *Morgan* v. *Palmer*, 2 B. & C. 729: *Lind* v. *Bell*, Peake, 35. And see *Lidster* v. *Borrow*, 9 A. & E. 654.

(*b*) *Wright* v. *Horton*, Holt, 433.

(*c*) *Lamont* v. *Southall*, 5 M. & W. 416; 7 Dowl. 469, *S. C.*

actions of tort (*d*). In the computation of the calendar month's notice, both the day of giving the notice and the day of suing out the writ are to be excluded (*e*). The notice need not be served by the attorney himself (*f*). A tender of amends by the magistrate, or any other act by him, does not waive the necessity of serving and proving the notice (*g*).

Against officers of Customs, Excise, &c.

By the 3 & 4 *W.* 4, *c.* 53, *s.* 103, "no writ shall be sued out against, nor a copy of any process served upon, any officer of the army, navy, marines, customs, or excise, or against any person acting under the direction of the commissioners of his Majesty's Customs, for any thing done in the execution of or by reason of his office (*h*), until one calendar month (*i*) next after notice in writing shall have been delivered to him, or left at his usual place of abode, by the attorney or agent for the party who intends to sue out such writ or process as aforesaid, in which notice shall be clearly and explicitly contained the cause of action (*j*), the name and place of abode of the person who is to bring such action, and the name and place of abode (*k*) of the attorney or agent; and that a fee of 20*s.* shall be paid for the preparing or serving of every such notice, and no more." And by the 104th section of this act, it is provided, "that no plaintiff, in any case where an action shall be grounded on any such act done by the defendant, shall be permitted to produce any evidence of the cause of such action, except such as shall be contained in the notice to be given as aforesaid, or shall receive any verdict against such officer or person, unless he shall prove on the trial of such action that such notice was given; and, in default of such proof, the defendant in such action shall receive a verdict and costs as aforesaid" (*l*). Notice of action under this statute by an infant to an officer of the customs may be given by his *prochein amy*, although he may not be the *prochein amy* on the record (*m*).

Against constables, &c., under 7 & 8 G. 4, c. 29.

Before any action can be brought against the constable or other officer or person for anything done in pursuance of the 7 & 8 *G.* 4, *c.* 29, or 7 & 8 *G.* 4, *c.* 30, notice in writing, and of the cause thereof, must be given to the defendant one calendar month (*n*) at least before the commencement of the action; and the officer, &c. may tender amends &c. (*o*) A party, to entitle himself to a notice of action under these acts, must not only *bonâ fide* believe that he is acting under them, but must have reasonable ground for such belief (*p*).

Special constables.

The 1 & 2 *W.* 4, *c.* 41, *s.* 19, *ante*, 1111, requires that "notice in writing of such cause of action shall be given to the defendant one calendar month (*q*) at the least before the commencement of the action" (*r*).

(*d*) Bull. N. P. 24.

(*e*) *Young* v. *Higgon*, 6 M. & W. 49; 1 Dowl. 212, *S. C.*, overruling *Castle* v. *Burdis*, 3 T. R. 623.

(*f*) *Morgan* v. *Leach*, *supra*, n. (*f*).

(*g*) *Mercins* v. *Upgather*, 1 Dowl., N. S., 332; 2 Q. B. 692, *S. C.*

(*h*) See *Daniel* v. *Wilson*, 5 T. R. 1: *Rex* v. *Brain*, 1 B. & P. 127: *Newton* v. *Miller*, 2 Chit. Rep. 149.

(*i*) See 5 & 6 Vict. c. 94, s. 4; *post*, 1114.

(*j*) See n. (*f*), *supra*.

(*k*) It will be observed, that the statute requires the statement of the plaintiff's place of abode, and not of his business.

(See *Johnson* v. *Lord*, 1 M. & M. 444).

(*l*) See 28 G. 3, c. 37, ss. 23—27; 7 & 8 G. 4, c. 53. ss. 114—119; 6 G. 4, c. 108, ss. 93, 94. See the form of the notice, Chit. Forms, 518.

(*m*) *De Goudouin* v. *Lewis*, 10 A. & E. 117.

(*n*) See 5 & 6 Vict. c. 97, s. 4, *post*, 1114.

(*o*) 7 & 8 G. 4, c. 29, s. 75; 7 & 8 G. 4, c. 30, s. 41.

(*p*) See *ante*, 1112.

(*q*) See 5 & 6 Vict. c. 97, s. 4; *post*, 1114.

(*r*) See *Jones* v. *Nicholls*, 2 D. & L. 425; 13 M. & W. 361, *S. C.*

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Uniformity of notice of action.

By the 5 & 6 *Vict. c.* 97, *s.* 4, from and after the 10th of August, 1842, in all cases where notice of action is required, such notice shall be given *one calendar month* at least before any action shall be commenced; and such notice of action shall be sufficient, any act or acts to the contrary thereof notwithstanding.

Demand of warrant.

Also, when an action is intended to be brought against a constable or other officer (*s*), or any person acting by his order or in his aid, for anything done by him in obedience to a warrant under the hand and seal of a justice of peace (*t*), a demand in writing of the perusal and copy of such warrant, signed by the party demanding the same, (or by his attorney) (*u*), must be made, or left at the usual place of abode of such constable or officer (*v*), by the plaintiff or his attorney or agent; and if the perusal (*x*) and copy of the warrant be not granted within six days after being thus demanded, (or before the action has been commenced (*y*)), the plaintiff may bring his action against the constable or other officer alone; but if such perusal and copy be granted, then, if the plaintiff sue the constable, &c., without making the justice also a party, upon proof of the warrant at the trial, the jury shall give a verdict for the defendant, notwithstanding any defect of jurisdiction (*z*) in the justice who made the warrant. Or if the action be brought jointly against the justice and such constable, &c., then, upon proof of the warrant, the jury shall find a verdict for such constable; but if they find a verdict also against the justice, he shall pay to the plaintiff as well his costs in the action, as also such costs as the plaintiff may have been obliged to pay to the other defendant (*a*). It may be as well to mention, that this relates to actions of trespass and on the case only (*b*), and not to *assumpsit* (*c*), replevin (*d*), or the like. If the constable do any act not authorised by the warrant, an action may be brought against him for it without making any demand (*e*). It seems that it is of no importance if the demand require the perusal of the warrant within a less time than six days (*f*).

Declaration. Venue.

Declaration.]—The *venue* must be laid in the county in which the facts complained of were committed, in all actions of trespass or on the case, against justices of peace, mayors or

(*s*) See the statutes and cases in 1 Burn's J., tit. "Constable," 29th ed.: *Harper* v. *Carr*, 7 T. R. 270; Bull. N. P. 24: *Entick* v. *Carrington*, 2 Wils. 275. It extends to gaolers, 1 Gow, Rep. 97.

(*t*) See 1 Burn's J., tit. "Constable," 29th ed.: *Sturch* v. *Clarke*, 4 B. & Ad. 113: *Price* v. *Messenger*, 2 B. & P. 158; 3 Esp. 96, *S. C.*: *Postlethwaite* v. *Gibson*, 3 Esp. 226: *Money* v. *Leech*, 3 Burr. 1742: *Milton* v. *Green*, 5 East, 233: *Caupey* v. *Henley*, 2 Esp. 542, n.: *Anon.*, 1 Str. 446: *Bell* v. *Oakley*, 2 M. & Sel. 259: *Theobald* v. *Crichmore*, 1 B. & Ald. 227: *Parton* v. *Williams*, 3 Id. 330.

(*u*) 1 Burn's J., tit. "Constable," 29th ed.: *Jory* v. *Orchard*, 2 B. & P. 42. See the form, Chit. Forms, 518.

(*v* See *Clarke* v. *Davey*, 4 Moore, 465; 1 Burn's J., 29th ed., tit. "Constable."

(*x*) The defendant may by his conduct dispense with the perusal of the warrant. (*Atkins* v. *Kilby*, 11 A. & E. 777; 4 P. & D. 145, *S. C.*)

(*y*) *Jones* v. *Vaughan*, 5 East, 445.

(*z*) See *Atkins* v. *Kilby*, 11 A. & E. 777; 4 P. & D. 145, *S. C.* And see *Peppercorn* v. *Hoffman*, *infra*.

(*a*) 24 G. 2, c. 44, *s.* 6.

(*b*) *Lyons* v. *Gulding*, 3 C. & P. 586.

(*c*) Bull. N. P. 24.

(*d*) *Fletcher* v. *Wilkins*, 6 East, 283: *Waterhouse* v. *Keene*, 4 B. & C. 211; 6 D. & R. 257, *S. C.* And see per *Tindal*, C. J., in *Merrell* v. *Martin*, 8 Scott, 705.

(*e*) *Peppercorn* v. *Hoffman*, 9 M. & W. 618: *Hoye* v. *Bush*, 2 Scott, N. R., 86; 1 Man. & G. 775, *S. C.*, where the defendant, under a warrant for the arrest of J. H., arrested R. H.

(*f*) *Collins* v. *Rose*, 5 M. & W. 194; 7 Dowl. 796, *S. C.*

bailiffs of cities or towns corporate, headboroughs, portreeves, constables, tithing-men, churchwardens, &c., or other persons acting in their aid or by their command (*g*), and in actions against officers of the customs (*h*) or excise (*i*), or persons acting in their aid, for anything done in execution of their respective offices. And the same in actions against all other persons holding a public employment, civil or military, in or out of this kingdom, having thereby authority to commit to safe custody; or if the fact be committed out of the kingdom, the plaintiff may lay the matter as having been done at Westminster, or in the county in which the defendant shall then reside (*k*). The declaration is in form the same as in ordinary cases. It must substantially correspond with the notice of action, where such notice has been given and was necessary.

Should agree with notice.

The *venue* in an action against a police magistrate for any thing done by him in pursuance of the 2 & 3 *Vict. c.* 71, and 10 *G.* 4, *c.* 44, must be laid in the county of Middlesex, though the act be within the ordinary province of a county justice (*l*).

Police magistrates.

By the 1 & 2 *W.* 4, *c.* 41, (*ante*, 1111, 1113), all actions to be commenced against any person for anything done in pursuance of this act, shall be laid and tried in the county where the fact was committed (sect. 19).

Special constables.

Plea and other Proceedings, &c.]—By several statutes, in actions against justices of peace, constables, &c., officers of excise and customs, &c., and all other persons holding public employments, and having authority to commit to safe custody, as above mentioned, for anything done by them in execution of their respective offices, the defendants are not bound to plead any matter of justification, &c. specially, but may give it in evidence under the *general issue* (*m*). The words "by statute" should be inserted in the margin of the plea, otherwise it will have only the same effect as in ordinary cases (*n*). The defendant may be compelled by judge's order to give a particular of the statute or statutes referred to (*o*). Where a person is not an officer within the meaning of these enactments, though he may have supposed he was so, he is not within the protection given by them (*p*).

Plea and other proceedings, &c.

Justices of peace (*q*), and officers of the customs and excise (*r*), and constables and other officers and persons acting under the 7 & 8 *G.* 4, *c.* 29, or 7 & 8 *G.* 4, *c.* 30 (*s*), and some other statutes, may *tender amends* before action brought, and plead such tender, together with the general issue or other plea,

Tender of amends and payment into court.

(*g*) 21 J. 1, c. 12, s. 5; 7 & 8 G. 4, c. 29, s. 75; c. 30, s. 41. See *Holton* v. *Boldero*, cited *per Curr.*, 5 Bing. 339.

(*h*) 6 G. 4, c. 108, s. 97; 3 & 4 W. 4, c. 53, s. 107.

(*i*) 7 & 8 G. 4, c. 53, s. 115.

(*k*) 42 G. 3, c. 85, s. 6. And see 6 G. 4, c. 108, s. 97.

(*l*) See *Hazeldine* v. *Grove*, 3 Q. B. 997; 3 G. & D. 210, *S. C.*

(*m*) 21 J. 1, c. 12, s. 5; 7 & 8 G. 4, c. 29, s. 75; c. 30, s. 41; 42 G. 3, c. 85, s. 6; 6 G. 4, c. 108, s. 97; 7 & 8 G. 4, c. 53, s. 115; 3 & 4 W. 4, c. 53, s. 107. See 1 Burn's J., titles "Constables," "Justices," 29th ed. See *Ratcliffe* v. *Murray*, Car. & M. 513, where constables acted out of their jurisdiction.

(*n*) R. T., 1 Vict., *ante*, Vol. 1, 946.

(*o*) *Post*, Pt. 5, Ch. 14.

(*p*) *Copland* v. *Powell*, 8 Moore, 400; 1 Bing. 369, *S. C.*: *Jones* v. *Williams*, 3 B. & C. 762; 5 D. & R. 654, *S. C.*

(*q*) 24 G. 2, c. 44, ss. 2, 4; 7 & 8 G. 4, c. 29, s. 75; 7 & 8 G. 4, c. 30, s. 41. See 3 Burn's J., tit. "Justices."

(*r*) 6 G. 4, c. 108, ss. 95, 96; 7 & 8 G. 4, c. 53, ss. 116, 117; 4 & 5 W. 4, c. 51, s. 114; 3 & 4 W. 4, c. 53, s. 105; 8 & 9 Vict. c. 87.

(*s*) 7 & 8 G. 4, c. 29, s. 75; 7 & 8 G. 4, c. 30, s. 41.

PART IV.

with the leave of the Court; or, if they have neglected to tender amends, or the tender be insufficient, they may pay money into court (even after issue joined and notice of trial given (*t*)); and such proceedings are thereupon to be had as in ordinary cases (*u*). The plea of payment into court may be in the ordinary form, and the defendant is not bound to state in it the character in which he makes the payment (*v*).

Proof of notice.

The plaintiff is bound, by the statutes above mentioned, to prove at the trial the service of the notice, otherwise the defendant shall be entitled to a verdict; and he is restricted in his proof by this notice, in the same manner as he is by a bill of particulars (*x*). No act of the magistrate can waive the necessity of proving the service of the above notice, see *ante*, 1114.

Costs. For the plaintiff.

Costs.]—If the plaintiff obtain a verdict, still, in actions against officers of the customs or excise, he shall not be entitled to costs, if the judge certify that there was probable cause for the seizure, &c. (*y*) And by the 43 *G.* 3, *c.* 141, *s.* 1, in all actions against any justice of the peace, on account of any conviction made by him under any act of Parliament, or for any act done by him for levying any penalty, or apprehending any party, or for carrying such conviction into effect, in case such conviction shall have been quashed, the plaintiff, besides the value and amount of the penalty levied upon him, (if any), shall not recover any greater damages than twopence, nor any costs, unless it be expressly alleged, in the declaration in the action, (which action shall be on the case only), that the acts complained of were done maliciously and without reasonable or probable cause (*z*). And by sect. 2, the plaintiff is not to recover any penalty or damages or costs whatsoever, in case the justice shall prove at the trial that the plaintiff was guilty of the offence for which he was convicted, and that he has undergone no greater punishment than was assigned by law for such offence (*a*). This statute only protects the magistrate where there has been a conviction quashed. But an informal one is enough, as where the warrant of commitment falsely recited an information by T. S., which was, in fact, laid by T. O. (*b*) But if, in actions against justices, constables, &c., the judge certify that the injury was "wilfully and maliciously" committed, it seems the plaintiff shall receive such full and reasonable indemnity, as to all costs, charges, and expenses incurred in or about such action or suit, or other legal proceedings, as shall be taxed by the proper officer in that behalf, subject to review, as in ordinary cases (*c*).

(*t*) *Nestor* v. *Newcomb*, 3 B. & C. 180. And *see Dawgmes* v. *Boys*, 5 Taunt. 33; 2 Marsh. 356, *S. C.*

(*u*) See *Cashburn* v. *Ball*, 2 W. Bl. 839: *Stringer* v. *Martyr*, 6 Esp. 134: *Collins* v. *Morgan*, 1 H. Bl. 244.

(*v*) *Aston* v. *Parkes*, 15 Law J., N. S., 241, Exch.

(*x*) See *Stringer* v. *Martyr*, 6 Esp. 134: *Forman* v. *Dawes*, 1 Car. & M. 127: *Johnson* v. *Lord*, 1 M. & M. 444.

(*y*) 6 G. 4, c. 108, s. 92; 7 & 8 G. 4, c. 29, s. 75; c. 30, s. 41; 7 & 8 G. 4, c. 53, s. 119. See *Laugher* v. *Bright*, 5 B. & Ald. 762; 1 D. & R. 417, *S. C.*

(*z*) See *Jones* v. *Gordon*, 11 Law J., N. S., M. C., 45; 2 Q. B. 808, *S. C.*

(*a*) 43 G. 3, c. 141. See 7 & 8 G. 4, c. 29, s. 75; 7 & 8 G. 4, c. 30, s. 41. See *Rogers* v. *Jones*, 3 B. & C. 409; 5 D. & R. 282, *S. C.*: *Gray* v. *Cookson*, 16 East, 13: *Burley* v. *Bethune*, 5 Taunt. 84.

(*b*) *Massey* v. *Johnson*, 12 East, 67.

(*c*) 24 G. 2, c. 44, s. 7. And see 5 & 6 Vict. c. 97, s. 2.

For defendant.

The defendant, if he have a verdict, or if the plaintiff be nonsuit or discontinue the action against a justice or constable, &c., is entitled to such full and reasonable indemnity, as to all costs, charges, &c., incurred in and about the action, as shall be taxed by the proper officer, subject to review, as in ordinary cases (*d*); and the same in actions against officers of customs or excise (*e*), and in actions against other persons holding public employment, civil or military, in or out of the kingdom, and having power to commit to safe custody (*f*). Where, in an action against magistrates for an act done in the performance of their duty as such, the plaintiff obtained a rule of court to remove the action to a county different from that in which it was brought, he undertaking by the rule to pay the defendants' costs of the removal, the defendants obtained a verdict, it was held that the defendants' costs of the removal were not to be doubled, under the 7 *Jac.* 1, *c.* 5, and 21 *Jac.* 1, *c.* 12 (*g*); but this might be otherwise now, under the 5 & 6 *Vict. c.* 97, *s.* 2, giving full indemnity against costs. In order to entitle a justice or officer to these full costs under these statutes, he must obtain a certificate from the judge, at or after the trial, that the action was brought against him as such justice or officer, for something done by him in the execution of his duty (*h*). And it has been held, that a certificate that the defendant was churchwarden, and acted by virtue of his office, to entitle him to double costs under the statute 7 *J.* 1, *c.* 5, (before the 5 & 6 *Vict. c.* 97, *s.* 2), need not be granted immediately after the trial; and where the plaintiff was nonsuited, it was considered that the judge before whom the cause was tried might, after an interval of four years, upon an affidavit that the defendant was within the provisions of the statute, grant a certificate to entitle him to double costs (*i*). Where a constable appointed under the Municipal Corporation Act, 5 & 6 *W.* 4, *c.* 76, is sued for an act done in the exercise of his general duty as a constable, and the plaintiff discontinues, the defendant is entitled to full costs under the 21 *J.* 1, *c.* 12, *s.* 5, and 5 & 6 *Vict. c.* 97, *s.* 2, and not merely to costs as between attorney and client under the 5 & 6 *W.* 4, *c.* 76, *s.* 133 (*k*).

Metropolitan, &c., police magistrates.

As to costs in actions against magistrates, &c., acting under Metropolitan Police Acts, see 10 *G.* 4, *c.* 44, *s.* 41 (*l*); 2 & 3 *Vict. c.* 71, *s.* 53.

(*d*) 7 J. 1, c. 5; 21 J. 1, c. 12; 5 & 6 Vict. c. 97. s. 2. And see 7 & 8 G. 4, c. 29, s. 73; 7 & 8 G. 4, c. 30, s. 41: *Blanchard* v. *Bramble*, 3 M. & Sel. 131: *Mackey* v. *Goodden*, 1 Dowl. 463. See 1 Burn's J., titles "Constable," "Justices," 29th ed.

(*e*) 6 G. 4, c. 108, s. 37; 7 & 8 G. 4, c. 53, s. 115; 3 & 4 W. 4, c. 53, s. 107. And see 3 & 4 Vict. c. 97, s. 2.

(*f*) 42 G. 3, c. 85, s. 6. See 3 & 4 W. 4, c. 53, s. 107: 5 & 6 Vict. c. 97, s. 2.

(*g*) *Thomas* v. *Saunders*, 1 Ad. & El. 552.

(*h*) *Penney* v. *Slade*, 7 Scott, 494; 7 Bowl. 449: *Harper* v. *Carr*, 7 T. R. 448: *Grindley* v. *Holloway*, 1 Doug. 307, 308, n.: *Devenish* v. *Martins*, 2 Str. 974: *Johnson* v. *Stanton*, 2 B. & C. 621; 4 D. & R. 156, *S. C.*: and see *Atkins* v. *Banwell*, 3 East, 92: *Wells* v. *Ody*, 3 Dowl. 799; 2 C., M., & R. 128, *S. C.*: and *Walker* v. *Sherwin*, 6 Jur. 1126, Exch., where a verdict was taken subject to a special case.

(*i*) *Norman* v. *Dangar*, 3 Y. & J. 203; and see *Penney* v. *Slade*, *supra*.

(*k*) *Moberley* v. *Titterton*, 7 M. & W. 540. A suggestion for such costs, it seems, is not necessary.

(*l*) See *Bartholomew* v. *Carter*, 5 Scott, N. R., 498; 1 Dowl., N. S., 212, *S. C.*

CHAPTER XV.

ACTIONS AGAINST CLERGYMEN.

PART IV.

Arrest of.

CLERGYMEN are, as has been already noticed, privileged from arrest while performing divine service, and while going to church for that purpose, and returning thence (*a*). The only other peculiarity in the mode of proceeding against clergymen is in the execution, and which is as follows :—

Fieri facias de bonis ecclesiasticis.

When the sheriff, to a common *fieri facias*, returns *nulla bona*, and that the defendant is a beneficed clerk, not having any lay fee (*b*), the plaintiff may sue out a *fieri facias de bonis ecclesiasticis*, directed to the bishop of the diocese, or to the archbishop, (during the vacancy of the bishop's see), commanding him to make of the ecclesiastical goods and chattels belonging to the defendant, within his diocese, the sum therein mentioned (*c*). It is tested and returnable, and must be sealed and indorsed, in the same manner as a common *fieri facias* (*d*). Take this writ to the registrar of the diocese, who will thereupon issue a sequestration (*e*), (which is in the nature of a warrant), directed to the churchwardens, requiring them to levy the debt of the tithes and other profits of the defendant's benefice; or, instead of directing it to the churchwardens, the plaintiff, upon giving security to the bishop, may have it directed to persons of his nomination (*f*). This sequestration must be published, which is now done by affixing a copy of the sequestration, either in writing or in print, or partly in writing and partly in print, previously to the commencement of divine service on a Sunday, on or near to the doors of all the churches and chapels within the parish or place where the benefice is situated (*g*). As the writ does not begin to operate, and has priority only from the time of this publication (*h*), it should be done without delay. It has been accordingly held, that a sequestration obtained by the assignees of an insolvent incumbent, operates only from the time of publication, and does not entitle the assignees to the arrears of composition for tithes due before publication (*i*). But the property as against the defendant is, it seems, bound from the time when the sequestrator is

(*a*) *Ante*, Vol. 1, p. 691; 50 Ed. 3, c. 5; 1 R. 2, c. 16. See *Goddard* v. *Harris*, 7 Bing. 320; 5 Moo. & P. 122, *S. C.* And see 9 G. 4, c. 31, s. 23.

(*b*) See *Pickard* v. *Pacton*, 1 Sid. 276; Dalt. 219. And see the form of this return, Chit. Forms, 174.

(*c*) See 2 Bac. Abr., Execution, G. 6: *Wahoyn* v. *Awberry*, 2 Mod. 258. And see the form of the writ, Chit. Forms, 519.

(*d*) See Vol. 1, 570, &c.

(*e*) See forms, Tidd's Forms, 380.

(*f*) 3 Burn, Ecc. Law, 317; Tidd, 9th ed., 1023.

(*g*) See 7 W. 4 & 1 Vict. c. 45. See *Bennett* v. *Apperley*, 6 B. & C. 630. And see this enactment further noticed, *post*, Pt. 5, Ch. 2, tit. "Outlawry."

(*h*) *Wait* v. *Bishop*, 3 Dowl. P. C. 234; 1 C., M., & R. 507, *S. C.*; 1 Cromp. 359; Tidd, 9th ed., 1024.

(*i*) *Waite* v. *Bishop*, 1 C., M., & R. 507; 3 Dowl. P. C. 234, *S. C.* Lodging the writ with the registrar of the bishop of the diocese does not bind the property of the incumbent from the time of such lodging. (Id. See *Wise* v. *Beresford*, 2 Con. & L. 282).

appointed, and the publication is only necessary in order to give security against conflicting rights (*k*).

Testatum, alias, &c.

If the entire debt be not levied in one diocese, the plaintiff, upon the return of the writ, may have a *testatum fi. fa. de bonis ecclesiasticis* into another diocese, for the residue (*l*); or he may have an *alias* into the same diocese.

Sequestrari facias (*m*).

Or, instead of a *fieri facias de bonis ecclesiasticis*, the plaintiff may sue out a writ of *sequestrari facias*, directed, tested, and returnable, &c., as the *fieri facias*, commanding the bishop to enter into the rectory and parish church, and to take and sequester the same, and hold them, until of the rents, tithes, and profits thereof, and of the other ecclesiastical goods of the defendant, he have levied the plaintiff's debt (*n*). It is not necessary, even for the purpose of proving the issuing of this writ, that there should be an award of it on the roll (*o*). It is in the nature of a *levari facias;* the writ first above mentioned is in the nature of a *fieri facias*. A sequestration issued on a *sequestrari facias* is a charge upon all the rents and profits, including the glebe lands of the benefice, except the parsonage-house, in which the incumbent is bound to reside, so as to disqualify him under the 18 *G.* 2, *c.* 20 (*o*).

After outlawry.

If, to a special *capias utlagatum*, the sheriff returns an inquisition, finding that the defendant had benefices but no lay fee, the court will award a writ of sequestration on reading the transcript of the outlawry and inquisition (*p*); provided the benefice be specified in the return (*q*).

Execution of.

Either of these writs is a continuing execution, that is, continuing until all that has been commanded to be levied is levied (*r*); and if the sequestration issue before the writ is returnable, it is sufficient, though it be not published till afterwards (*s*). And the plaintiff is entitled to the growing profits from time to time, though long after it is returnable, until he is satisfied the sum indorsed on the writ. If, however, it be actually returned, the bishop's authority is determined (*t*). The incumbent cannot be turned out of the parsonage-house, as he is bound to reside therein, notwithstanding any sequestration (*u*). A sequestration, as above observed, is in the nature of a *levari facias* at common law, and the party sequestering has neither *jus in rem vel in re;* the legal estate of the premises remaining in every respect as before (*x*). The sequestrator is the mere bailiff or agent of the bishop, and has no such interest in the profits as will enable him to maintain an action at law against a party who wrongfully receives them (*y*).

(*k*) Per *Bayley*, J., *Bennett* v. *Apperley*, 6 B. & C. 630.

(*l*) See the form, Chit. Forms, 522.

(*m*) See, as to the history and nature of this writ, and the character and duties of the bishop and sequestrator, Burn's Eccl. Law, tit. "Sequestration;" Gilb., Execution; Com. Dig., Ecclesiastical Persons, (D.); Bac. Abr., tit. "Execution:" *Hubbard* v. *Beckford*, 1 Hagg. Consis. Rep. 307, &c. As to a justification under a sequestration, see 1 Mod. 258; 2 Id. 254.

(*n*) See the form, Chit. Forms, 520. And see *Marsh* v. *Fawcett*, 2 H. Bl. 582.

(*o*) *Peck* v. *Turpley*, *infra*.

(*p*) *Ras* v. *Hind*, 1 Dowl. 296; 1 C. & J. 389; 1 Tyr. 347, *S. C.* And see *Ras* v. *Armstrong*, 3 Dowl. 760.

(*q*) *R.* v. *Powell*, 1 M. & W. 321.

(*r*) *Bendry* v. *Price*, 7 Dowl. 753: *Alderton* v. *St. Aulyn*, 6 M. & W. 150; 8 Dowl. 223, *S. C.* See *Moore* v. *Ramsden*, 7 A. & E. 898.

(*s*) *Bennett* v. *Apperley*, 6 B. & C. 630. See *Colebrooke* v. *Layton*, 1 Nev. & M. 384: *Cottle* v. *Warrington*, 5 B. & Ad. 447.

(*t*) *Marsh* v. *Fawcett*, 2 H. Bl. 582. See *Phillips* v. *Berkely*, 5 Dowl. 279.

(*u*) *Peck* v. *Turpley*, 9 A. & E. 468; 1 P. & D. 478, *S. C.*

(*x*) 1 P. Wms. 307.

(*y*) *Harding* v. *Hall*, 10 M. & W. 42.

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Rule to return, &c

The bishop, with reference to these writs, stands in the same situation precisely as the sheriff with reference to writs in ordinary cases, and may be ruled, and is bound to obey the orders of the Court, as to their execution, &c., in the same manner as the sheriff (*z*). The defendant has no right to have the writ returned, though he may have a return of the amount of the profits received by the sequestrator (*a*). It seems, that a return merely setting out the debtor and creditor account of the sequestrator is insufficient, but that it should be verified (*b*).

Premature return.

The sequestrator may be ordered to account before the officers of the Court (*c*). Where the writ was returned to the Court before the plaintiff's execution was satisfied, the Court granted a rule absolute in the first instance for it to be taken off the file, and sent back to the bishop, in order that he might take the return off the writ, and certify to the Court what he had done under it (*d*).

Setting aside sequestration.

On an application to set aside the sequestration of a benefice issued by the bishop, it is perhaps requisite that the bishop be made a party to the rule (*e*).

Effect of the insolvency of defendant.

The 55th section of the 1 & 2 *Vict. c.* 110, enacts, that the assignees of a clergyman shall not be entitled, as such, to the income of his benefice or curacy for the purposes of that act, but provides that they may apply for and obtain a sequestration of the profits of his benefice for payment of his debts, and that the order for their appointment in pursuance of the act shall be a sufficient warrant for granting such sequestration without any other proceedings, and that the sequestration shall be issued, as it might have been issued upon any writ of *levari facias*, on a judgment against the prisoner. Under the corresponding section in the former act, the title of the assignees to a sequestration commenced with the order of the *adjudication*, and not with the order of *appointment*, as will be the case under the present act. Under the former act it was held (*f*), that a creditor who had commenced his action after the imprisonment of the insolvent, and obtained judgment, and procured sequestration before adjudication, was entitled to priority over the assignees, who were considered to stand merely as judgment-creditors from the time of adjudication. And this, substituting appointment, for adjudication, is still the case; so that a creditor who takes care to procure sequestration before the assignees are appointed will secure the payment of his debt, so far as the profits of the benefice extend, to the prejudice of the other creditors.

Warrant of attorney, charge on benefice.

As to setting aside a warrant of attorney creating a charge on an ecclesiastical benefice, see *ante*, 860.

(*z*) *Hart* v. *Vellams*, 1 Dowl. 434.
(*a*) See *Ras* v. *Bishop of London*, 1 D. & R. 486: *Bennett* v. *Apperley*, 6 B. & C. 630; 9 D. & R. 673, *S. C.* And see *Phillips* v. *Berkely*, 5 Dowl. 279: *Harding* v. *Hall*, 10 M. & W. 42.
(*b*) *Elchin* v. *Hopkins*, 7 Dowl. 146.
(*c*) *Garston* v. *Williams*, 1 L. & T. 188.
(*d*) *Alderton* v. *St. Austyn*, 6 M. & W. 156; 8 Dowl. 223, *S. C.*
(*e*) *Bishop* v. *Hatch*, 1 A. & E. 171.
(*f*) *Bishop* v. *Hatch*, 1 A. & E. 171. See *Waite* v. *Bishop*, 1 C., M., & R. 887: *Moore* v. *Ramsden*, 7 A. & E. 904.

CHAPTER XVI.

ACTIONS BY PAUPERS.

Who admitted to sue in formâ pauperis, and in what cases.

Who admitted to sue in Formâ Pauperis, and in what Cases.]—Every poor person, who may have cause of action, shall have writs according to the nature of his case, without paying for the sealing or writing the same; and the justices shall assign him counsel and attornies, who, together with the officers of the court, shall act *gratis* (*a*). The party applying must swear that he is not worth 5*l.*, excepting his wearing apparel, and the matter in question in the cause (*b*). It is discretionary with the Court or chief justice to grant the indulgence of suing thus *in formâ pauperis*. They will not grant it in any vexatious action. And it will not be granted in a second ejectment, where the costs of a prior ejectment for the same cause are unpaid (*c*).

It is confined to the plaintiffs, and cannot be granted to a defendant in a civil action in a court of law (*d*). A person may be admitted to sue *in formâ pauperis* by *prochein amy*, and the application for this purpose may form the subject of one motion (*e*).

When admitted.

When admitted.]—The order for admission to sue *in formâ pauperis* may be granted either at the commencement of the suit, or at any subsequent period of it (*f*), even after verdict and a rule absolute for a new trial obtained (*g*). But the order has not a retrospective operation (*h*).

How admitted.

How admitted.]—The party may be admitted, either upon motion in court (*i*), or (which is the mode usually adopted) upon petition to the chief justice or chief baron of the court (*k*). *Write an affidavit to the effect above mentioned, on plain paper (k), and have it sworn by the pauper, before a judge or commissioner. Write out a petition also on plain paper, and signed by the*

(*a*) 11 H. 7, c. 12. And see 23 H. 8, c. 15, s. 2. This latter statute applies to actions of assumpsit: *Casey* v. *Tomlin*, 7 M. & W. 189; 8 Dowl. 892, *S. C.* The courts, also, by the common law, have power to admit plaintiffs to sue in *formâ pauperis*. (*Brunt* v. *Wardle*, *infra*).

(*b*) R. H., 3 & 4 J. 2, r. 1, a; Lil. Pr. Reg. 633; Tidd, 9th ed., 98.

(*c*) *Goodtitle* v. *Mayo*, Tidd, 9th ed., 98. See *Weston* v. *Withers*, 2 T. R. 511.

(*d*) *Anon.*, Barnes, 328; 16 Vin. Abr. 29, pl. 4. The Court of Exchequer may, in an information on the excise laws, allow a party to defend as pauper. (See *Attorney-General* v. *Dunning*, 2 C. & M. 393; 4 Tyr. 294, *S. C.*; *R.* v. *Wright*, Hard. 211, 253). So, on an indictment he may be allowed to defend as a pauper. (See *R.* v. *Page*, 1 Dowl. 507; *R.* v. *Wilkins*, Id. 536).

(*e*) *Bryant* v. *Wagner*, 7 Dowl. 576.

(*f*) *Casey* v. *Tomlin*, 7 M. & W. 189; 8 Dowl. 892, *S.C.*; *Brunt* v. *Wardle*, 3 M. & G. 534; 4 Scott, N. R., 188; 1 Dowl., N. S., 229, *S. C.*; *Doe Ellis* v. *Owens*, 9 M. & W. 455; 1 Dowl., N. S., 404, *S. C.*: *Fisher* v. *Roberts*, 2 Dowl., N. S., 394: *Blood* v. *Lee*, 3 Wils. 24, per *Wilmot*, C. J.: *Jones* v. *Peers*, 1 M'Clel. & Y. 582: *Morgan* v. *Eastwick*, 7 Dowl. 543. The case of *Lovewell* v. *Curtis*, 5 M. & W. 158, is overruled.

(*g*) *Hall* v. *Isse*, 2 D. & L. 610.

(*h*) See *Doe* d. *Ellis* or *Ellis* v. *Owen* or *Roe*, 10 M. & W. 514; 2 Dowl., N. S., 426, *S. C.* See *post*, 1122.

(*i*) See R. H., 3 & 4 J. 2, r. 1.

(*k*) See the form, Chit. Forms, 583.

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pauper, stating the cause of action, and praying to be admitted to sue in formâ pauperis, and that counsel and attorney (naming them) may be assigned to him (k); and at the foot of it, get counsel to subscribe his opinion shortly, that the plaintiff has good cause of action (k). Annex the affidavit to the petition; take them to the chief justice's chambers, and his clerk will thereupon make out the order (l); if moved for in court, annex the affidavit and opinion to the brief; and, afterwards, draw up the rule with one of the Masters. The rule is absolute in the first instance (m). It need not be drawn up on reading counsel's certificate, as that instrument is only for the information of the Court (n). Take this rule or order to the different offices through which you pass the proceedings, in order to avoid any demand for fees; and annex a copy of it to the declaration, (or to the next proceedings after obtaining the order, if after action), before you deliver or file it. There is a rule in the Exchequer (o) that no person shall be admitted *in formâ pauperis*, unless the attorney to be assigned, or his clerk, attend a baron with a petition for his admission, and that no counsel shall be assigned, unless such counsel only who hath certified the cause of such action and petition. In one case, on an application for leave to sue *in formâ pauperis*, without obtaining the certificate of a barrister, it was stated that the action intended to be brought was a second action; that the counsel who signed upon the former occasion was out of town, and that the applicant apprehended counsel would be unwilling to sign his certificate: the Court refused the application, thinking it prematurely made (p).

Effect of admission.

Effect of Admission.]—The order for admission extends only to the particular cause in which it is granted (q); and, if granted *pendente lite*, it has, in general, no retrospective effect (r): therefore, the plaintiff may be liable to the costs up to the time of his admission (s).

No fees, &c. payable by pauper.

After admission to sue *in formâ pauperis*, the plaintiff shall be at liberty to carry on all the proceedings without paying fees to the officers of the court, or to his counsel or attorney. But, if he afterwards have judgment in the action for more than 5*l*., the counsel, attorney, and officers are, it seems, entitled to their fees, at least to such fees as shall be allowed by the Master in taxing the costs (t); for, although they perform their several duties for the pauper gratuitously, his adversary should not be allowed to derive any advantage or benefit from that circumstance. A plaintiff suing *in formâ pauperis* is exempted from the payment of interlocutory

(k) See the form, Chit. Forms, 533.
(l) See the form, Chit. Forms, 524.
(m) *Hall* v. *Ive*, 8 Scott, N. R., 715, where the rule was granted *pendente lite*.
(n) *Bryant* v. *Wagner*, 7 Dowl. 676.
(o) R. E., 3 G. 1.
(p) *Stockdale* v. *Hansard*, 1 Jur. 355.
(q) Lib. Pr. Reg. 663. And see *Gibson* v. *M'Carty*, Hardw. 311.
(r) *Jones* v. *Peers*, 1 M'Clel. & Y. 289; where, through the laches of the defendant, it obtained a retrospective effect. (See *Blood* v. *Lee*, 3 Wils. 24).
(s) *Casey* v. *Tomlin*, 7 M. & W. 189; 8 Dowl. 892, *S. C.* And see *Doe Ellis* v. *Owens*, 9 M. & W. 455; 10 M. & W. 514; 2 Dowl., N. S., 496, *S. C.*: *Pilcher* v. *Roberts*, 2 Dowl., N. S., 394.
(t) In *James* v. *Harris*, 7 C. & P. 257, it was ruled by *Williams*, *J.*, that if the pauper obtain a verdict for more than 5*l*. the officers should be paid their court fees, and for passing the record, &c.: but *Parke*, B., in *Gougenheim* v. *Lane*, (4 Dowl. 482), expressed a doubt whether they were so entitled, though 5*l*. were recovered.

equally as of final costs (*u*). But a plaintiff suing *in formâ pauperis*, who is desirous of amending his pleadings, is not entitled to do so as a matter of right without payment of costs (*x*).

Costs as against defendant.

A pauper is entitled to costs in all cases in which other plaintiffs are entitled to them; but in no case (except where he omits to proceed to trial pursuant to notice, or an undertaking, as noticed, *post*, 1124) is he obliged to pay costs incurred after his admission, to the defendant (*y*). And a pauper is entitled to his costs from the commencement of the action, although admitted to sue in that character in the progress of it; and, therefore, the defendant cannot stay proceedings on payment of the debt only (*z*). The defendant is not even entitled to have costs of issues, on which he or his co-defendant succeeds, set off or deducted from the plaintiff's costs (*a*). But, as we have seen, *ante*, 1122, the plaintiff is liable to costs antecedent to his admission to sue *in formâ pauperis*. After a plea of payment of money into Court, in an action of assumpsit, the plaintiff obtained an order to sue *in formâ pauperis*, a judge thereupon made an order that the money should remain in Court to abide the event of the cause, unless the plaintiff would take it out in full satisfaction: the defendants having obtained the verdict, the Court ordered that the money should be paid out to them in satisfaction of their costs antecedent to the order to sue *in formâ pauperis* (*b*).

Costs between attorney and client.

It may be added, that, if a pauper be admitted to defend a suit in Chancery *in formâ pauperis*, his solicitor can only recover of him money actually paid out of pocket for the defence of the suit (*c*).

Proceedings in the cause.

Proceedings in the Cause.]—The proceedings in the cause are the same as in ordinary cases.

In what cases dispaupered or compelled to pay costs.

In what Cases dispaupered or compelled to pay Costs.]—Though an order has been made for admitting a party to sue *in formâ pauperis*, yet, if it appear that the plaintiff has no meritorious cause of action, or that he has acted vexatiously or improperly in the conduct of the suit, the Court will discharge the order, though a judge's order for that purpose must be made a rule of Court before the Court will entertain a motion to discharge it (*d*). Also, by 23 *H.* 8, *c.* 15, *s.* 2, the pauper shall not pay costs, but shall suffer such other punishment as the Court shall deem reasonable. The only punishment, however, which the court ever inflict, and this only in cases where the pauper has been guilty of very gross laches or other misbehaviour (*e*), is to dispauper him; and, when thus dispaupered, he is not liable

(*u*) *Pratt* v. *Delarue*, 10 M. & W. 509; 2 Dowl., N. S., 322, S. C.

(*x*) *Foster* v. *Bank of England*, 2 D. & L. 791.

(*y*) See 23 H. 8, c. 15. s. 2: *Rice* v. *Brown*, 1 B. & P. 30: *Blood* v. *Lee*, 3 Wils. 24.

(*z*) *Morgan* v. *Eastwick*, 7 Dowl. 543.

(*a*) *Ungenheim* v. *Lane*, 4 Dowl. 482, and the cases in the note: *Foss* v. *Racine*, 4 M. & W. 610; 7 Dowl. 203, S. C.

(*b*) *Casey* v. *Tomlin*, 7 M. & W. 189; 8 Dowl. 892, S. C.

(*c*) *Phillips* v. *Baker*, 1 C. & P. 533.

(*d*) *Hawes* v. *Johnson*, 1 Y. & J. 10.

(*e*) See *Winter* v. *Slow*, 2 Str. 878, 963: *Doe Lappingwell* v. *Trussell*, 6 East, 505. And see *Anon.*, 2 Salk. 507: *Ancell* v. *Sloman*, 8 Mod. 344. It has been said that if a pauper be nonsuit, he shall pay costs or be whipped; but this punishment does not appear to have been ever inflicted. (Tidd, 9th ed., 98). And the punishment of whipping is now abolished. (See Burn's J., 29th ed., tit. "Whipping").

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for costs previously incurred (*f*). A plaintiff cannot be dispaupered after judgment as in case of a nonsuit, because the action is then at an end (*g*).

Costs of the day.

Formerly, in order to make a pauper plaintiff pay the costs of the day, for not proceeding to trial according to notice, it was necessary that the Court should dispauper him. But now, by the *R. H.*, 2 *W.* 4, *r.* 10, "where a pauper omits to proceed to trial, pursuant to notice or an undertaking, he may be called upon by a rule to shew cause why he should not pay costs, though he has not been dispaupered." Since this rule, the pauper may be called upon to pay these costs, in the same manner as any other person; and, in order to excuse him from paying them, he must shew some strong ground. He has been made to pay them, where he withdrew his record, because he was not prepared with necessary evidence (*h*); and, in another case, where the record required amendment (*i*). So, he was made to pay them, where, in consequence of a gross mistake in his jury process, he could not enter the record in time with the marshal (*k*).

Costs of prior action.

The Court have stayed proceedings in a second action by a pauper, until the costs of a nonsuit in a former action for the same cause were paid (*l*); though there are instances in which they have refused even this (*m*).

(*f*) *Slowman* v. *Aynel*, Fortesc. 390: *Mumford* v. *Pait*, 1 Sid. 261: *Pratt* v. *Delarue*, 10 M. & W. 512, per *Abinger*, C. B.

(*g*) *Jenkins* v. *Hyde*, 6 M. & Sel. 228.

(*h*) *Facer* v. *French*, 5 Dowl. 554. See also *Gore* v. *Morphew*, 8 Dowl. 137.

(*i*) *Doe* d. *Lindsay* v. *Edwards*, 2 Dowl. 471.

(*k*) *Hodges* v. *Topliss*, 15 Law J., N. S. 195, C. P.

(*l*) *Weston* v. *Withers*, 2 T. R. 511. See *Goodtitle* v. *Mayo*, Tidd, 98.

(*m*) *Brittain* v. *Grenville*, 2 Str. 1121: *Winter* v. *Slow*, Id. 878. And see *Butler* v. *Inneys*, Id. 891: *Blood* v. *Lee*, 3 Wils. 24.

CHAPTER XVII.

PROCEEDINGS AGAINST TRADERS SUBJECT TO THE BANKRUPT LAWS.

Trader, how compelled to pay or secure debt, or become bankrupt.

1 & 2 Vict. c. 110, s. 8.

SINCE the abolition of arrest on *mesne* process by the 1 & 2 *Vict. c.* 110, the committal of an act of bankruptcy by lying in prison on arrest for twenty-one days can seldom occur; and, apparently as a substitute for that mode of making a debtor bankrupt, the 8th section of the act enacts, "that if any single creditor (*a*), or any two or more creditors being partners, whose debt shall amount to 100*l.* or upwards, or any two creditors whose debt shall amount to 150*l.* or upwards, or any three or more creditors whose debts shall amount to 200*l.* or upwards, of any trader within the meaning of the laws now in force respecting bankrupts, shall file an affidavit or affidavits in her Majesty's courts of bankruptcy, that such debt or debts is or are justly due to him or them respectively, and that such debtor, as he or they verily believe, is such trader as aforesaid, and shall cause him to be served personally with a copy of such affidavit or affidavits, and with a notice in writing requiring immediate payment of such debt or debts; and if such trader shall not, within twenty-one (*b*) days after personal service of such affidavit or affidavits and notice, pay such debt or debts, or secure or compound for the same to the satisfaction of such creditor or creditors, or enter into a bond (*c*), in such sum and with such two sufficient sureties as a commissioner of the Court of Bankruptcy shall approve of, to pay such sum or sums as shall be recovered in any action or actions which shall have been brought or shall thereafter be brought for the recovery of the same, together with such costs as shall be given in the same, or to render himself to the custody of the gaoler of the Court in which such action shall have been or may be brought according to the practice of such Court, or within such time and in such manner as the said Court or any judge thereof shall direct, after judgment shall have been recovered in such action, every such trader shall be deemed to have committed an act of bankruptcy on the twenty-second day of service of such affidavit or affidavits and notice, provided a fiat in bankruptcy shall issue against such trader within two calendar months from the filing of such affidavit or affidavits, but not otherwise." It seems that this enactment is not repealed by the 5 & 6 *Vict. c.* 122, presently noticed (*d*).

Affidavit for.

The affidavit under this enactment is to be looked on as

(*a*) See the form of affidavit, Chit. Forms, 525; and of notice, Id.

(*b*) It seems, that, in the computation of these twenty-one days, the day on which the notice is served is to be excluded; but the point has not been decided. See *Gibson* v. *Musket*, 3 Scott, N. R., 419: *Ex parte Rhodes*, 4 Deac. 125; *Ex p. Whitby*, 4 Deac. 139; 1 Mont. & Chit. 671, & C. And see *ante*, 130.

(*c*) See the form, Chit. Forms, 526.

(*d*) *Re Cheese*, 12 Law J., N, S., 23, C. B.

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strictly analogous to an affidavit to hold to bail, and as a substitute for it, and not as a process tending to a fiat (*e*). It must be made by the creditor, and the affidavit of any one on his behalf would not suffice (*f*). It seems that it may be made by one of several partners (*g*); or by a public officer of a banking company (*h*). It need not be intituled in any Court (*h*). It seems doubtful whether it is defective, if it depose to a debt greater than the creditor can establish to be due, and whether it need state the consideration for the debt (*i*). It may be sworn before a Master Extraordinary in Chancery, and filed in the Registrar's office of the Court of Bankruptcy (*k*).

Render by defendant.

The terms of the condition in the bond, are in the alternative, either for the defendant to render himself, according to the practice of the Court, or the terms of a judge's order, or rule of court; and if the defendant does either, it will suffice. The sureties cannot, it seems, render him (*l*). He is bound only to render upon a *ca. sa.* sued out, the same as in the case of a recognisance of bail, by analogy to which, this bond is to a great extent construed; and unless so sued out, there is no forfeiture of the bond, either as against the defendant or the sureties (*m*). It is sufficient that there be eight days between the *teste* and return of the *ca. sa.* (*n*). It would also seem, that there is no forfeiture, unless the *ca. sa.* has been returned *non est inventus* (*o*), though this has not been expressly decided. In an action against the original debtor on a bond given under this statute, where the declaration alleged that the defendant did not render himself according to the terms of a judge's order, a plea, averring that such order had been obtained *ex parte* by the plaintiff, was held bad, and that the proper course for the defendant, if it had been irregularly obtained, was to apply to set it aside (*p*). Also, in the same case, where the declaration alleged that a judge's order had been made for the render within a given time, which time had been extended till the fifth day of term by a subsequent judge's order, and that a rule *nisi* had been obtained within that period, calling on the plaintiff to shew cause on a subsequent day, why the defendant and his bail should not have further time to render, and that, in the meantime, proceedings against the defendant and his bail should be stayed, a plea alleging that, upon that rule *nisi*, a rule absolute was made on the 22nd day of term, directing a render within a given period, and that a subsequent render was made within that time, was held a good plea (*p*). It has been held, that the render may be made before judgment, the same as if the

(*e*) *Re Hall*, 1 Mont. & C. 467, per Sir *G. Rose.*

(*f*) See *Ex p. Hall.* 3 Deac. Rep. 405.

(*g*) *Re Rhodes*, 4 Deac. 125; 1 Mont. & C. 319, *S. C.*

(*h*) *Ex p. Hall, supra.*

(*i*) *Ex p. Brown*, 1 Mon. Ch. 198.

(*k*) See *Ex p. Hall, supra*: *Re Hall, supra.* See as to filing a second affidavit on account of some irregularity in the first, *Re Rhodes supra*: *Re Rose*, 1 Mont. & C. 149; 4 Deac. 66, *S. C.*

(*l*) The dictum of Lord *Denman*, in *Ouston* v. *Coates*, 10 Ad. & E. 193, that they can, is, it seems, overruled: per *Wilde*, Serjt., arguendo, in *Hinton* v. *Acraman*, 15 Law J., N. S., 58, C. P.

(*m*) *Hinton* v. *Acraman*, *supra.*

(*n*) *Kymer* v. *Sydserf*, 5 Scott, N. R., 193; 4 M. & Gr. 636, *S. C.*

(*o*) See *South* ats. *Griffiths*, Cro. Car. 481. See *Hayward* v. *Bennett*, 3 & 6 July, 1846, C. P., in which a plea of a *ca. sa.* issued and executed, and a commitment on *habeas*, at plaintiff's instance, was held bad for some informalities.

(*p*) *Hinton* v. *Acraman*, *supra.*

defendant were at large on bail (*q*), but the correctness of this seems questionable (*r*).

Action before and after bond given.

Although, at the time of the giving of the bond, an action has been commenced against the defendant, still plaintiff may bring another action against him, and a judgment in that action will be one within the meaning of the bond (*s*).

Defendant's bankruptcy no discharge from bond.

The bond given under the act, is not a bond within the 6 *G.* 4, *c.* 16, *ss.* 52, 56, and the defendant's bankruptcy and certificate, after the commencement of the action brought for the debt, and before judgment obtained in it, is no defence to an action against him on the bond (*t*). It is not necessary to make an affidavit of the notice of the render (*u*). If the plaintiff lodges a *ca. sa.* with the sheriff against the defendant after render, it is irregular, and the Court will set it aside (*x*). If the plaintiff, by proving under the fiat, elect to relinquish action, and the defendant is thus entitled to be discharged, if duly rendered, the sureties are entitled to summary relief on motion to the Court in which the action was brought (*y*). But the Court will not, it seems, order the bond to be delivered up to be cancelled, on an affidavit that the defendant has rendered himself to gaol according to the condition of it (*z*).

Proceedings under 5 & 6 Vict. c. 122.

By the stat. 5 & 6 *Vict. c.* 122, *ss.* 11 to 22, if any creditor of any trader within the meaning of the statutes relating to bankrupts, shall file an affidavit in the Court of Bankruptcy therein mentioned, and demand payment, and take certain other steps, such court may summon the trader, and proceed as therein mentioned. See also the 7 & 8 *Vict. c.* 111, *s.* 7, &c., and the 7 & 8 *Vict. c.* 113, *s.* 48, as to trading and joint-stock companies. The proceedings under sect. 11 of this act may be taken simultaneously with an action at law for the recovery of the same debt; and, though the debtor pays the demand under pressure of the former proceedings, the Court will not stay the action without payment of costs (*a*). The 19th section of the act enacts, that in every action brought, wherein such creditor is plaintiff and any such trader is defendant, and wherein the plaintiff shall not recover the amount of the sum for which he shall have filed an affidavit of debt under the provisions of the act, such defendant shall be entitled to costs of suit, provided that it shall be made appear to the Court, that the plaintiff had not any reasonable or probable cause for making such affidavit of debt in such amount as aforesaid, &c. It seems doubtful whether this section applies to a cause referred to arbitration (*b*).

(*q*) Cousins v. Coates, 10 Ad. & E. 193. See Lymer v. Sydserf, 5 Scott, N. R., 195. And see Saunderson v. Parker, 9 Dowl. 495, where the bond was conditioned to render, &c., according to the practice of the Court, within such time, &c.; the word "or" being omitted by mistake: and Coleridge, J., held, that a render might be made before judgment.

(*r*) See per Maule, J., in Hinton v. Arcaman, 15 Law J., N. S., C. P., 56.

(*s*) Hinton v. Arcaman, *supra*.

(*t*) Hinton v. Arcaman, *supra*.

(*u*) Saunderson v. Parker, 9 Dowl. 495, per Coleridge, J.

(*x*) Saunderson v. Parker, *supra*.

(*y*) Gelkie v. Hewson, 5 Scott, N. R., 494; 4 M. & G. 618. As to such relinquishment of the action, see *ante*, 1105.

(*z*) Ridler v. Chappelow, 1 Dowl., N. S., 637: Hayward v. Heffer, 13 Law J., N. S., Q. B., 92. But see Wilson v. Firth, 9 Dowl. 573, where Coleridge, J., ordered a similar bond to be delivered up to be cancelled, it appearing that it had been satisfied. And see Re Farraday, 4 Jur. 369, C. Rev.

(*a*) Covington v. Hogarth, 8 Scott, N. R., 725; 2 Dowl. & L. 619, S. C.

(*b*) Higginson v. Broadhurst, 1 Dowl. & L. 490, where it was held, that there was reasonable or probable cause.

PART V.

PROCEEDINGS INCIDENTAL AND COLLATERAL TO THE ACTION.

CHAPTER I.

ENTRY OF PROCESS ON ROLL TO SAVE THE STATUTE OF LIMITATIONS.

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Statute 2 W. 4, c. 39, s. 10.

THE 2 *W.* 4, *c.* 39, *s.* 10, enacts, "that every writ of summons [and *capias* (*a*)] may be continued by *alias* and *pluries*, as the case may require, if any defendant therein named may not have been [arrested thereon, or] served therewith; provided that no *first* writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be [arrested thereon, or] served therewith, *or* proceedings to or towards outlawry shall be had thereupon, *or* unless such writ, and every writ (if any) issued in continuation of a preceding writ, shall be returned *non est inventus*, and *entered of record* within one calendar month (*b*) next after the expiration thereof, including the day of such expiration; and unless every writ issued in continuation of a preceding writ shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum indorsed thereon, or subscribed thereto, specifying the day of the date of the first writ, and return (*c*) to be made, in bailable process, by the sheriff or other officer to whom the writ shall be directed, or his successor in office; and in process not bailable, by the plaintiff or his attorney (*d*) suing out the same, as the case may be." The enactment is confined in its operation to cases where it is intended to save the Statute of Limitations; and, therefore, where, before the 1 & 2 *Vict. c.* 110, a *capias* was issued against two defendants, one of whom was arrested and put in bail before the expiration of the *four* months which the writ had to run, and the other defendant could not be arrested during that period,

Cases on it.

(*a*) Since 1st October, 1838, all personal actions in the superior courts of law must be commenced by writ of summons, with the exception mentioned, *ante*, Vol. 1, pp. 2, 3.

(*b*) See *M'Killar* v. *Reddie*, 5 Scott, N. R., 192; 4 M. & G. 769, *S. C.*: *Harper* v. *Phillips*, 6 Scott, N. R., 115.

(*c*) See *Williams* v. *Williams*, 2 Dowl. N. S., 209; 10 M. & W. 174, *Qu.* [illegible] v. *Spalding*, 1 Dowl. & L. 676.

(*d*) See *Williams* v. *Williams*, 2 Dowl. N. S., 209.

the proceedings were holden to be regular, although the first writ had not been returned, nor any continuance entered, and the second writ was not issued within one calendar month after the first had expired (*e*). Where a writ of *summons* was sued out in time to save the statute, but was afterwards re-sealed in consequence of some alteration in it, and was not served until after the *six* years had expired, the court held that the re-sealing did not amount to a re-issuing of the writ (*f*). But a re-sealed writ must, it seems, be dated of the day on which it is re-sealed (*g*). The court will not allow process to be served at the house of the agent of a defendant out of the jurisdiction, in order to save the Statute of Limitations; but the plaintiff must proceed according to the above enactment, namely, either to outlaw the defendant, or else to return the first writ, and issue an *alias* within one calendar month after the expiration of such writ, and so *toties quoties* until the defendant is served in the usual way (*h*). A *distringas*, with a view to outlawry, may issue in continuation of writs of summons, *alias*, &c., previously sued out to save the Statute of Limitations, for this is contemplated by the act (*i*). But if the plaintiff issue a *distringas* for the purpose of outlawry, and act upon it, he must regularly proceed thereon to outlawry: he cannot use that writ as a writ of summons, for the purpose of supporting a subsequent writ, nor carry on both proceedings concurrently; nor abandon the one, and fall back upon the other (*k*).

Practical directions. Summons.

The practical mode of proceeding, in order to prevent the operation of a statute of limitations, is as follows:—*Sue out the writ of summons against the defendant as usual, within the time limited for bringing the action.* If the defendant has not been served therewith within four calendar months from its date inclusive, (there is no absolute necessity for any attempt to serve him (*l*)), *then you must, within a calendar month after the expiration* (*m*) *of the writ, inclusive of the day of such expiration, return on the writ "non est inventus"* (*n*); *and, within the same time, get a roll from the person appointed to deliver out the rolls of the Court, or it may be had at any stationer's. Ingross the writ on this roll, and also enter the writ and return, with the award of an alias writ of summons* (*o*). *In making the ingrossment, leave a margin of an inch at least, and a space at bottom to prevent the writing being rubbed out, writing upon both sides, if necessary. Make out a docket-paper* (*o*). *Take the writ, roll, and docket-paper to one of the Masters, and docket the entry, and he will mark the writ. Then carry in the roll to the treasury of*

(*e*) *Nicholson* v. *Rowe & Leman*, 2 C. & M. 449; 2 Dowl. 296; 4 Tyr. R. 308, S. C. And see *Pearce* v. *Swain*, 7 M. & W. 549; 9 Dowl. 794, S. C.

(*f*) *Braithwaite* v. *Lord Montford*, 2 C. & M. 488; 4 Tyr. R. 276, S. C.

(*g*) *Knight* v. *Warren*, 7 Dowl. 663.

(*h*) *Frith* v. *Lord Donegal*, 2 Dowl. 527, S. C.

(*i*) *Ray* v. *Dow*, 5 Dowl. 310; 2 M. & W. 188, S. C. In Mr. Tidd's work on the *Uniformity of Process Act*, p. 60, there is a form of entry of a *distringas*, as a mode of continuing a writ of summons.

(*k*) See *Normann* v. *Winter*, 7 Dowl. 304; 5 Bing. N. C. 279, S. C. Before the 2 Will. 4, c. 39, it was decided, that the writ upon which the defendant was ultimately brought before the Court should be of the same species with that originally sued out and entered on the roll, and that the continuances should correspond with both. (*Smith* v. *Bower*, 3 T. R. 662: *Beadmore* v. *Rattenbury*, 5 B. & Ald. 452: *Page* v. *Newman*, 8 B. & Cres. 439: *Plummer* v. *Woodburne*, 4 B. & Cres. 625).

(*l*) *Williams* v. *Roberts*, 3 Dowl. 512; 1 Gale, 56; 1 C., M., & R. 676: 5 Tyr. 421, S. C.; but without it perhaps the costs of the writ would not, under circumstances, be allowed to the plaintiff. (Id.)

(*m*) The writ expires in four calendar months after its date, inclusive of such date. See Vol. 1, p. 149.

(*n*) See form, Chit. Forms, 527.

(*o*) See form, Chit. Forms, 527.

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Alias summons.

the Court, and file the writ with the Master. After this, *and within one calendar month after the expiration of the first writ of summons, inclusive of the day of such expiration, sue out an alias writ of summons against the defendant, as in ordinary cases.* It need not be tested on the day the former writ was returned (*p*), but it must of course bear teste on the day on which it is sued out. *Indorse on or subscribe to this alias writ a memorandum specifying the day of the date of the first writ and of the return to it* (*q*). If the defendant has not been served with this *alias* writ within four calendar months from its date inclusive, *then you must, within a calendar month after the expiration of the alias writ, inclusive of the day of such expiration, return on such writ "non est inventus;" and, within the same time, enter on the roll containing the entry of the first writ this alias writ and return thereon, together with the award of a pluries. Take the draft of the entry to one of the Masters, who will make the entry on the roll; pay him for the entry. File the writ with him.* After this, *and within one calendar month after the expiration of the alias writ of summons, inclusive of the day of such expiration, sue out a pluries writ of summons against the defendant, as in ordinary cases. Indorse on or subscribe to this pluries writ a memorandum specifying the day of the date of the first writ and of the return to it* (*q*). If the defendant has not been served with this *pluries* writ within four calendar months from its date inclusive, *then you must, within a calendar month after the expiration of the pluries writ, inclusive of the day of such expiration, return on such writ "non est inventus;" and, within the same time, enter on the roll containing the entry of the first writ this pluries writ and return thereon, together with the award of a pluries* (*r*). *Take the draft of the entry to one of the Masters, who will make the entry on the roll; pay him for the entry. File the pluries writ with the Master.* After this, *proceed by other pluries writs of summons, and get them issued, returned, and filed in the same manner, until the defendant has been served therewith, or until you have obtained his appearance under a writ of distringas, or have outlawed him.* It may be doubtful, whether the writ issued in the continuation of a preceding writ can be properly issued until the preceding writ be returned and filed: it is submitted that it may; but, as the point has not been decided, it will be safest to get the preceding writ returned and filed in due time, before issuing the succeeding one (*s*). The writ upon which the defendant is ultimately brought before the Court must be a continuance of the same writ which was originally sued out, and entered on the roll, as above mentioned.

Pluries summons.

Service or outlawry.

Returning and filing the preceding writ.

How defective issuing or entry of continuances to be taken advantage of.

If the plaintiff delivers an issue on a plea of the Statute of Limitations, stating, in the commencement of the issue, as usual, the issuing of a writ of summons, the statement of the time of the issuing of such writ will, at the trial, be taken as conclusive evidence of it, and the Court will not afterwards grant

(*p*) *Nicholson* v. *Leman*, 2 Dowl. 296.

(*q*) See *Williams* v. *Williams*, 2 Dowl., N. S., 209; 10 M. & W. 174, 476: *Mayor* v. *Spalding*, 1 Dowl. & L. 878. See the form, Chit. Forms, 528, 529.

(*r*) See the form, Chit. Forms, 528.

(*s*) See *Gregory* v. *Des Anges*, 5 Dowl. 193: *Weldon* v. *Gray*, 1 Tidd, 60: *Vincent's case*, Comb. 346: *Attwood* v. *Burr*, 7 Mod. 5: *Simpson* v. *Heath*, 5 M. & W. 634, per *Parke*, B.: and see *Norman* v. *Winter*, 7 Dowl. 304: 5 Bing. N. C. 279, S. C., where the question was raised, but not decided.

the defendant a new trial, or otherwise interfere, on the ground that no such writ issued or was returned, or any continuances entered on the roll; or, it seems, on the ground that the continuances were improperly entered (*t*). The defendant's course in such a case would be, to apply to the Court or a judge to set aside the issue, or to compel the plaintiff to state, in the commencement of it, the writ with which the defendant was served. Perhaps, an improper entry of the continuances might be taken advantage of by a special plea.

Amendment.

As to when an amendment of a writ of summons will be allowed to prevent the Statute of Limitations barring the claim, see *Vol.* 1, 163. The Court may allow of an amendment of the entry of continuances on the roll; and where the indorsement on the *alias* and *pluries* was regular, with the exception that they did not contain the date of the return of the first writ, the Court of Exchequer allowed the plaintiff to amend, even after the defendant had pleaded the Statute of Limitations and issue was joined (*u*). But the Court will not, it is apprehended, allow the plaintiff to enter a writ on the roll after the time limited for so doing.

Costs of unnecessary writs.

The expense of such of the writs as are unnecessarily issued will not be allowed to the plaintiff (*y*).

In an action commenced in an inferior court.

If a suit be commenced in an *inferior court* in due time, and it be afterwards removed into one of the superior courts by *habeas corpus*, &c., and the plaintiff declare there *de novo*, and the defendant plead the Statute of Limitations, the plaintiff may reply, and shew the *plaint* or commencement of the suit in the inferior court, and that will be sufficient to avoid the statute (*z*).

(*t*) *Harper* v. *Phillips*, 8 Scott, N. R., 115; 7 M. & Gr. 397, *S. C.*: *Whipple* v. *Manle*, 1 M. & W. 432.

(*u*) *Mercer* v. *Spalding*, 1 Dowl. & L. 678: *Williams* v. *Williams*, 10 M. & W. 476; 2 Dowl., N. S., 209, *S. C.*: *Taylor* v. *Gregory*, 2 B. & Ad. 257: and see *ante*, Vol. I, 163.

(*y*) *Williams* v. *Roberts*, 3 Dowl. 512; 1 C., M., & R. 676, *S. C.*

(*z*) Tidd, 9th ed., 27, 28. It will be observed that the Uniformity of Process Act does not extend to any cause removed into either of the superior courts by writ of *pone*, *certiorari*, *recordari facias loquelam*, *habeas corpus*, or otherwise. (2 W. 4, c. 39, s. 19: and see *Dod* v. *Grant*, 6 Nev. & M. 70).

CHAPTER II.

OUTLAWRY.

SECT. 1. *Upon Mesne Process*—1132 *to* 1143.
2. *Upon Final Process*—1143 *to* 1144.
3. *Reversal of Outlawry*—1144 *to* 1148.

SECT. 1.

Outlawry upon Mesne Process.

What, and in what Cases it lies, and against whom, 1132.
Consequences of, 1133.
Writs of Summons and Distringas, 1134.
Writs of Exigi Facias and Proclamation, 1136.
Appearance, &c., 1138.
Judgment of Outlawry, 1139.
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Special Capias Utlagatum, &c., 1140.
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What, and in what cases it lies.

In what Cases it lies, and against whom.]—Outlawry, in a civil suit, is a punishment inflicted by law on a party, by putting him out of the protection of it, for his contempt in wilfully avoiding the execution of the process of the Queen's Court (*a*). Before the 2 *W.* 4, *c.* 39, process of outlawry would lie in no case but where a *capias* would lie; and, therefore, where the proceeding was by bill, and not by original, as there could be no *capias*, so there could be no process of outlawry, as in a bill of privilege by or against an attorney (*b*). This, however, is altered as far as regards the process of outlawry by that act, though perhaps the principle remains the same (*c*).

Where defendant abroad.

A party cannot be properly outlawed, if he be abroad at the time the *exigent* is awarded; for, if abroad, he could not take cognisance of the process and proclamations against him, and he could not, therefore, be said to be avoiding the process of the Court; nor could he be regularly outlawed in such a case, even though he went abroad purposely to avoid the suit or his

(*a*) Com. Dig., tit. Utlagary, B.
(*b*) Bac. Abr., Outlawry (A.); 1 Leon. 329.
(*c*) See *Cassidy* v. *Stewart*, 9 Dowl. 366; 10 Law J., N. S., C. P., 57, S. C.

creditors (*d*). But although an outlawry in such a case would be erroneous, and be a ground for reversing it as of right on a writ of error, it would not be an irregular outlawry, so as to entitle the defendant as of right to have it reversed on motion for irregularity (*e*). And the outlawry will, in general, have the effect of attaining the purpose for which it was obtained; for, in consequence of the delay and expenses occasioned to the defendant by a reversal on writ of error, it is not usual to get a reversal by that course; and the usual course is to apply to the Court on motion to set it aside, and then it will only be set aside on the terms of his entering an appearance, (or, if he be about going abroad, or be still abroad, that he shall put in and perfect bail), if the outlawry be on *mesne* process, and that he shall pay the debt and costs, if it be on final process; and, generally, the defendant is ordered to pay the costs of the application.

Where defendant can be met with, or the process executed.

Neither can the defendant be properly outlawed, unless he be avoiding the execution of the process of the Queen's Court, and unless the process cannot be executed on him. Consequently, where a defendant, although abroad, had an agent (an attorney) in this country, who conducted his affairs, and that was known to the plaintiff, who proceeded to outlaw the defendant without making any application to the attorney to appear to the writ, the outlawry was set aside, with costs (*f*). But the case would be different, if the agent was such only for a particular purpose, and not an attorney who could undertake to appear to the writ (*g*). And an outlawry will not be set aside merely on the ground of the defendant having constantly appeared in public during the proceedings against him, unless, perhaps, he swears he had no notice of them (*h*), or that the plaintiff might easily have found him, so as to have served him with process, and that is not denied by plaintiff (*i*).

Against whom it lies.

As we have already seen, outlawry will lie only where a *capias* would lie before the 2 *W.* 4, *c.* 39 (*k*); consequently, it does not lie against a peer or member of Parliament (*l*). It may be adopted against men above the age of twelve years (*m*), and against women of any age; in which latter case, the defendant is said to be "waived," not outlawed (*n*). In an action against husband and wife, the husband may be outlawed, and the wife waived (*o*).

Consequences of.

Consequences of Outlawry.]—The party outlawed is to be imprisoned if he can be found; he forfeits to the Crown (*p*) his personal chattels presently, and his real chattels and the profits

(*d*) *Bryan* v. *Wagstaffe*, 5 B. & Cres. 314; 8 Dowl. & L. 208; 1 M. & P. 135, n., *S. C.*: *Porter* v. *O'Meara*, 7 Dowl. 667: *Harvey* v. *O'Meara*, 7 Dowl. 725: *Hesse* v. *Wood*, 4 Taunt. 691: *Graham* v. *Henry*, 1 B. & Ald. 131: *Pigou* v. *Drummond*, 1 Bing. N. C. 354; 1 Scott, 264, *S. C.*: *Levi* v. *Claggett*, 1 M. & W. 547; 5 Dowl. 322, *S. C.*

(*e*) *North* v. *Chambers*, Barnes, 319; Com. Dig. Utlagary, C. (4).

(*f*) *Pigou* v. *Drummond*, 1 Bing. N. C. 354; 1 Scott, 264, *S. C.*

(*g*) *Hunter* v. *Whitfield*, 3 Bing. N. C. 878.

(*h*) *Johnson* v. *Driver*, 1 Dowl. 127.

(*i*) See *James* v. *Jenkins*, 9 Moore, 599: *Blacoe* v. *Kennedy*, 2 Wils. 127. As to the determination of outlawry by death, &c., see Tidd, 144.

(*k*) *Ante*, 1132.

(*l*) *Cassidy* v. *Stewart*, 9 Dowl. 366; 2 M. & Gr. 437, *S. C.* And see Vol. 1, 171, and cases there cited in n. (*d*).

(*m*) Co. Litt. 128. a.

(*n*) Id. 122. b.

(*o*) See Tidd's Supplement, 63, and cases and practice there noticed.

(*p*) See *Rex* v. *Cooke*, 1 M'Clel. & Y. 196: *Tisdall* v. *Bennett*, 1 Jones, Rep. Exch. Ir. 492: *Macrae* v. *Hyndman*, 1 Rob. 571: Com. Dig. Utlagary, D.

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of his lands immediately upon office found (*q*); and he is incapacitated from suing in his own right, from seeking to enforce a legal right of his own, from serving on juries, &c., from appearing in court for any other purpose than either to reverse his outlawry (*r*) or to protect or defend himself from being wrongfully charged in execution (*q*), or from any other wrongful action or proceeding (*s*), or to obtain his discharge under the Insolvent Debtors Act (*t*), or as a witness (*u*), or to sue or defend in *autre droit* (*x*), for which purpose his competency is not destroyed. But, by outlawry in personal actions, the party does not forfeit any freehold lands, nor a rent-charge for life, nor arrears which accrue for the rent during his life; nor are copyholds liable to be seized (*y*). Indeed, in civil actions, outlawry at the present day is rather in the nature of process to compel the defendant to submit to the jurisdiction of the court: if outlawed upon *mesne* process, he may, as we have just seen, upon entering an appearance, &c., reverse the outlawry as of course; if upon final process, he may reverse the outlawry upon payment of the debt and costs. The outlawry, if reversed, does not put an end to the action as against a sole defendant, nor does it sever an action originally joint: the reversal leaves the proceedings in the action as they were, and it is to that action the defendant appears (*z*).

We will now proceed to notice how the outlawry is to be obtained, and the subsequent proceedings thereon.

Writs of summons and distringas.

Writs of Summons and Distringas.]—Formerly, in order to outlaw a defendant in a civil action, the action must have been commenced by *original writ*, otherwise process of outlawry would not lie, either upon *mesne* or final process (*a*). But now, by the 1 & 2 *Vict. c.* 110, every personal action must be commenced by writ of *summons*; and, by the 2 *W.* 4, *c.* 39, *s.* 5, "upon the return of *non est inventus* and *nulla bona*, as to any defendant against whom such writ of *distringas* as hereinbefore mentioned shall have issued, (whether such writ of *distringas* shall have issued against such defendant only, or against such defendant and any other person or persons), it shall be lawful, until otherwise provided for, to proceed to outlaw or waive such defendant, by writ of *exigi facias* and proclamation, and otherwise, in such and the same manner as may now be lawfully done upon the return of *non est inventus* to a *pluries* writ of *capias ad respondendum*, issued after an original writ: Provided always, that every such writ of exigent * proclamation, and other writ subsequent to the writ of *distringas*, shall be made returnable on a day certain in term; and every such first

2 W. 4, c. 39, ss. 5, 6.

* [Sic]

(*q*) *Adcock* v. *Fiske*, 8 Scott, 138; 8 Dowl. 66, *S. C.*

(*r*) *Aldridge* v. *Buller*, 2 M. & W. 412; 5 Dowl. 733, *S. C.*, where it was held, that he cannot sue out a *habeas corpus ad satisfaciendum* in order to charge a plaintiff in execution, against whom he has obtained judgment as in case of a non-suit; although his outlawry was at the suit of a different plaintiff.

(*s*) *Hall* v. *Hawkins*, Rolls Court, 1839: 1 Beavan, 73; per *Parke*, B., 2 M. & W. 412; *Walker* v. *Thelluson*, 1 Dowl., N. S., 578.

(*t*) *R.* v. *Insolvent Court*, 3 Nev. & P. 543.

(*u*) See Co. Litt. 6. b.

(*x*) *Walfred* v. *Evershem*, Moore, 431: *Brook* v. *Phillips*, Cro. Eliz. 684.

(*y*) Com. Dig., Utlagary, D. 2. See *Macrae* v. *Hyndman*, 1 Rob. 571.

(*z*) *Hesse* v. *Wood*, 4 Taunt. 691: *Gent* v. *Abbott*, 2 Moore, 87. Where several defendants, see *post*, 1143.

(*a*) *Crew* v. *Boile*, 1 Levn. 309: see *Edwards* v. *Carter*, 1 Str. 473: *Gent* v. *Abbott*, 8 Taunt. 187.

writ of exigent and proclamation shall bear *teste* on the day of the return of the writ of *distringas*, whether such writ be returned in term or in vacation; and every subsequent writ of exigent and proclamation shall bear *teste* on the day of the return of the next preceding writ; and no such writ of *distringas* shall be sufficient for the purpose of outlawry or waiver, if the same be returned within less than *fifteen days* after the delivery thereof to the sheriff or other officer to whom the same shall be directed." Also, by sect. 6 of the same act, outlawry or waiver may be obtained on *final* process in an action commenced by summons.

How sued out and form of, &c.

The course of proceeding to outlawry on *mesne* process is as follows:—*Prepare and sue out a writ of summons, as in ordinary cases, in the manner pointed out, Vol.* 1, 154. *You must afterwards obtain an order of the Court, or of a judge, for a writ of distringas for the purpose of outlawry, as directed,* ante, *Vol.* 1, 176; *and if leave to issue it be granted, issue it accordingly, in the form and in the manner directed, Vol.* 1, 177. The order for it may be obtained and the writ be issued after the expiration of the four months from the issuing of the summons (*c*), or upon an *alias* or *pluries* writ of summons (*d*). The only difference in the form of the *distringas* in this case, between that issued for the purpose merely of compelling an appearance, is in the notice at the foot, which states, that, in default of defendant's appearance, proceedings to outlawry will be taken against him. A *distringas* to compel an appearance cannot be converted into a *distringas* for the purpose of outlawry (*e*). The order for the *distringas* will state to which sheriff the writ is to be directed. The practice is to direct it to the sheriff of the county in which it is intended that the defendant should be outlawed, and the order should be for such a direction. In London, the defendant may be exacted every fortnight; in other counties every month. It is, therefore, usual to outlaw defendants in London for expedition sake. It was held, before 1 & 2 *Vict. c.* 110, that there was no objection to the old process by *capias* being issued into a county different from that in which the defendant was described as being resident (*f*).

How executed.

Having thus issued the writ of distringas, take it to the sheriff's office, and leave it there fifteen days at least (or at the latest on the sixteenth day (g)) before the return-day, and, at the expiration of that time, get him to return it "non est inventus and nulla bona;" unless, indeed, the defendant can be met with so as to serve him with the writ, or his goods can be distrained under it, in which case it should be, it seems, executed and returned accordingly (*h*); or the sheriff might be subject to an action at the suit of the defendant for a false return, if he be outlawed upon it (*i*); but, as the truth of the return cannot, in general, be tried on affidavits (*j*), perhaps the outlawry cannot be set

(*c*) *Norman* v. *Winter*, 6 Bing. N. C. 279; 7 Dowl. 304, *S. C.*

(*d*) *Reay* v. *Jouds*, 2 M. & W. 188; 5 Dowl. 310, *S. C.*: *Pearce* v. *Swain*, 7 M. & W. 543; 9 Dowl. 724, *S. C.*

(*e*) *Vere* v. *Gower*, 3 Bing. N. C. 503; 4 Scott, 397; 5 Dowl. 494, *S. C.*

(*f*) *Morris* v. *Davies*, 4 Dowl. 317; 1 H. & W. 513, *S. C.*

(*g*) *Rippon* v. *Dawson*, 7 Scott, 145.

(*h*) See Form, Chit. Forms, 23.

(*i*) See *Jenkins* v. *Biddulph*, 4 Bing. 160; 12 Moore, 390, *S. C.*; and *ante*, Vol. 1, 557.

(*j*) *Ante*, Vol. 1, 557: but see per Tindal, C. J., in *Vere* v. *Gower*, 4 Scott, 397.

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aside simply upon the ground of its falsity. It will be seen that the statute, in terms, requires a return both of *non est inventus* and *nulla bona*, to warrant proceedings to outlawry; but, looking at the form of the *distringas* for outlawry, and that the plaintiff is not warranted in entering an appearance for the defendant under it, it is not clear but that the plaintiff might, after the expiration of eight days from the return-day of the *distringas*, if the defendant has not entered an appearance, proceed to outlawry, and issue the writs of *exigi facias* and proclamation for that purpose on a partial return.

Exigi facias.

Writs of Exigi Facias and Proclamation, &c.]—*Upon the return to the distringas of "nulla bona and non est inventus," leave it and the writ with one of the Masters, who will thereupon make out and sign the writs of exigi facias and proclamation.*

Form of, &c.

The *exigi facias* is a judicial writ, commanding the sheriff to demand the defendant from county court to county court, until he be outlawed, if he do not appear in court on a day certain in term, to answer to the plaintiff in an action on promises, or as the form of action may be (*i*). It is usual in practice, and perhaps necessary, to direct it to the sheriff to whom the *distringas* was directed. It must, it seems, be tested on the day on which the *distringas* was actually returned, whether in term or vacation (*k*); but it is not necessary that it should be actually sued out on that day (*l*). It must, it would seem, be returnable in the same or the following term, on a day certain, and must have fifteen days at least between the *teste* and return (*m*); and, if possible, you should regulate the return-day so that five hustings in London, or county courts elsewhere, may be held between the *teste* and return of the writ, in order to save the expense of an *allocatur exigent*; for the *exigent* must have such a return as that five county courts may intervene between the *teste* and return (*n*). The 12th sect. of the 2 *W.* 4, *c.* 39, which requires writs issued under that act to bear date on the day on which they issued, &c., and to be indorsed with the name and abode of the attorney or party suing out the same, does not apply to a writ of *exigent*, which is not a writ issued under the authority of it (*o*).

Writ of proclamation.

The *writ of proclamation* recites the *exigi facias*, and requires the sheriff to make three proclamations, in pursuance of stat. 31 *Eliz.* *c.* 3, *s.* 1, and 7 *W.* 4 & 1 *Vict.* *c.* 45, *s.* 2 (*p*).

31 Eliz. c. 3.

By the first of these statutes, it is enacted, "that in every action personal wherein any writ of *exigent* shall be awarded out of any court in or after the term of Easter next coming, one writ of proclamation shall be awarded and made out of the same court, having day of *teste* and return as the said writ of *exigent* shall have, directed and delivered of record to the sheriff of the county where the defendant at the time of the *exigent* so awarded shall be dwelling, which writ of proclamation shall contain the effect of the same action: and that the sheriff of

(*i*) See the form, Chit. Forms, 530, and the notes there.

(*k*) The point, however, is doubtful. See *Vere* v. *Gosser*, 4 Scott, 287; Tidd, New Pract., 93.

(*l*) *Lewis* v. *Davison*, 2 Dowl. 275; 4 Moo. & P. 523, *S. C.*

(*m*) See *Shirley* v. *Wright*, 2 L. Raym. 775.

(*n*) Com. Dig., Pleader, 2 W. 4.

(*o*) See *Lewis* v. *Davison*, 3 Dowl. 272; 4 Moo. & P. 523, *S. C.*

(*p*) See the form, Chit. Forms, 532.

the county unto whom any such writ of proclamation shall be directed shall make three proclamations in this form following, and not otherwise; that is to say, one of the same proclamations in the open county court, and one other of the same proclamations to be made at the general quarter sessions of the peace, in those parts where the party defendant at the time of *exigent* awarded shall be dwelling, and one other of the same proclamations to be made one month at least before the *quinto exact.* by virtue of the said writ of *exigent*, at or near to the most usual door of the church or chapel of that town or parish where the defendant shall be dwelling at the time of the said *exigent* so awarded; and if the defendant shall be dwelling out of any parish, then in such place as aforesaid of the parish, in the same county, and next adjoining to the place of the defendant's dwelling; and upon a Sunday, immediately after divine service and sermon, if any sermon there be; and if no sermon there be, then forthwith after divine service: and that all outlawries had and pronounced after the end of the next Easter term, and no writs of proclamations awarded and returned according to the form of this statute, shall be utterly void and of none effect; and that the officer in whose office such writs of *exigent* and proclamation shall be made, shall and may take such fees as, by the statute made in the sixth year of the reign of the late king of famous memory, King Henry VIII., is limited and appointed in that behalf, and no greater fees in anywise; and that the sheriff, for making of the proclamation at or near to the church or chapel-door as is aforesaid, shall have twelve pence."

By the 7 *W.* 4 & 1 *Vict. c.* 45, *s.* 2, it is enacted, "that, from and after the first day of January next, all proclamations or notices, which, under or by virtue of any law or statute, or by custom or otherwise, have been heretofore made or given in churches or chapels during or after divine service, shall be reduced into writing, and copies thereof, either in writing or in print, or partly in writing and partly in print, shall, previously to the commencement of divine service on the several days on which proclamations or notices have heretofore been made or given in the church or chapel of any parish or place, or at the door of any church or chapel, be affixed on or near to the doors of all the churches and chapels within such parish or place; and such notices when so affixed shall be in lieu of and as a substitution for the several proclamations and notices so heretofore given as aforesaid, and shall be good, valid, and effectual to all intents and purposes whatsoever." 7 W. 4 & 1 Vict. c. 45, s. 2.

In pursuance of the first of these enactments, the writ of proclamation should be directed to the sheriff of the county where the defendant shall be actually dwelling at the time of the *exigent* awarded (*q*); but, of course, this cannot be complied with if the defendant is abroad; and in practice it is usual to direct it to the same sheriff the *exigi facias* and other writs were directed to. If directed to a different sheriff, it is called a writ of "*foreign proclamation*" (*r*). A writ (issued before the stat. 7 *W.* 4 & 1 *Vict. c.* 45, *s.* 2) directing the proclamation to be made at the parish church, has been held sufficient, though the 31 *Eliz. c.* 3, says "nearest church or chapel" (*s*). It must Form, &c. of writ of proclamation.

(*q*) 31 Eliz. c. 3, s. 1.
(*r*) See the form, Chit. Forms, 533.
(*s*) *Lewis* v. *Davison*, 3 Dowl. 272; 1 C., M., & R. 685, *S. C.*; 4 Mee. & P. 523.

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be tested and returnable the same as the *exigi facias* (*t*). Unless this writ be regularly sued out and returned (*u*) according to the directions of these statutes, the outlawry will be void, and may be reversed (*x*).

How these writs are to be executed.

Take these writs to the officers of the sheriffs to whom they are directed respectively, and they will be executed. The *exigi facias* is executed, by exacting the defendant, or, in other words, calling him to appear to the action at five successive county courts, or, in London, at five successive hustings, unless before that time the defendant appear. The writ must be actually in the sheriff's possession at the time he thus executes it (*y*). The *writ of proclamation* is executed by making three proclamations in the order pointed out by the stat. of *Eliz.*; one in the county court, or hustings in London; one at the general quarter sessions; and the last of them one month at least before the *quinto exactus*, on a Sunday, by affixing, previously to the commencement of divine service, a written or printed, or partly written and partly printed, notice of such proclamation on or near to the doors of all (*z*) the churches and chapels of that town or parish where the defendant, at the time of the *exigent* awarded, was dwelling; or, if he was then dwelling out of any parish, then on or near to the doors of all the churches and chapels of the next adjoining parish in the same county. It would seem, that it is not necessary to affix the notice on dissenting chapels. It appears, that, if a church has two principal doors, it is sufficient to affix the notice upon one of them (*a*). Where one month had not elapsed between the proclamation at the church-door and the *quinto exactus*, the Court reversed the outlawry (*b*).

Allocatur exigent.

If you find by the sheriff's return (*c*) to the writ of *exigent* that there have not been five county courts or hustings between the *teste* and return of it, *sue out with one of the Masters another writ, called an "allocatur exigent"* (*c*), *and leave it with the sheriff or his deputy, as above directed, who will thereupon exact the defendant at the next and subsequent county courts or hustings, so as to make the number of county courts or hustings at which the defendant has been demanded upon both writs, five.* If upon this writ the defendant be not demanded the requisite number of times, you may sue out another writ of *allocatur exigent*, and have it executed in the same manner.

Exigent must be executed at five successive courts.

The defendant must be exacted, or demanded, upon these several writs, at five consecutive county courts or hustings; for if any county court or husting have intervened, the several writs of *exigent* &c. already executed are without effect, and you must sue out an *exigi facias* and writ of proclamation *de novo* (*d*).

Appearance, &c.

Appearance before Return of Exigi Facias.]—At any time before the return of the *exigent*, or *allocatur exigent* (*e*), the

(*t*) 31 Eliz. c. 3, s. 1: 2 W. 4, c. 39, s. 5.

(*u*) See form of return, Chit Forms, 533.

(*x*) 31 Eliz. c. 3, s. 1: see *Res* v. *Yandell*, 4 T. R. 521: *Volet* v. *Waters*, 3 D. & R. 55: *Raper* v. *Cook*, 5 Id. 302: 3 B. & C. 529, S. C.

(*y*) *Volet* v. *Waters*, 3 D. & R. 55.

(*z*) See *R.* v. *Whipp*, 4 Q. B. 141; 11 Law J., N. S., 64, Q. B., *S. C.*: *R.* v. *Royde*, 8 Jur. 1096.

(*a*) *R.* v. *Royde*, *supra*: see also, as to the construction to be put on the 7 *Will.* 4 & 1 *Vict.* c. 45, s. 2, *R.* v. *Marriott*, 12 Ad. & E. 779; 4 P. & D. 440: *Stuls* v. *Wyatt*, 2 D. & L. 561: *R.* v. *Justices of Worcester*, 4 N. & P. 440.

(*b*) *Taylor* v. *Waters*, 3 D. & R. 575; 2 B. & C. 353, S. C.

(*c*) See the form, Chit. Forms. 531.

(*d*) Sellon, 285: see *Stowel* v. *Lord Zouch*, 1 Plowd. 371: *Whitwick* v. *Hewenden*, 3 Lev. 245.

(*e*) *i. e.* the *quinto exactus*.

defendant *may enter an appearance with the clerk appointed by the Master for outlawries* (*f*), *who will thereupon make out a supersedeas; or you may make out a supersedeas yourself upon getting a note of particulars of the exigent from the clerk, and get the Master to sign it. Leave it at the sheriff's, or his deputy's, office before the return of the exigent* (*g*), *and he will thereupon cease to execute the latter writ, and make a return to it accordingly* (*h*).

The judgment of outlawry.

Return to Exigi Facias and Judgment of Outlawry.]—If the defendant do not appear before the return of the *exigent*, as above mentioned, then, after being exacted five times, and proclaimed thrice, he is outlawed. After the return-day of the *exigent*, the sheriff, upon application, will return it with the five exactions thereon stated with certainty as to time, place, &c., together with the judgment of outlawry, by the coroner, or in London by the recorder (*i*). The writ of proclamation must also be returned (*j*). *File the writ of proclamation and return with the proper clerk at the Master's Office, and take the writ of exigent and return to him, and he will make out the capias utlagatum.*

Capias utlagatum, &c.

Capias Utlagatum, &c.]—The *capias utlagatum* is general or special; the former against the person only, the latter against the person, lands, and goods. The general writ of *capias utlagatum* commands the sheriff to take the defendant, so that he have him before the Court on a day certain in term (*k*), to do and receive what the Court shall consider of him (*l*). Upon filing the writ of proclamation and return, and taking the *exigent* and return to the officer as already mentioned, he will make out the *capias utlagatum. Get it signed by one of the Masters. It is executed in the same manner as a capias ad satisfaciendum.* Both this and the special writ may issue into any county, at the option of the plaintiff, without being *testatum* writs (*m*).

Discharge from custody on.

When the defendant has been arrested on the *capias utlagatum* in the Queen's Bench, unless in an action in which he has received a judge's order for holding him to bail, the sheriff shall discharge him, upon receiving an attorney's undertaking in writing to appear for the defendant and reverse the outlawry (*n*). In the Courts of Exchequer and Common Pleas, it seems that the defendant cannot thus obtain his discharge without a *supersedeas* (*o*), which, however, is obtained as of course, unless the Masters of the court have had notice of a judge's order for holding him to bail. If the sheriff has received a judge's order for holding him to bail, then it would seem that he should, if the return be in the Queen's Bench, discharge him upon his giving a bond, with two sufficient sureties, for double the sum for which special bail is required,

(*f*) See the form, Chit. Forms, 18: see Vol. 1, 167.

(*g*) See *Peach* v. *Watland*, Barnes, 319. From that case it would seem, that this *supersedeas* is necessary, and that it is in itself an appearance if delivered to the sheriff before the return of the *exigent*.

(*h*) See forms of *supersedeas* and return, Chit. Forms, 534.

(*i*) See *Rex* v. *Almon*, 4 T. R. 202: *Rex* v. *Yandell*, 4 Id. 521: *Reynolds* v. *Adams*, 3 T. R. 578: see the forms of return, Chit. Forms, 531.

(*j*) See form, Chit. Forms, 533.

(*k*) 2 W. 4, c. 39, s. 5, *ante*, 1136.

(*l*) See the forms, Chit. Forms, 534.

(*m*) *Anon.*, 1 Vent. 33; Gilb. C. B. 17.

(*n*) 4 & 5 W. & M. c. 18, s. 4. The act refers only to proceedings in the Queen's Bench.

(*o*) A *supersedeas* is necessary at common law: (see 23 Hen. 6, c. 9; 13 Car. 2, st. 2, c. 2, s. 4): and the stat. 4 & 5 W. & M. c. 18, applies only to proceedings in the Queen's Bench.

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conditioned for his appearance by attorney at the return of the writ, or if given after the return, then for his appearance at some return in the following term (*o*), to reverse the outlawry, and to do and perform such other things as shall be required by the said Court (*p*); but the practice on this head has not been settled since the 1 & 2 *Vict.* c. 110, for the abolition of arrest.

Discharge in case of bankruptcy and insolvency.

It has been held, that a bankrupt who has been outlawed, and his person arrested, and goods taken by the sheriff under a special *capias utlagatum*, is not entitled to be relieved, on summary motion, from such arrest and levy, except upon the terms of appearing to the action, and, if about to go abroad, upon putting in and perfecting bail, although the plaintiff had also proved his debt under the commission, and received a dividend, after which the action was commenced for the balance; for, until those terms are complied with, he has no *locus standi in judicio* (*q*). But, during the forty-two days allowed for the examination of the bankrupt under the 117th section of the 6 *G.* 4, *c.* 16, the bankrupt cannot be arrested under the *capias utlagatum;* and, if he be, the Court of Bankruptcy will discharge him (*r*). It seems that bankruptcy and certificate are no ground of discharge of a prisoner in custody on a *capias utlagatum* (*s*). And it has been decided, that a party outlawed on final process, and, on his petition subsequently made to the Insolvent Court, adjudged to be discharged, is not entitled to a reversal of the outlawry, though the debt on which the outlawry is founded be included in his schedule (*t*). The Insolvent Court, however, have power to discharge an outlaw from the judgment or other debt on which an outlawry is founded, as well as other debts, and this without previous reversal of his outlawry (*u*); and the effect of such discharge is to relieve the defendant not only from the judgment or other debt, but from the outlawry also. The Court would not allow him to be charged in execution either on the judgment in the action, if the outlawry was on final process, or on the judgment of outlawry (*v*).

Privilege from arrest.

Escape.

It may be added, that the *capias utlagatum*, when founded upon a judgment in a civil action, is in the nature of a private execution; and the defendant is in general entitled to the same privilege from arrest as in other cases (*x*); on the same principle, it seems, that an action may be maintained against the sheriff for an escape under this writ (*y*).

Special capias utlagatum, &c.

Special Capias Utlagatum, &c.]—The special *capias utlagatum*, like the general writ, commands the sheriff to take the defendant; and thus far it is executed, and the defendant is entitled to be discharged, in the same manner as when the writ is general, and as to which, see *supra*. But the special writ also commands the sheriff to inquire, by a jury, of the

(*o*) 4 & 5 W. & M. c. 18, s. 5.
(*p*) Id. s. 4.
(*q*) *Summerell* v. *Watkins*, 14 East, 536: and see *Loaker* v. *Holbeche*, 1 Moo. & P. 126.
(*r*) *Ex p. Hemsley*, Jan., 1832, Court of Review, 1 Deac. & Chit. Rep. 16.
(*s*) *Beauchamp* v. *Tomkins*, 3 Taunt. 141.
(*t*) *Dickson* v. *Baker*, 1 A. & E. 853; 3 Nev. & M. 775, *S. C.*
(*u*) *R.* v. *Commissioners of Insolvent Court re Hamlin*, 3 Nev. & P. 543.
(*v*) *Adcock* v. *Fiske*, 8 Scott, 18; 5 Dowl. 66, *S. C.*, nom. *Attorney* v. *Fiske*.
(*x*) The case of the sheriff of *Kent*, 1 Car. & K. 197; 15 Law-J., N. S., 289, Q. B., *S. C.*
(*y*) *Bonner* v. *Stokeley*, Cro. Eliz. 68: *Wolf* v. *Denison*, 1 Salk. 319.

defendant's goods and lands, to extend and appraise the same, and to take them into the Queen's hands and safely keep them, so that he may answer to the Queen for the value and issues of the same (*z*). *Get this writ signed by one of the Masters.* As the inquiry and extent in this case, however, are merely to compel the appearance of the defendant, if he be arrested, and give the undertaking or bond above mentioned, before this part of the writ be executed, it would be very harsh proceeding to inquire of and extend his property afterwards, and, it seems, is never done. But, if he have not been arrested, or have not given the undertaking or bond above mentioned, or have not appeared to the original action, the sheriff must summon a jury to inquire of the defendant's property, real and personal, in possession and in action, and to appraise the same; and you may subpœna witnesses before the inquest, to prove the defendant's interest in the property, and its value. As soon as the inquest is taken, the sheriff takes possession of the property found by it, and returns the *special capias utlagatum*, annexing thereto the inquisition (*a*). *Get the writ and return from the sheriff, and get it filed with one of the Masters* (*b*), *who will give you a transcript of it for the Exchequer.* Where the return was bad, the inquisition finding that various lands of the defendant were in the possession of several individuals, without naming them, the Court, on the application of the creditor and the sheriff, quashed the return (*c*). The sheriff has no right to poundage upon executing this writ (*d*). The Court will not, on the 4 & 5 *W. & M. c.* 18, *ss.* 4, 5, restore goods taken under it (*e*). As to a landlord's right to his rent, where goods, &c., are thus taken under this writ, see *St. John's College* v. *Murcott*, 7 T. R. 259.

Proceedings to obtain satisfaction out of the property seized.

If the defendant have not as yet appeared, and there be no probability of his doing so, you may proceed to obtain satisfaction for your debt and costs out of the property thus seized. For this purpose, *take the transcript the Master has given you to the proper officer on the revenue side of the Exchequer, who, after giving a rule for persons to come in and claim the property seized, will, upon the expiration of that rule, make out for you a venditioni exponas, commanding the sheriff to sell the goods* (*f*), *a levari facias to levy the issues and profits of the freehold land* (*f*), *and a scire facias to recover debts due to the defendant* (*g*), *if necessary. Take these writs (or such of them as you may think proper to sue out) to the sheriff, who will thereupon sell the goods, levy the issues, or summon the parties on the scire facias, as thereby directed.* If to a special *capias utlagatum* the sheriff return an inquisition finding that the defendant had benefices, but no lay fee, the Court will award a writ of sequestration on reading the transcript of the outlawry and inquisition (*h*).

(*a*) See the form, Chit. Forms, 538.
(*b*) See the form of the return, and of the inquisition, Chit. Forms, 536, 536.
(*c*) *Reynolds* v. *Adams*, 3 T. R. 578.
(*c*) *Engler* v. *Annesley*, 1 Dowl., N. S., 185.
(*d*) See *Graham* v. *Gill*, 2 M. & Sel. 294.
(*e*) *Anon.*, 1 Tidd, 133.
(*f*) See a form, Chit. Forms, 537.
(*g*) See Gilb. C. B. 16: *Ahearth* v. *Hutchinson*, 1 Lutw. 534. Where plaintiff in an action was outlawed in another action, proceedings were stayed on defendant paying the money recovered into Court; for if he paid it to the plaintiff after knowing of the outlawry, he might be liable to pay it over again to the Crown. (*Grant* v. *Bryant*, 6 M. & Sel. 347).
(*h*) *Rex* v. *Hind*, 1 Dowl. 286; 1 C. & J. 369; 1 Tyrw. 347, *S. C.*: *Rex* v. *Armstrong*, 3 Dowl. 760; 2 C., M., & R. 296; 5 Tyr. 759, *S. C.*

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But where, to a *capias utlagatum*, the sheriff returned that the defendant had no goods nor any lay fee within his bailiwick, but that he was a beneficed clergyman, without stating the name or situation of the benefice, the Court refused a writ of sequestration, but suggested a motion for a rule, calling upon the sheriff to amend his return (*i*).

Where the amount does not exceed 50*l*.

When the goods have been sold, &c., by the process above pointed out, if the amount do not exceed the sum of 50*l*., *move the Court of Exchequer that it be paid to you, and an order will be granted accordingly. Draw up the order* (*k*), *and obtain from the proper officer a subpœna requiring the sheriff to pay you the money; and the sheriff being served therewith, will pay you the amount mentioned in the return to the venditioni exponas, deducting his poundage.*

Where the amount exceeds 50*l*.

But if the money in the sheriff's hands exceed the sum of 50*l*., *then petition* (*l*) *the lords of the treasury that it may be paid over to you, who will thereupon refer it to the solicitor of the treasury* (*l*). *Get a certificate of the proceedings upon the outlawry from the proper officer* (*l*); *make an affidavit of the debt and costs before a judge at chambers* (*l*); *and lay these, together with your attorney's bill, and the venditioni exponas and return, before the solicitor of the treasury, who will thereupon make his report* (*l*). *File this report with the clerk of the treasury; and a warrant will then be issued, directing the attorney-general to consent to an order* (*l*); *which being taken to the attorney-general, he will give his consent of course. Then move the court, and get the order and subpœna as above mentioned; and the sheriff, upon being served with the order, &c., will pay you the money.* This warrant, and the attorney-general's consent for the payment of the money in the hands of the sheriff, under the *capias utlagatum*, do not amount to an appropriation of that money, where they are granted in ignorance of the death of the defendant; and the court, on a plea by the representatives suggesting the death, will stay the making of an order for the payment until the fact of the death is determined on an issue taken on the plea (*m*).

Grant of debtor's lands, &c.

In the same manner, if your debt be considerable, and the chattel property not sufficient to satisfy it, you may obtain a lease or grant of the Queen's right to levy the issues of the defendant's freehold lands, by petition to the lords of the treasury (*n*). A warrant will thereupon be granted for the lease, and the lease be made out at the Pipe-office of the Court of Exchequer (*o*).

Declaration after outlawry.

Declaration after Outlawry.]—If the defendant enter an appearance before he is outlawed, the plaintiff may declare against him, as in ordinary cases. And the same, in ordinary cases, where he puts in and perfects bail, when ordered by a judge, or enters a common appearance to the action on reversing the outlawry (*p*). Upon reversing the outlawry for want of pro-

(*i*) *R.* v. *Powell*, 1 M. & W. 321.
(*k*) See the forms, Chit. Forms, 541.
(*l*) See the forms, Chit. Forms, 539, 540, 541.
(*m*) *Rex* v. *Buchanan*, 1 C. & M. 195.
(*n*) See the form, Chit. Forms, 538.
(*o*) 2 Sellon, 290 to 292.
(*p*) See *Hesse* v. *Wood*, 4 Taunt. 691: see form of commencement of declaration after a reversal, 8 Dowl. 677.

clamation, under the 31 *Eliz. c.* 3, *s.* 3, the defendant had, before the 1 & 2 *Vict. c.* 110, to appear to a new action to be brought against him by the plaintiff for the same cause; and the plaintiff had until the end of the second term next after the reversal of the outlawry to declare against him (*q*); after which time the defendant might have refused to receive a declaration, in which case his bail were discharged, and the plaintiff would have been obliged to sue out new process against him. It is apprehended, however, that this enactment applies only to bailable actions, and that it is in effect repealed by the 1 & 2 *Vict. c.* 110 (*r*).

Venue.

If the plaintiff declare in time, he is not obliged to lay his *venue* in the county into which the summons issued, but may lay it in any other county at his pleasure (*s*).

Where there are several defendants.

Where there are two defendants, and one only has appeared or is in custody, then, after proceeding to outlawry against the other, you may declare against the one who has appeared alone, stating the outlawry of the other in the commencement of your declaration (*t*). In such declaration you must state that the co-defendant was outlawed in the particular suit: stating that he was "in due manner" outlawed would not suffice (*u*). There is no occasion to refer to the record of outlawry (*x*). The declaration must appear on the face of it to have been filed or delivered some day subsequent to the outlawry (*y*). Where one of two defendants was outlawed, and the other died after interlocutory and before final judgment, it was held that the plaintiff could not support a *sci. fa.* against the representatives of the latter (*z*).

SECT. 2.

Outlawry upon Final Process.

On what process.

By stat. 2 *W.* 4, *c.* 39, *s.* 6, after judgment given in any action commenced by writ of summons, proceedings to outlawry or waiver may be had and taken, and judgment of outlawry or waiver given, in such manner, and in such cases, as may now be lawfully done after judgment, in an action commenced by original writ. (See *ante*, 1132).

Proceedings to outlawry.

In order to proceed to outlawry after final judgment, the plaintiff should sue out a *capias ad satisfaciendum*, as in ordinary cases, directed to the sheriff of the county in which the *venue* in the action is laid (*a*). It should, it seems, be returnable on some day certain in term time, and not *immediate*, and there should be fifteen days between the teste and the re-

(*q*) 31 Eliz. c. 3, s. 3.

(*r*) See the 4 & 5 W. & M. c. 16, s. 3, by which it seems to have been repealed as to actions in Q. B.

(*s*) R. H., 2 W. 4, r. 40: *Whitwick* v. *Hovenden*, 3 Lev. 245. See form of judgment of *nonpros* for not declaring after defendant's appearance on the *exigi facias*, Chit. Forms, 542.

(*t*) See form, Chit. Forms, 542: *Haigh* v. *Conway*, 15 East, 1: *Goldsmith* v. *Levy*, 4 Taunt. 299.

(*u*) *Saunderson* v. *Hudson*, 3 East, 144: *Haigh* v. *Conway*, 15 East, 1.

(*x*) *Macmichael* v. *Johnson*, 7 East, 50.

(*y*) *Ghent* v. *Abbott*, 8 Taunt. 187; 2 Moore, 87, S. C.

(*z*) *Fort* v. *Oliver*, 1 M. & Selw. 242.

(*a*) Fits. Ab., Exigent, 26; Bro. Ab., Exigent and Capias, 19; Dyer, 295; Gilb. C. P. 15.

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turn (*b*); but this is not free from doubt; and Mr. Justice *Wightman*, in a recent case, refused to reverse an outlawry for an alleged irregularity in this respect, and left the defendant to his writ of error (*c*). On a return of *non est inventus* to the *ca. sa.*, you may (without suing out an *alias* or *pluries ca. sa.*) sue out an *exigi facias*, as directed *ante*, 1136, and upon the return thereof sue out a *capias utlagatum*, general or special, as directed, *ante*, 1139, 1140 (*d*). The *exigi facias* should be tested on the *quarto die post* of the return of the *ca. sa.* (*e*) There should be fifteen days between the *teste* and the return (*f*). A writ of proclamation is not necessary in this case (*f*). It may be added, that the Court will not allow a *ca. sa.* to be issued against a peer or member of Parliament, for the purpose of proceeding to outlawry on it (*g*).

Proceedings on capias utlagatum.

If the defendant be arrested on the *capias utlagatum*, he must remain in custody until he have reversed the outlawry (*h*), and which reversal, in general, cannot be obtained on motion, except on the terms of paying the whole debt and costs, and costs of the outlawry (*i*). If his property have been taken under a special *capias utlagatum*, you may proceed to get the produce of it paid over to you in satisfaction of your debt and costs, as directed *ante*, 1141, 1142.

After error.

After error brought, you cannot proceed to outlaw the defendant on judgment (*j*), unless the grounds of error be frivolous; as to which, see *ante*, *Vol.* 1, 488, &c.

SECT. 3.

Reversal, &c. of Outlawry.

Reversal, &c. of outlawry.

The defendant may be relieved from the outlawry, either by reversing it, or by obtaining the Queen's pardon.

How effected.

There are two modes of reversing a judgment of outlawry; upon application to the Court or a judge at chambers, or by writ of error *coram nobis*. The latter, however, is not frequently resorted to in practice, being much more expensive and dilatory than the former; for the Court on motion, or a judge on summons, will now reverse an outlawry for error in fact not appearing on the face of the record, as well as for any irregularity in the proceedings. Both modes of proceeding will now be considered; and, first, as to—

On application to the court or a judge.

Reversal of, on Motion.]—Reversal of outlawry, on motion, or application to a judge, is discretionary with the Court or judge: there is no act of Parliament which gives a party a right to reverse his outlawry, unless there be error in the proceedings, and then only by writ of error. The Court or a

(*b*) See 13 Car. 2, st. 2, c. 2.
(*c*) *Sandford* v. *Wyatt*, 2 Dowl., N. S., 2.
(*d*) See the forms, Chit. Forms, 543.
(*e*) Tidd, 9th ed., 139.
(*f*) Cro. Jac. 577.
(*g*) *Cassidy* v. *Stewart*, 9 Dowl. 360; 10 Law J., N. S., C. P., 57, *S. C.*; *ante*, 1133.
(*h*) See *R.* v. *Wilkes*, 4 Burr. 2539, 2540.
(*i*) See *Ibbetson* v. *Fenton*, 6 Ad. & Ell. 772.
(*j*) *Spinks* v. *Bird*, Pr. Reg. 184; Barnes, 443, *S. C.*

judge at chambers will, however, reverse the outlawry, almost as of course, either unconditionally, or on compliance by the defendant with certain equitable terms, according to the circumstances of the case. And they will reverse it in this summary way for any defect which would be a ground for reversal on a writ of error, though not appearing on the face of the record, (such as that the defendant was in prison, or beyond sea, at the time of the *exigent* awarded, or the like (*k*)), as well as for defects or errors in the proceedings apparent on the record; and it may be taken as a general rule, that they will on terms reverse the outlawry upon the mere suggestion of an error, whether there be real error or not; for the proceedings are looked upon merely for the purpose of bringing the party into court. If the application for the reversal be on the ground of an error in the proceedings, and the error be not clear, and the defendant will not submit to terms, the Court will, in general, refuse to interfere, and will leave him to his remedy by writ of error (*l*). It may be added, that, after a motion to reverse an outlawry has been discharged, the Court will not reverse it, on a new motion founded on affidavits not stating any fact subsequent to the first application, but will leave the defendant to his writ of error (*m*).

At what time applied for.

As to the time of making the application, if the ground for it be irregularity in the proceedings, the motion must be made promptly after the defendant is first apprised of them (*n*), otherwise the Court will not reverse the outlawry, except upon the usual terms, and will put him to his writ of error. But if the ground of the application be any defect not appearing on the record, which would form the ground of a writ of error, it would seem that the application may be made at any time within which a writ of error may be brought; and the same if the ground of the application be, that the proceedings have been vexatiously adopted.

By whom applied for.

Formerly, in the Queen's Bench, the defendant was obliged to appear in person when he applied to reverse an outlawry; but now he may appear for that purpose by attorney in any of the courts (*o*). If the party outlawed do not appear in person, the person making the application must state in his affidavit that he makes it on the behalf and by the authority of the outlaw (*p*). A third party cannot take advantage of any irregularity or other defects in its proceedings (*q*). Where, one of two co-defendants having been outlawed, the plaintiff declared against the other, stating the outlawry, and the latter applied to set aside the declaration, because the outlawry was irregular, the rule was discharged (*r*).

Terms may be imposed.

As to what terms will be imposed on the defendant, on re-

(*k*) See *ante*, 1133; *Beauchamp* v. *Tomkins*, 3 Taunt. 141: *Hasse* v. *Wood*, Id. 691: *Graham* v. *Henry*, 1 B. & Ald. 131: *Lay* v. *Claggett*, 1 M. & W. 547: *Hunter* v. *Whitfield*, 3 Bing. N. C. 878: *Porter* v. *O'Meara*, Id. 626: *Houlditch* v. *Swinfen*, 3 Scott, 170; 5 Dowl. 37, *S. C.*

(*l*) *Sandford* v. *Wyatt*, 2 Dowl., N. S., 2.

(*m*) *Stultz* v. *Wyatt*, 6 Q. B., 666.

(*n*) *Anderson* v. *Alexander*, 2 Dowl. 267: *Lewis* v. *Davison*, 3 Dowl. 272.

(*o*) 4 & 5 W. & M. c. 18, s. 3: see *Anon*, Lofft, 372, 590: and see *ante*, 1138, as to the right of the outlaw to appear.

(*p*) *Plunkett* v. *Buchanan*, 5 D. & R. 625; 3 B. & C. 736, *S. C.*: *Houlditch* v. *Swinfen*, 5 Dowl. 36; 2 Bing. N. C. 712, *S. C.*

(*q*) *Symonds* v. *Parminter*, 1 Sir W. Bla. 20.

(*r*) *Selly* v. *Forbes*, 2 Moore, 90.

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versing the outlawry, where the proceeding to outlawry is an abuse of the process of the court, as, for instance, where it was taken with a knowledge that the defendant was represented by an attorney in this country, and without applying to such attorney, or the like, the Court will reverse it without imposing any terms, and will even compel the plaintiff to pay the costs of the application (*r*). And if there be error apparent on the record, it has been laid down by high authority, that the party has a right to reverse the outlawry, and the Court cannot impose terms (*s*); and they in general will not impose them if the error be clear. In ordinary cases, however, of applications to reverse outlawry for error not apparent on the face of the record, where the plaintiff has not been guilty of any improper conduct, or for an error which is not clearly such, the terms imposed are as follows:—In the case of outlawry on final process, payment of the debt or damages and costs, including costs of the outlawry, &c. (*t*). And before the 1 & 2 *Vict. c.* 110, *s.* 18, the Court would not impose, as one of the terms, that the defendant should pay interest from the time of signing final judgment to the period of reversal (*t*); but, perhaps, this would be decided otherwise since that act. In the case of outlawry on *mesne* process under similar circumstances, the terms are,—the entry forthwith of a common appearance to the action (*u*), and payment of costs (*x*). Before the 1 & 2 *Vict. c.* 110, if the action were bailable, the defendant (at least, if not in custody on the *capias utlagatum*) would have been required to put in special bail, instead of merely entering a common appearance (*y*). But this would not, it seems, be required since that act, unless the plaintiff shew, by affidavit, that the defendant is about to quit England forthwith; and, perhaps, not even then, unless an order to arrest has previously been obtained by application to a judge at chambers, under the third section (*z*). Judges at chambers have, however, frequently imposed the terms of putting in and perfecting special bail without such order, and also on reversal of an outlawry where the defendant is still abroad. It may be here added, that custody on a *capias utlagatum* has been held to be custody upon *mesne* process, within the 7th section of the 1 & 2 *Vict. c.* 110: therefore, where, in a bailable action, during the absence of the defendant abroad, an outlawry was completed, and *capias utlagatum* issued before that act came into force, and the defendant was arrested thereon, after that act came into force, the outlawry was reversed and the defendant discharged, on entering a common appearance and payment of costs (*a*).

What terms.

Bail.

In case of death, &c. of plaintiff.

If the plaintiff die after the outlawry, the same will not be reversed unless the defendant will undertake to appear to a new action to be brought by the personal representative; or, if the

(*r*) See *Pigou* v. *Drummond*, 1 Bing. N. C. 354: see when not, *Hunter* v. *Whitfield*, 3 Bing. N. C. 678. See *ante*, 1133.

(*s*) See per *Patteson*, J., in *Ibbotson* v. *Fenton*, 1 Nev. & P. 782; 6 A. & E. 772, *S. C.*

(*t*) *Ibbotson* v. *Fenton*, *supra*.

(*u*) See *Hesse* v. *Wood*, 4 Taunt. 691. See *Graham* v. *Henry*, 1 B. & Ald. 131.

(*x*) See *Summervil* v. *Watkins*, 14 East, 536: *Hesse* v. *Wood*, 4 Taunt. 691: *Solly* v. *Forbes*, 2 Moore, 567; 8 Taunt. 516, *S. C.*: *Porter* v. *O'Meara*, 7 Dowl. 657; 5 Bing. N. C. 627.

(*y*) See *Sawcold* v. *Hampson*, 2 Str. 1178, and last note. In that case, the Court said it was discretionary to require bail or not.

(*z*) See per *Coleridge*, J., in *Harvey* v. *O'Meara*, 7 Dowl. 725.

(*a*) *Harvey* v. *O'Meara*, 7 Dowl. 725.

plaintiff be a *feme sole*, and has married, then to a new action by her and her husband (*c*).

In case of insolvency.

It would seem that the Court will make a *conditional* order for setting aside an outlawry, in order to prevent an insolvent from remaining in custody unnecessarily (*d*).

Costs.

The party reversing the outlawry is, on motion to the Court or application to a judge, in general obliged to pay the costs of the outlawry and of the reversal (*e*), unless the proceeding to outlawry was an abuse of the process of the court, or the proceedings have been clearly irregular. Even where an attorney (plaintiff in person) outlawed a defendant, although he knew that a person received an annuity for the defendant under a power of attorney during his absence abroad, and also knew several persons with whom the defendant was acquainted, without applying to the receiver or to those persons, the Court would not make the plaintiff pay the costs of reversing the outlawry (*f*). So, where the party applying to reverse the outlawry fails, even by a formal defect in his affidavits, the rule will, it seems, be discharged with costs (*g*). But where it has appeared that the plaintiff proceeded to outlawry merely for the purpose of harassing and oppressing the defendant—as where it appeared that the defendant was actually in custody at the suit of the plaintiff for another cause of action at the time of the *exigent* awarded (*h*); or where the defendant was constantly to be met with, and might have been arrested or served with process (*i*); or where the defendant was abroad, and was represented by an attorney in this country, and the plaintiff proceeded to outlawry without making any application to the attorney (*k*), the Court have ordered the plaintiff to reverse the outlawry at his own expense.

Proceedings after order of reversal.

Having obtained an order for the reversal of the outlawry, take it to one of the Masters, who will thereupon enter the proceedings on the roll, (if they have not already been entered by the plaintiff), and docket the same. He will also mark the outlawry as reversed in his book, and enter the reversal on the roll, which should be filed in the treasury (*l*). If the order be drawn up on payment of costs, the costs must be taxed and paid before the outlawry can be reversed. In cases where bail is required, the same should be put in and perfected as in ordinary cases. The Court have refused to reverse the outlawry because the record was not in court (*m*). The defendant should, if in custody on a *capias utlagatum*, sue out a *supersedeas* with one of the Masters, upon which he shall be discharged out of custody, or it will prevent the sheriff from executing a *capias utlagatum*,

Supersedeas on capias utlagatum.

(*c*) See R. T., 2 Jac. 2, C. P.

(*d*) *Nicholson* v. *Nichols*, 3 Dowl. 326: see *R.* v. *Insolvent Court*, 3 Nev. & P. 543: *Adcock* v. *Flak*, 9 Law J., N. S., 17, C. P. But see *Dickson* v. *Baker*, 3 N. & M. 775.

(*e*) See *Graham* v. *Grill*, 1 M. & Sel. 409: *Bank of England* v. *Reid*, 7 M. & W. 159: *Summervil* v. *Watkins*, 14 East, 536: *Hesse* v. *Wood*, 4 Taunt. 691: *Graham* v. *Henry*, 1 B. & Ald. 131.

(*f*) *Hunter* v. *Whitfield*, 3 Bing. N. C. 878.

(*g*) *Houldfitch* v. *Swinton*, 5 Dowl. 36; 2 Bing. N. C. 712, *S. C.*

(*h*) *Adlams* v. *Colebatch*, 2 Salk. 495: *James* v. *Jenkins*, 9 Moore, 589. And see 2 Sellon, 412.

(*i*) *Seabrook* v. *Hawkins*, Sir Thos. Jones, 211: *Hilliard* v. *Smith*, Comb. 19: *Hill* v. *Wilkes*, 12 Mod. 413: see *Holman* v. *Brazier*, Barnes, 320: *Tamworth* v. *Smith*, Id. 322: *Roger* v. *Cook*, 3 B. & C. 529; 5 D. & R. 302, *S. C.*

(*k*) *Pigou* v. *Drummond*, 1 Bing. N. C. 354; 1 Scott, 264, *S. C.*

(*l*) See the form of entry, Chit. Forms, 543.

(*m*) Lofft, 348, 370.

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generis or special, against him in the same cause, if not already executed (*n*). Or, if his property be still in the sheriff's hands under a special *capias utlagatum*, and the produce of it not paid over to the plaintiff (*o*), it shall be restored to the defendant by a writ of *amoveas manus*, or other proceeding in the Court of Exchequer.

Reversal by writ of error.

Reversal by Writ of Error.]—Judgment of outlawry may be reversed by writ of error *coram nobis*, or *coram vobis*, either for matter of law apparent upon the record, or for matter of fact not appearing upon it (*p*). The writ is claimable by the outlaw as a matter of right, and not of favour (*q*).

As to the mode of proceeding in this case, see *ante*, *Vol.* 1, 519 (*r*). An appearance must be entered, or bail must be put in and perfected, in the same cases and in the same manner as where the outlawry is reversed upon motion, &c. If the judgment be reversed, the *supersedeas* is made out and signed by one of the Masters (*s*).

This mode of proceeding by writ of error, however, is seldom adopted in practice; for the Court will always afford relief upon motion, or a judge at chambers on summons, as already mentioned, if the defendant be willing to comply with those conditions upon which alone they will grant it; namely, entering an appearance, or putting in and perfecting bail, and paying the costs of the outlawry, where the outlawry was upon *mesne* process; or paying the debt and costs, and the costs of the outlawry, where the outlawry was upon final process. There may be cases, however, in which reversing an outlawry by writ of error may be advisable; and it is to be borne in mind, that, on a reversal by such writ, the Court cannot, as in the case of a motion for the reversal, impose on the party any terms (*t*).

(*n*) See a form of *supersedeas*, Chit. Forms, 834.

(*o*) See *Pinfold* v. *Northey*, 2 Lev. 49. And see *Frost's case*, 5 Co. 90: *Eyre* v. *Woodliffe*, Cro. El. 278.

(*p*) See *ante*, 1144, 1145; *Richardson* v. *Robinson*, 5 Taunt. 309: *Sowcold* v. *Hempsey*, 12 East, 695, n.: *Bryant* v. *Wiggenhall*, 5 B. & Cres. 314.

(*q*) See *Matthews* v. *Gibson*, 8 East, 527; Bac. Abr., Outlawry, G. 4, 7th ed., *ante*, Vol. 1, 476.

(*r*) See as to the forms, Chit. Forms, 161 to 168.

(*s*) See a form of *supersedeas*, Chit. Forms, 834.

(*t*) See *Matthews* v. *Gibson*, 8 East, 527; Bac. Ab., Outlawry, G. 1, 7th ed.: per Parkinson, J., in *Ibbetson* v. *Fenton*, 1 N. & P. 782; 6 A. & El. 772, S. C.

CHAPTER III.

REMOVAL OF PRISONERS INTO THE CUSTODY OF THE KEEPER OF THE QUEEN'S PRISON.

By what writs.

PRISONERS in the custody of the sheriff, or in the prisons of inferior courts, may be removed into the custody of the keeper of the Queen's Prison by the writ of *habeas corpus ad faciendum et recipiendum*, (usually called a *habeas corpus cum causâ*), or by the writ of *habeas corpus ad respondendum*, or the writ of *habeas corpus ad satisfaciendum*, according to circumstances.

Habeas corpus cum causâ.

Habeas Corpus cum Causâ.]—If the defendant be in custody of the sheriff, or in some other prison than the Queen's Prison, under process of one of the superior courts, he has a right to remove himself into the custody of the keeper, if he wish it, by this writ of *habeas corpus cum causâ*, even although he should also at the same time be detained upon process of other courts. The right extends to a custody under a *capias utlagatum* (*a*). As to its use when the defendant is in custody in an inferior court, see the next Chapter. The defendant, by suing out the writ, is not estopped from controverting the legality of his custody (*b*). Where a prisoner, arrested at the suit of A., is ordered by the Insolvent Court to be discharged, except as to the debt of S., and as to that debt to be discharged after a time named, and to be confined during the interval within the walls of a prison named, and S. thereupon issues a *capias*, upon which he lodges a detainer in the prison, the prisoner may, nevertheless, under 1 & 2 *Vict. c.* 110, *s.* 85, remove himself by *habeas corpus* into the custody of the keeper (*c*). As to bringing up a prisoner in custody under this suit to render him in discharge of his bail, see *Vol.* 1, 786.

Form of, when and how sued out, &c.

This writ is grantable of course, and may be sued out in term or vacation; but it must bear *teste* in term. It may be made returnable *immediatè* (*d*). *Ingross it on a plain piece of parchment* (*e*); *or get a blank form at the stationer's, and fill it up; and write out a præcipe on plain paper. Take the præcipe and writ to one of the Masters in the Queen's Bench or Common Pleas, who will seal the latter; or, if in the Exchequer, get the writ sealed at the Exchequer Seal Office, at Westminster, and in that court get it also signed by one of the Masters.* It must be also signed by the chief justice, or, in his absence, by one of

(*a*) *Re Sutherland*, 4 Scott, N. R., 609.
(*b*) *Pearson* v. *Yewens*, 7 Scott, 435.
(*c*) *Samuel* v. *Nettleship*, 6 Q. B., 188; 2 G. & D. 770, *S. C.*
(*d*) *Butterworth* v. *Bell*, 3 Burr. 1675. See *R.* v. *Batchelder*, 1 Per. & D. 516: *Case of Leonard Watson*, 9 Ad. & E. 731.
(*e*) See the form, Chit. Forms, 845.

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the other judges of the court out of which it issued (*f*); and, unless so signed, the sheriff is not obliged to execute it (*g*). In the Exchequer, it ought perhaps to have the name and address of the attorney who issued it indorsed or written thereon, and also the day, month, and year when issued (*h*). *Take it to the office of the sheriff or his deputy, or the officer in whose custody the defendant is, at all events four days before the defendant is to be brought up* (*i*), *and he will have him brought up to the judge's chambers; pay him his fees* (*k*).

How obeyed, &c.

The officer should bring him to the judge's chambers in due and convenient time (*l*), without permitting him to wander under pretence of such writ (*m*). Neither should the officer deviate from the direct road, or allow the defendant to go at liberty in conveying him to the judge's chambers; for, if he do, it would be an escape (*n*). He must also take force sufficient to prevent the defendant from being rescued, as a rescue of the defendant would make the sheriff liable to an action for an escape (*o*). If the officer to whom the writ is directed do not obey it, he will, after being ruled to return it (*p*), be liable to an attachment (*q*). When the prisoner is brought up to chambers, any one of the judges who is then sitting (although the writ be returnable before the chief justice only) will commit him to the Queen's Prison, and he will be sent there in the custody of a tipstaff (*r*). If the writ be directed to the keeper, it remains with him, and is not returned to the Queen's Bench (*s*).

Habeas corpus ad respondendum.

Habeas Corpus ad respondendum.]—The writ of *habeas corpus ad respondendum* was formerly used for the purpose of removing a prisoner to the prison of the court in which the action was pending, in order to declare against him. But it seems that this is now unnecessary (*t*), and it therefore needs no further notice.

Habeas corpus ad satisfaciendum, to charge defendant in execution.

Habeas Corpus ad satisfaciendum.]—If a defendant, against whom you have a judgment in one of the superior courts, be a prisoner in the Queen's Prison, or in the prison of any inferior court, but at the suit of a third person, and not of the plaintiff, the latter may have him brought up before the court in which the judgment is obtained by writ of *habeas corpus ad satisfaciendum*, in order to charge him in execution (*u*). But where the defendant is in a county gaol, the plaintiff is not entitled as of right to this writ, with a view to remove him to the custody of the keeper of the Queen's Prison; the issuing

(*f*) 1 & 2 P. & M. c. 13, s. 7.
(*g*) *Rex* v. *Redham*, Cowp. 672.
(*h*) R. M., 1 W. 4, reg. 2, s. 1; 1 C. & J. 274. And see *Sheppard* v. *Shum*, 2 C. & J. 632.
(*i*) See *Parke* v. *Terre*, 3 B. & B. 93; 6 Moore, 260, *S. C.*
(*k*) See *Anon.*, 1 Str. 308: *Hopman* v. *Barber*, 2 Id. 814.
(*l*) *Bettenscorth* v. *Bell*, 3 Burr. 1875.
(*m*) R. M., 1654, ss. 7—10.
(*n*) Roll. Abr., Escape, D. 9: *Anon.*, Cro. Car. 14: *Baldon* v. *Temple*, Hob. 302.
(*o*) *Compton* v. *Ward*, 1 Str. 429.
(*p*) *Semble*, *Rex* v. *Wright*, 2 Str. 915.
(*q*) *Rex* v. *Winton*, 5 T. R. 89.
(*r*) See *In re Salisbury*, 5 B. & Ald. 266.
(*s*) *Cooper* v. *Jones*, 2 M. & Sel. 202.
(*t*) *Barnett* v. *Harris*, 2 Dowl. 167: *Millard* v. *Millman*, Id. 523: *Guiseppe* v. *Haynes*, 10 Law J., N. S., 425, Exch., decided since the 1 & 2 Vict. c. 110.
(*u*) See *ante*, 1059; *Sandys* v. *Hornby*, 5 Nev. & M. 59.

of such writ is discretionary with the Court, and it would in most cases be refused, as the defendant may be charged in execution by a *capias ad satisfaciendum* (*v*).

Also, this writ lies to bring up a plaintiff already in custody in order to charge him in execution for costs of a nonsuit, or verdict against him; and in such case no affidavit is necessary to warrant the issuing of the *habeas*, nor is it necessary that any day certain for the bringing up of the party should be inserted, or that the number-roll of judgment should appear therein (*x*). To charge plaintiff in execution.

This writ must bear *teste* in term, and be returnable in court upon a day certain in term. It was, however, made a question, but not decided, in a recent case, whether it might be tested on a different day to that on which it issued (*y*). It would seem that it might. *Sue it out in the same manner as the habeas corpus cum causâ, ante*, 1149. No affidavit is necessary to obtain it (*z*). It need not, it seems, be marked or indorsed with the term and number of the roll of the judgment (*z*). It need not be against more than those defendants who are in actual custody, although the judgment be against several (*a*). Where it is for the residue of a debt, after a *fi. fa.* is executed, it is not necessary that it should refer to what has been done under the *fi. fa.* (*b*) *Indorse, however, on the back of the writ the amount to be levied, if less than the amount in the body of it. Having made a duplicate of it, deliver the writ to the officer to whom it is directed, who will bring the prisoner up into open court on the return-day.* It is usual to deliver the writ to the keeper of the Queen's Prison at least two days, or to any other officer at least four days, before the prisoner is brought up (*c*). *When the prisoner is brought up into court, he will be charged in execution in the mode pointed out*, ante, 1060; *unless he pays the condemnation-money, no motion is necessary* (*d*), and no opposition can be offered to the commitment on the ground of any illegality in the arrest: such illegality must form the subject of a separate motion for his discharge (*e*). *In vacation, it seems, the writ should be lodged with the keeper of the Queen's Prison, who will detain the prisoner thereon till the next term, and then bring him up.* By *R. M.* 1654, *s.* 10, C. P., the writ, when lodged, is a good cause of detainer. A prisoner cannot be detained until payment of the court fees on this writ, which is merely a substitution for a *ca. sa.* (*f*) Where a party in custody under this writ had removed himself by *habeas corpus* into a different custody, for the purpose of taking the benefit of the Insolvent Act, it was held, that he had thereby waived an irregularity in the *teste* of the first writ (*g*). Form of, how sued out, &c. Proceedings on.

(*v*) *Williams* v. *Jones*, 2 C. & J. 611.

(*x*) *Furnival* v. *Stringer*, 5 Dowl. 195; 3 Scott, 551, *S. C.*

(*y*) *Newton* v. *Rowe*, 14 Law J., N. S., 73, C. P.

(*z*) The rule of H. T., 2 W. 4, r. 95, dispenses with the entry of the proceedings on record. See *Furnival* v. *Stringer*, supra: and the prior case of *Wilson* v. *Bacon*, 2 Dowl. 450. See the form, Chit. Forms, 546.

(*a*) *Wilson* v. *Baron*, 1 Dowl. 118.

(*b*) *Green* v. *Foster*, 2 Dowl. 191.

(*c*) See *Park* v. *Torre*, 3 B. & B. 93; 6 Moore, 260, *S. C.*

(*d*) See *Aldridge* v. *Stanford*, 3 M. & G. 409, C. P. The practice is now the same in all the courts.

(*e*) *Aldridge* v. *Stanford*, *supra*. And see *Wright* v. *Stanford*, 1 Dowl., N. S., 272.

(*f*) *Daksell* v. *Cullen*, 12 M. & W. 1; 1 Dowl. & L. 448, *S. C.*

(*g*) *Newton* v. *Rowe*, 1 Dowl. & L. 814, C. P.; 7 Scott, N. R., 543; 13 Law J., N. S., 73, C. P., *S. C.*

CHAPTER IV.

REMOVAL OF CAUSES FROM INFERIOR COURTS, &c.

1. *Removal before Judgment.*
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2. *Removal after Judgment for the purpose of Execution.*
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1. *Removal of Causes before Judgment.*

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Removal of causes before judgment.

By what Writs.]—Causes from inferior courts, not being courts of record, may in general be removed into the Court of Queen's Bench, Common Pleas, or Exchequer, by writs of *pone, recordari facias loquelam*, or *accedas ad curiam*, according to circumstances; and from inferior courts of record, by *habeas corpus* or *certiorari*. But as causes depending in inferior courts not of record are seldom, in practice, removed into the superior courts, except in replevin, it is enough here to refer to a former part of this volume (*a*) where the writs of *pone, recordari facias loquelam*, and *accedas ad curiam*, have been already noticed. We shall accordingly confine our attention in this Chapter to the writs of *habeas corpus cum causâ* and *certiorari*, the writs used to remove causes into the superior courts from inferior courts of record, as already mentioned.

By habeas corpus cum causâ.

The writ of *habeas corpus cum causâ*, before the 1 *&* 2 *Vict. c.* 110, lay to remove the proceedings from an inferior court of record, where the defendant was actually or virtually in the custody of the court below (*b*), and, therefore, where the proceedings in the inferior court were by plaint only, the proceedings could not be removed by that writ (*c*). By that statute, a defendant can no longer be held to bail in an action in an infe-

(*a*) See p. 988, &c.
(*b*) *Mitchell* v. *Mitchenham*, 1 B. & C. 513; 2 D. & R. 722, *S. C.*; *Palmer* v. *Forsyth*, 4 B. & C. 401; 6 D. & R. 407, *S. C.*
(*c*) *Mitchell* v. *Mitchenham*, *ubi supra*.

rior court; and, therefore, it would seem that this writ can no longer be used, and the only writ for a removal of the cause before judgment is a *certiorari*. There seems, however, to be one exception to this, viz. where a party is a prisoner in a court below, or out of custody on bail, under an attachment out of that court; but in this case there is no removal of the cause, but only of the cause of the party being in custody.

Now, by certiorari.

The *certiorari* lies, as of course, in all cases before judgment, with the exceptions presently mentioned (*d*), whether the action were commenced by process against the person or not; and it may, it seems, be sued out to remove an ejectment, as well as other actions (*e*). The general rule is, that it will not lie to remove proceedings in an inferior court after judgment (*f*). To support an application to stay proceedings in a Court of Requests, a writ of *certiorari* must issue, the rule for which is absolute in the first instance (*g*).

When not removable.

When not removable.]—Neither the *habeas* nor the *certiorari* lies where the debt or damages laid, or things demanded in the declaration in the court below, do not amount to 5*l.*, if the steward or judge of such court be a barrister of three years' standing; unless the action concerned the freehold or inheritance, or title to lands, lease or rent (*h*); or if there be several causes, some under and others above 5*l.*, those only which are above 5*l.* shall be removed (*i*).

Secondly, it does not lie to the courts established under the 9 & 10 *Vict. c.* 95, unless the debt or damage exceed 5*l.*; and then only by leave of a judge, in cases which shall appear to him fit to be tried in the superior court, and on such terms as to payment of costs, giving security for debt or costs, or such other terms as he shall think fit (*j*).

Thirdly, it lies not where the action is maintainable only in the inferior court; as, for instance, where an action is brought in the courts in London for calling a woman a whore (*k*), or against a *feme covert* as sole trader (*l*), it cannot be removed by this or any other writ, unless by a writ of error.

Fourthly, it lies not to the counties palatine, unless some special grounds and circumstances for the issuing of it be first laid before the superior court (*m*).

Fifthly, it does not in general lie after judgment, except for the purpose of suing out execution, or giving the judgment of an inferior court the effect of a judgment of a superior court, under the 1 & 2 *Vict. c.* 110, as to which, see *post*, 1165 (*n*). And where a *certiorari* was moved for to remove the record of a

(*d*) See *Landens* v. *Shiel*, 3 Dowl. 90: *Edwards* v. *Bowen*, 5 B. & Cres. 206; 7 D. & R. 709, *S. C.* It has been considered that a *habeas corpus* could not be used by the plaintiff to remove his own cause. See *Melson* v. *Gardner*, Cowp. 116; Tidd., 494; Pr. Reg. 216; Cas. Pr. C. P. 5.

(*e*) *Goodright* d. *Sadler* v. *Dring*, 2 D. & R. 407; 1 B. & C. 253, *S. C.*: *Patteson* v. *Eades*, 3 B. & C. 550; 5 D. & R. 445, *S. C.*

(*f*) See *R.* v. *Scton*, 7 T. R. 373: *Kemp* v. *Babie*, 1 Dowl. & L. 885; 13 Law J., N. S., 149, Q. B., *S. C.*

(*g*) *Franks* v. *Wicks*, 9 Dowl. 178. And see Id. 489.

(*h*) 21 J. 1, c. 21, 3, ss. 5, 6. See *Fairley* v. *M'Connell*, 1 Burr. 515: *Franks* v. *Quinsee*, 7 Dowl. 607.

(*i*) 12 G. 1, c. 29, s. 3.

(*j*) 9 & 10 Vict. c. 95, s. 90.

(*k*) *Watson* v. *Clerke*, Carth. 75.

(*l*) *Pope* v. *Vaux*, 2 W. Bl. 1060.

(*m*) *Zink* v. *Langton*, 2 Doug. 749: *Williams* v. *Thomas*, Id. 751, n.: *Jones* v. *Dan*, 1 B. & C. 143: *Patterson* v. *Reay*, 2 D. & Ry. 177. And see *Edwards* v. *Bowen*, 5 B. & C. 206; 7 D. & R. 709, *S. C.*

(*n*) See *Fox* v. *Veale*, 8 M. & W. 126; 9 Dowl. 798, *S. C.*: *Kemp* v. *Babie*, 1 D. & L. 885; 13 Law J., N. S., 149, Q. B., *S. C.*

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judgment in the court at Durham, against a person who was in the custody of the marshal in execution in an action in the Queen's Bench for the purpose of enabling his bail in the court below to render him in the Court of Queen's Bench in their discharge, the Court refused it (*o*). And it has been decided, that, in the case of a judgment by default, if the writ is not delivered until after the jury have assessed the damages on the writ of inquiry, the Court will award a *procedendo* (*p*).

Lastly, it of course does not lie where it is expressly taken away by statute (*q*).

When bail required before removal.

When Bail required before Removal.]—By the 19 *Geo.* 3, *c.* 70, *s.* 6, amended by 7 & 8 *Geo.* 4, *c.* 71, *s.* 6, no cause, where the cause of action does not amount to 20*l.* or upwards, can be removed into any superior court, by any writ of *habeas corpus*, or otherwise, unless the defendant who shall be desirous of removing such cause enter into a recognisance with the party for whom the judgment is given by the inferior court in double the sum adjudged to be recovered by the said judgment, for payment of the debt and costs, in case judgment shall pass against him (*r*). This applies only to cases of removal before judgment from courts of record (*s*). If the sum in the declaration be 20*l.* or more, the plaintiff is precluded from his right to require a recognisance under either of the statutes, though the sum sought to be recovered be really less (*t*). The statute extends to actions of tort; such as trover (*u*), slander (*x*), injury to right of way (*y*), and so forth, where the damages claimed are less than 20*l.*

Form, &c. of the writ.

Form, &c. of the Writ.]—The writ is directed to the judge or steward of the inferior court, and it is tested on some day in term; and it may be returnable *immediate*, if directed to the inferior courts of London, Westminster, Southwark, or other court within four miles of London (*z*); and in all other cases on some day certain in term (*a*). If the defendant be in custody, which he may be under an attachment, the writ of *habeas corpus cum causâ* should be directed to the sheriff or other officer in whose custody the defendant is detained (*b*).

Consequence of defects in form.

With respect to informalities in writs of *certiorari*, it is to be observed that third persons cannot object to the misdirection of a *certiorari* to remove a cause from an inferior court, if the proper officer in whose keeping the record is waive the objection, and return the record upon such writ (*c*). If a plaintiff, without improper motives, has removed a judgment into a superior court, by an irregular writ, issued without leave of the Court, such amendments will be allowed and terms imposed as

(*o*) *Patterson* v. *Reay*, 2 D. & R. 177. And see *Bevan* v. *Prothesk*, 2 Burr. 1151.

(*p*) *Smith* v. *Sterling*, 3 Dowl. 609; 1 H. & W. 194., *S. C.* And see *Walker* v. *Gann*, 7 D. & R. 769: *Lawes* v. *Hutchinson*, 3 Dowl. 506; and *post*, 1161.

(*q*) See *Fox* v. *Veale*, 8 M. & W. 126; 9 Dowl. 798, *S. C.*

(*r*) See *Atterborough* v. *Hardy*, 4 D. & R. 362; 2 B. & C. 802, *S. C.*: *Cotton* v. *Baiers*, 1 Jur. 22.

(*s*) *Crookes* v. *Longden*, 7 Dowl. 413; 5 Bing N. C. 410, *S. C.*, nom. *Longden* v. *Crooks*, 7 Scott, 377.

(*t*) *Brady* v. *Veares*, 5 Dowl. 416.

(*u*) *Furnish* v. *Swann*, 10 B. & C. 458.

(*x*) *Lee* v. *Goodlad*, 4 D. & R. 350.

(*y*) *Franks* v. *Quinsee*, 7 Dowl. 607.

(*z*) See R. H., 13 & 14 Car. 2; R. M. 1654.

(*a*) R. H., 13 & 14 Car. 2. See *Rowell* v. *Breedon*, 3 Dowl. 324. See the form of *habeas corpus*, Chit. Forms, 545: and of *certiorari*, &c., Id. 549: and of the different directions of writs, Id. 545.

(*b*) Tidd., 9th ed., 349, &c. See *Perrin* v. *West*, 3 A. & E. 405; 5 Nev. & M. 291, *S. C.*

(*c*) *Daniels* v. *Phillips*, 4 T. R. 499. See 3 Dowl. 325, n.

will enable him to avail himself of the judgment without prejudice to the defendant (*d*). Where a party has by mistake issued a *certiorari* instead of a *re. fa. lo.*, the rule to quash it, on his application, is absolute in the first instance (*e*).

Writ, how sued out.

Writ, how sued out, &c.]—In some cases, you are obliged to obtain the leave of the Court or a judge to sue out the writ; but this is necessary only on removals from courts constituted under the 9 & 10 *Vict. c.* 95, and also, it seems, on removals from the courts of the counties palatine. In other cases, no such leave is necessary (*f*), and the writ may be sued out as a matter of course (*g*). The affidavit for a rule to sue out the writ, when necessary, must not be intitled in any cause; or, if intitled, it cannot be read (*h*). The rule for the writ is absolute in the first instance (*i*). *Sue out the writ in the manner directed*, ante, 1149, *and leave it with the clerk of the papers, or secondary of the inferior court.*

Within what time to be sued out and delivered.

Within what Time to be sued out and delivered.]—The writ must, by the 43 *Eliz. c.* 5, be delivered to the judge or officer of the inferior court, at latest, before any of the jury are sworn (*k*); and, by the 21 *Jac.* 1, *c.* 23, *s.* 2, before issue or demurrer joined, if such issue or demurrer be joined within six weeks after the appearance of the defendant; and, as we have seen, *ante*, 1160, before a writ of inquiry has been executed in case of a judgment by default (*l*): otherwise, in either of these cases, if not so delivered in such time, the writ shall not be received or allowed by such judge or officer, and the inferior court may proceed in the cause. If the judge or officer of the inferior court receives the *certiorari* after the time thus limited, a *procedendo* will issue, and that although in the meantime the record has been filed in the court above (*m*).

How obeyed and returned.

How obeyed and returned.]—In cases where the writ lies, it has the effect of suspending all proceedings in the action against the defendant in the inferior court, immediately upon it being delivered to the officer (*n*), and the writ must be obeyed with-

(*d*) *Rowell* v. *Breedon*, 3 Dowl. 324.

(*e*) *Ruffman* v. *Thornwell*, 7 Dowl. 613.

(*f*) *Walkington* v. *Davis*, 29th April, 1839, at chambers, *coram Erskine*, J., after consulting with other judges. It was the case of a *habeas* to the Palace Court.

(*g*) See per *Littledale*, J., in *Landens* v. *Shiel*, 3 Dowl. 90: *Walkington* v. *Davis*, *ubi supra*. It has been said, that in the Exchequer the fiat of a baron is necessary where the defendant obtains such a writ, and it is the common practice to procure the fiat. It does not clearly appear why a writ which is as much of right in the other courts as a writ of error, (see per *Littledale*, J., and *Erskine*, J., *ubi supra*), should be clogged with this condition in the Exchequer. Perhaps it is because the right to sue in that court in civil cases was originally founded on the fiction, that the plaintiff was the Queen's debtor; and as this removal is in general effected by the defendant, and not by the plaintiff, the fiction did not apply in these cases; and, consequently, the Court would only allow the removal as a matter of favour. If this be so, considering that even the formula expressing the fiction alluded to is now unnecessary, (see *Doe Bloxham* v. *Roe*, 6 Dowl. 388), there seems no reason why the practice in the Exchequer should any longer differ from that in the other courts.

(*h*) *Ex p. Nohro*, 1 B. & C. 267, *semb.*

(*i*) *Pessoay* v. *Goaday*, 3 Dowl. 605.

(*k*) See *Landens* v. *Shiel*, 3 Dowl. 90.

(*l*) In one case, it has been held it could not be delivered after an interlocutory judgment by default, though inquiry not executed, (see *Wyatt* v. *Markham*, Barnes, 221); but in more recent cases, it appears to have been considered, that it may at any time before inquiry. (See *Cox* v. *Hart*, 2 Burr 759: *Godley* v. *Marsden*, 4 M. & P. 138; 6 Bing. 433, *S. C.*)

(*m*) *Lavcrack* v. *Bean*, 3 M. & W. 62.

(*n*) *Fussachary* v. *Baldo*, 1 Salk. 352. It suspends the power of the inferior court, so that, if they proceed, the proceedings would be void, and *coram non judice*.

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out delay (*o*). The *habeas corpus* is obeyed by bringing up the defendant (if in custody (*p*)), and by returning the causes with which he stands charged. The record itself is not removed into the court above, but remains in the court below (*q*). The *certiorari* is obeyed by returning the record itself, formally made up, and not a mere transcript or copy of it, into the court above, in order to be further proceeded upon there (*r*). If, under the particular circumstances of the case, the writ does not lie, those circumstances must be stated specially in the return (*s*).

Bail on removal by habeas.

Bail and Appearance after Removal.]—On the removal by *habeas* of a party in custody or out of custody on bail on an attachment out of an inferior court, (the only case, it seems, in which a removal by *habeas* lies), he may be bailed as in other cases on an attachment, and as to which see *post*, *Pt.* 8.

Common bail.

On the removal of the action by *certiorari*, the defendant should enter an appearance, or file common bail, thus:—*Ingross the bail-piece, and annex it to the writ and return; file the same at the judge's chambers, and give notice to the plaintiff's attorney or agent of your having done so* (*t*). *The plaintiff may at any time, after the return of the writ* (*u*), *compel the defendant to put in common bail, by obtaining, from one of the judge's clerks, a rule for a procedendo, unless the defendant put in common bail within four days after notice thereof, if in term, or in six days if in vacation* (*x*). And if there be several defendants, and the cause be removed by one, common bail must be put in for all, otherwise a *procedendo* may be awarded (*y*).

Procedendo.

Where cause improperly removed.

Procedendo.]—If the cause has been removed when it ought not to have been, the course to be adopted by the opposite party is to apply to the Court or a judge for a writ of *procedendo*. The writ is grantable by any judge of the court into which the cause was removed, upon application to one of their clerks at chambers. *Ingross the writ upon plain parchment* (*z*), *directed to the inferior court, commanding them to proceed in the action. Make out a præcipe for the office. Get the writ sealed by one of the Masters in the Queen's Bench and Common Pleas. In the Exchequer, get the writ sealed at the Exchequer seal office at Westminster, and in that court get it also signed by one of the Masters. Take the writ to the secondary of the inferior court, and file it;* and the cause will be then proceeded in, in the inferior court, from the stage in which it was at the time the *certiorari* was served.

Where common bail not filed in time.

If the defendant do not file common bail within the time limited by the rule for that purpose, the plaintiff may sue out

(*o*) See *Bettesworth* v. *Bell*, 3 Burr. 1876.

(*p*) See *ante*, 1157.

(*q*) *Fazecharly* v. *Baldo*, 1 Salk. 352.

(*r*) See *Palmer* v. *Forsyth*, 4 B. & C. 401; 6 D. & R. 497, *S. C.*: *Askew* v. *Haytan*, 1 Dowl. 510. See *Franks* v. *Wicks*, 9 Dowl. 489, where, upon an application in the cause, an omission in the return was allowed to be supplied by affidavit.

(*s*) See forms of return, Tidd's Forms, 147, 156.

(*t*) See the form of the common bail-piece, Chit. Forms, 550; and of the notice of having filed it, Id. 551. See Tidd, 9th ed., 407.

(*u*) *Clarke* v. *Harbin*, Barnes, 90: see *Lee* v. *Goodlad*, 4 D. & R. 350.

(*x*) See R. M., 1654, s. 8; R. H., 10 W. 3. See the form, Chit. Forms, 550.

(*y*) *Kent* v. *Goldstein*, 7 B. & C. 525; 1 M. & R. 305, *S. C.*: *Jameson* v. *Schonswar*, 1 Dowl. 175.

(*z*) See form of *procedendo*, Chit. Forms, 551.

a *procedendo*. But if common bail be filed after the expiration of the rule, and before the *procedendo* is sued out, it seems the *procedendo* cannot be sued out afterwards (*a*). Where a cause has been removed from the Lord Mayor's Court by *certiorari*, on the part of the defendant, and the plaintiff serves the defendant with a common rule for a *procedendo*, the latter has a right to give notice of justifying his bail, which he has already put in, and of which he has given notice, without waiting until he is served by the plaintiff with a rule for better bail; and if the plaintiff objects to such a justification, he is bound to attend before the judge when the bail appears to justify, and if he does not, and the bail are allowed, he has no right to treat the rule for allowance as a nullity, and issue a *procedendo* (*b*).

For other causes.

And, generally, if the defendant, upon removing a suit commenced against him, does not comply with the statutes and rules of court, made to regulate the proceedings therein upon such removal, as by not pleading in due time to the declaration delivered, or the like, the plaintiff may obtain a *procedendo*. Also, if the court below state, in their return to the *habeas* or *certiorari*, circumstances from which the Court judge that the writ ought not to have issued, a *procedendo* will be awarded (*c*).

Quashing procedendo.

If the *procedendo* has been improperly awarded or issued, the opposite party may apply to the court out of which it issued, to have it quashed.

Quashing certiorari.

The court will not quash a regular writ of *certiorari*, unless there is an admission, or something tantamount to it, by the party suing it out, that he has done it for the purpose of delay (*d*).

No removal after procedendo.

By stat. 21 *Jac.* 1, *c.* 23, *s.* 3, after the cause has thus been remanded, it can never afterwards be removed before final judgment (*e*). Even where the plaintiff, after the cause was thus remanded, recovered in the court below, and then sued the bail below upon their recognisance, who removed the proceedings into the King's Bench by *habeas*, the Court, upon application, awarded a *procedendo* (*f*). But this provision of the statute of James does not extend to applications by bail (*g*).

Proceedings after removal. Declaration.

Proceedings after Removal.]—After the cause has been removed into the court above by the plaintiff, he may be compelled to proceed, as pointed out *ante*, 992, on such removal, or he may be *nonprossed*. If not *nonprossed*, the cause is not out of court till a year after the return of the writ for the removal of it (*h*). After the cause has been removed by the *defendant*, the plaintiff may proceed in the action or not, as he thinks fit, and the defendant cannot, in such a case, *nonpros* him (*i*); but the cause will be out of court if he do not declare

(*a*) See *Johnson* v. *Walker*, 4 B. & Ald. 535, a case of special bail. And see *Wiggins* v. *Stephens*, 5 East, 533.

(*b*) *Scarnett* v. *Price*, 1 Dowl., N. S., 333.

(*c*) See *Watson* v. *Clarke*, Carth. 75: *Pope* v. *Vaux*, 2 W. Bl. 1060: *Fazacharly* v. *Bakie*, 1 Salk. 352: *Horton* v. *Beckman*, 6 T. R. 760: *Jones* v. *Davies*, 1 B. & C. 143. And see *Fry* v. *Carey*, 1 Str. 527.

(*d*) *Landens* v. *Shiel*, 3 Dowl. 90.

(*e*) See *Lawes* v. *Hutchinson*, 3 Dowl. 506. *Lawes* v. *Hutchinson*, 3 Dowl. 506; 1 C., M., & R. 766, *S. C.*

(*f*) *Dixon* v. *Heslop*, 6 T. R. 365: see *Glynn* v. *Hutchinson*, 3 Dowl. 529; 2 Ad. & E. 600, *S. C.*

(*g*) *Glynn* v. *Hutchinson*, 3 Dowl. 529; 2 Ad. & E. 600, *S. C.*

(*h*) *Norrish* v. *Richards*, 5 Nev. & M. 268; 1 H. & W. 437, *S. C.* It was the case of a removal by *habeas corpus*.

(*i*) *Clark* v. *Dixon*, 3 M. & Sel. 93: *Clerk* v. *Mayor of Berwick*, 4 B. & C. 649; 7 D. & R. 104, *S. C.*: *Norrish* v. *Richards*, 5 Nev. & M. 268; 1 H. & W. 437, *S. C.*: *Davies* v. *James*, 1 T. R. 372; R. M., 16 C. 2.

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within a year after the return of the writ for the removal of it; and after that time the defendant need not receive the declaration (*k*). Also the defendant may, within four days after the end of the term in which the writ is returned, or in any subsequent term, rule the plaintiff to declare; and if he does not declare, then, within the second term inclusive after the appearance entered by the defendant, the defendant may afterwards refuse to receive the declaration (*l*). If the plaintiff do proceed, he must begin *de novo*, by declaring against the defendant, whatever may have been the stage in which the cause was in the inferior court at the time it was removed (*m*). The plaintiff, however, cannot declare before appearance is entered. The rule of *M. T.*, 3 *W.* 4, as to commencements of declarations, does not apply to causes removed from inferior courts; and, therefore, it seems that the declaration should be in the old form (*n*). It would be irregular if the declaration stated that the defendant had been summoned to answer the plaintiff, and if he had not been so (*o*). There is, it seems, no objection to the plaintiff declaring in a different form of action from that which he commenced in the court below, provided it be for the same cause of action (*p*), and not for a larger amount (*q*).

Plea, &c.

The time for pleading is the same as in *replevin*, *ante*, 994; but no imparlance is allowed, although the plaintiff do not declare until the next term after the appearance entered, provided he declare on or before the last day of the term (*r*).

The subsequent proceedings are the same as in ordinary cases.

Costs.

If the plaintiff have judgment, he shall be entitled to, and allowed, the costs of the proceedings in the inferior court (*s*).

Affidavits.

When a plaint is removed by *certiorari* from an inferior court into the Queen's Bench, affidavits used on an application in the case may be intitled in the Queen's Bench (*t*). On a rule for discharging a prisoner who was arrested under process from an inferior court, and brought up into the Court of Queen's Bench by *habeas corpus cum causâ*, it was held no objection that the affidavits on which the rule was obtained were intituled in a cause in that court (*u*).

2. *Removal of Causes after Judgment for the Purpose of Execution* (*v*).

Removal of judgments of inferior courts of

Removal of Judgments of Inferior Courts of Record generally by 19 *G.* 3, *c.* 70.]—By stat. 19 *G.* 3, c. 70, *s.* 4, where judgment is given in an inferior court of record (*x*), or any of

(*k*) *Clarke* v. *Harbin*, Barnes, 90: *Hutton* v. *Stroubridge*, 1 Str. 631: *Norrish* v. *Richards*, 5 Nev. & M. 268; 1 H. & W. 437, *S.C.*

(*l*) *Clarke* v. *Harbin*, *Hutton* v. *Stroubridge*, *supra*.

(*m*) R. M., 16 C. 2: *Fanacharly* v. *Baldo*, 1 Salk. 352: *Turner* v. *Bean*, Barnes, 345.

(*n*) *Dod* v. *Grant*, 6 Nev. & M. 70; 4 Ad. & E. 485, *S.C.*; and per *Patteson*, J., in 2 Dowl. & L. 525.

(*o*) *Keane* v. *White*, 2 Dowl. & L. 525.

(*p*) *Gunn* v. *Macheury*, 1 Wils. 277: *Bowerbank* v. *Walker*, 2 Chit. Rep. 519.

(*q*) *Wyatt* v. *Evans*, 3 Salk. 55, *per cur.*: *Bowerbank* v. *Walker*, 2 Chit. Rep. 519.

(*r*) See *ante*, 994; and *Smith* v. *James*, 6 T. R. 752.

(*s*) R. M., 1654, s. 22.

(*t*) *Franks* v. *Wicks*, 9 Dowl. 489.

(*u*) *Perrin* v. *West*, 5 Nev. & M. 291; 3 Ad. & E. 405; 1 H. & W. 401, *S.C.*

(*v*) See as to writs of error and writs of false judgment from inferior courts, *ante*, Vol. 1, 516, 518, 523.

(*x*) See *Steer* v. *Potter*, 9 Jur. 13.

the superior courts at Westminster (upon affidavit of such judgment being obtained, and of diligent search and inquiry having been made after the person of the defendant or his effects, and of execution having issued against his person or effects, as the case may be, and that his person or his effects are not to be found within the jurisdiction of the inferior court,) may cause the record of the judgment to be removed into such superior court, and issue writs of execution thereon against the person or effects of the defendant, in the same manner as upon judgment in the said courts at Westminster (*y*). This statute does not extend to an ejectment (*z*). Nor to judgments against the garnisher in foreign attachment in the lord mayor's court of London (*a*), the statute being confined to cases where the proceedings below are similar to those in the court above (*b*). Nor, as it seems, to judgments for defendants (*c*). The amount for which the judgment was obtained, or of the original debt or damages, is immaterial (*d*). According to one case, it would seem that the Court, and not a judge at chambers, can grant the writ for the removal of the cause (*e*); but this is questionable, and it is the common practice for judges at chambers to grant it. The rule, on application to the Court, is absolute in the first instance (*f*). Where the original judgment was destroyed by accidental fire, the Court ordered execution to issue on a verified copy of the judgment (*g*).

Record generally by 19 G. 3, c. 70.

Removal of Judgments, &c., where the Judge is a Barrister of seven Years' Standing, under 1 *&* 2 *Vict. c.* 110.]—The 22nd section of 1 *&* 2 *Vict. c.* 110, enacts, "that in all cases where final judgment shall be obtained in any action or suit in any inferior court of record, in which, at the time of passing of this act, a barrister of not less than seven years' standing shall act as judge, assessor, or assistant in the trial of causes, and also in all cases where any rule or order shall be made by any such inferior court of record as aforesaid, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, it shall be lawful for the judges of any of her Majesty's superior courts of record at Westminster, or, if such inferior court be within the county palatine of Lancaster, for the judges of the Court of Common Pleas at Lancaster, or for any judge of any of the said courts at chambers, either in term or vacation, upon the application of any person who, at the time of the commencement of this act shall have recovered or who shall at any time thereafter recover such judgment, or to whom any money or costs, charges or expenses, shall be payable by such rule or order as aforesaid, or upon the application of any person on his behalf, and upon the production of the record of such judgment, or upon the production of such rule or order, such record, or rule or order, as the case may be, being respectively

Removal of judgments, rules, and orders of inferior courts where the judge is a barrister of seven years' standing, under 1 & 2 Vict. c. 110.

(*y*) See the form of the affidavit in this latter case, Chit. Forms, 552; of the rule, Id. 552; and of the *certiorari*, Id. 503. See *Jordan* v. *Cole*, 1 H. Bl. 532.

(*z*) *Doe Stansfield* v. *Shipley*, 2 Dowl. 408.

(*a*) *Bulmer* v. *Marshall*, 1 D. & R. 537; 5 B. & Ald. 825, *S. C.*

(*b*) Per *Abbott*, C. J., 5 B. & Ald. 823.

(*c*) *Batten* v. *Squires*, 4 Dowl. 53.

(*d*) *Knowles* v. *Lynch*, 2 Dowl. 623.

(*e*) *Rowell* v. *Breedon*, 3 Dowl. 324.

(*f*) *Knowles* v. *Lynch*, 2 Dowl. 623.

(*g*) *Cheesewright* v. *Franks*, 6 Dowl. 471.

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under the seal of the inferior court and signature of the proper officer thereof, to order and direct the judgment, or, as the case may be, the rule or order, of such inferior court to be removed into the said superior court, or into the Court of Common Pleas at Lancaster, as the case may be; and immediately thereupon such judgment, rule, or order shall be of the same force, charge, and effect as a judgment recovered in or a rule or order made by such superior court, and all proceedings shall and may be immediately had and taken thereupon, or by reason or in consequence thereof, as if such judgment so recovered, or rule or order so made, had been originally recovered in or made by the said superior court, or into the Court of Common Pleas at Lancaster, as the case may be; and all the reasonable costs and charges attendant upon such application and removal shall be recovered in like manner as if the same were part of such judgment, or rule or order: Provided always, that no such judgment, or rule or order, when so removed as aforesaid, shall affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, any further than the same would have done if the same had remained a judgment, rule, or order of such inferior court, unless and until a writ of execution thereon shall be actually put into the hands of the sheriff or other officer appointed to execute the same (*h*). It seems doubtful whether the removal of a transcript of the judgment of an inferior court made from the minutes or roll of the court, sealed with the seal and signed by the officer of the court, for the purpose of suing out execution from a superior court on a judgment in an inferior one, is a compliance with this enactment (*i*). Where a judgment has been removed under it, the Court will not inquire into the regularity of the proceedings of the court below previous to the judgment (*j*). It may be observed, that this enactment does not contain the words on the construction of which it has been held that the above statute, 19 *G.* 3, *c.* 70, does not include judgments for defendants. It applies to inferior courts of equity as well as law (*k*).

Courts of Requests.

Most of the recent statutes establishing or further extending the powers of courts of requests, contain provisions making this enactment applicable so as to authorize the removal of the judgment for the purpose of execution (*l*).

Removal of a judgment, &c. in Common Pleas at Lancaster.

Removal of Judgment, &c. from the Common Pleas at Lancaster or Durham.]—The above statute of 19 *G.* 3, *c.* 70, *s.* 4, was extended to the counties palatine by the 32 *G.* 3, *c.* 68, *s.* 1; but the removal of judgments, &c., from these courts is now regulated by more modern statutes. The 4 & 5 *W.* 4, *c.* 62, *s.* 31, as to Lancaster, enacts, "that whenever a plaintiff or defendant, in any action or suit in which judgment shall be recovered in the said Court of Common Pleas at Lancaster, shall remove his person or goods or chattels from or out of the jurisdiction of the said Court of Common Pleas at Lancaster, it shall and may be lawful for any of the superior courts at Westminster, upon a certificate from the prothonotary of the said

(*h*) See the forms of affidavit, order, and writs of execution on this section, Chit. Forms, 555 *et seq.*

(*i*) *Kemp* v. *Parry*, 8 Jur. 576, B. C.

(*j*) *Simons* v. *Count de Winta*, 1 Dowl. 646.

(*k*) *Harvey* v. *Gilbert*, 7 Dowl. 616.

(*l*) See *Fox* v. *Veal*, 8 M. & W. 126.

Court of Common Pleas at Lancaster, or his deputy, of the amount of final judgment obtained in any such action, to issue a writ or writs of execution thereupon for the amount of such judgment, and the costs of such writ or writs and certificate, to the sheriff of any county, city, liberty, or place, against the person or persons or goods of the party or parties against whom such final judgment shall have been obtained, in such manner as upon judgments obtained in any of the said Courts at Westminster" (*m*). An application to obtain execution under this act should be supported by an affidavit of the recovery of the judgment in the court at Lancaster, and of the removal of the party against whom the judgment was recovered, or of his goods and chattels, out of the jurisdiction of that court. And the affidavit should, it seems, state distinctly that the party was a resident within the jurisdiction at the time of the judgment, or of action brought, and then had goods and chattels there which he has since removed out of the jurisdiction. It is not sufficient to state that he is not now a resident within the jurisdiction, and has not any goods or chattels within it; or that he is not now a resident there, and has removed all his goods and chattels out of the jurisdiction since the judgment (*n*). If the application be for a *capias ad satisfaciendum*, it would seem the affidavit need merely state the removal of his person and not of his goods (*o*). The affidavit should be intitled in the superior court (*p*).

Removal of rules from that court.

Sect. 32 also enacts, "that, in case any rule of the said Court of Common Pleas at Lancaster cannot be enforced by reason of the non-residence of any party or parties within the jurisdiction thereof, it shall be lawful, upon a certificate of such rule by the prothonotary of the said court, and an affidavit, that by reason of such non-residence such rule cannot be enforced as aforesaid, to make such rule a rule of any one of the said courts at Westminster, if such court shall think fit, whereupon such rule shall be enforced as a rule of such court."

In Court of Pleas at Durham.

The 2 & 3 *Vict. c.* 16, *s.* 28, as to judgments in the Court of Pleas at Durham, contains a provision similar to that of 1 & 2 *Vict. c.* 110, *s.* 22, *ante*, 1159. The 2 & 3 *Vict. c.* 16, *s.* 29, contains a similar provision to the 4 & 5 *W.* 4, *c.* 62, *s.* 32, *supra*, as to rules of the Court of Pleas at Durham.

Removal of a judgment, &c. from the Stannaries Court.

Removal of Judgment, &c. from the Stannaries Court.]—The 6 & 7 *W.* 4, *c.* 106, *s.* 11, for the improvement of the administration of justice in the Stannaries of Cornwall, contains provisions similar to those of the above act of 4 & 5 *W.* 4, *c.* 62, *s.* 31. But the provisions of the 6 & 7 *W.* 4, *c.* 106, apply only to judgments, orders, &c., on the law side of the court (*q*). And decrees on the equity side of the court can only be removed under the provisions of the 1 & 2 *Vict. c.* 110, *s.* 22, noticed *ante*, 1159 (*r*).

(*m*) See the forms, Chit, Forms, 553.
(*n*) *Wigden* v. *Birt*, 9 M. & W. 50; 1 Dowl., N. S., 93, 372, *S. C.* And see *Duckworth* v. *Fogg*, 2 C., M., & R. 736; 1 Tyr. & G. 172; 4 Dowl. 396, *S. C.*
(*o*) *Lord* v. *Cross*, 4 Nev. & M. 30; 2 Ad. & E. 81, *S. C.* But see *S. C.*, 3 Dowl. 4.
(*p*) *Wigden* v. *Birt*, *supra*.
(*q*) *Harvey* v. *Gilbard*, 7 Dowl. 525, cor. *Patteson*, J.
(*r*) *Harvey* v. *Gilbard*, 7 Dowl. 616, cor. *Williams*, J.

CHAPTER V.

CLAIM OF CONUSANCE.

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In what cases.

In what Cases.]—Inferior courts of record (*a*) having a grant of "conusance of pleas," with or without exclusive words, may claim *conusance* if an action for a cause within their *conusance* be brought in a superior court (*b*). But *conusance* shall not be allowed when the franchise claiming it cannot give a remedy, and when, consequently, there would be a failure of justice (*c*), as in *quare impedit* (*d*), replevin (*e*), waste (*f*), or attaint (*g*); nor shall it be allowed after the cause has been removed from the inferior court by writ of error (*h*), or where the corporation or lord to whom the franchise was granted are themselves parties (*i*), or in *quo warranto* informations (*k*); nor shall it be allowed where the defendant is a stranger, not having any property within the franchise (*l*), or where the action in the superior court is against an heir on the bond of his ancestor, and he hath no assets within the jurisdiction of the inferior court (*m*); nor shall it be allowed where the plaintiff is an attorney or officer of the superior court, and consequently privileged to sue there (*n*). The defendant being in the custody of the keeper of the Queen's Prison, however, does not oust the inferior court of its jurisdiction (*o*).

As to the species of actions in which *conusance* is allowed, it depends entirely upon the charter by which the franchise has been granted. The universities have *conusance* in personal actions only (*p*); in other cases the *conusance* is usually confined to local actions (*q*); but in all cases, the actions in which it is claimed must be such as were *in esse* at the time of the charter, and not subsequently created by statute (*r*).

When to be made.

When to be made.]—*Conusance* must be claimed before the defendant has pleaded (*s*), and even before imparlance (*t*); and in cases where the cause of action appears in the writ, it must be claimed upon the return-day of the writ (*u*).

(*a*) 2 Inst. 140; Co. Litt. 117. b.
(*b*) See 2 Bac. Abr., Courts, (D) 3; 1 Sellon, 257; Hardr. 509, 510: *Jennings* v. *Hankyn*, Carth. 11: *Davis* v. *Stringer*, Carth. 354.
(*c*) 1 Ro. Abr. 489.
(*d*) 44 E. 3, 29 b; 26 E. 3, 73; Co. Litt. 134.
(*e*) 38 E. 3, 31; 2 Inst. 140; Bro. Conusance, 423.
(*f*) 1 H. 4, 5.
(*g*) Dy. 302; Keilw. 210; Co. Litt. 204.
(*h*) 50 Ass. 2.
(*i*) Bendl. 88, pl. 134: *Day* v. *Savadge*, Hob. 87
(*k*) Keilw. 88 to 90.
(*l*) 22 Ass. 83.
(*m*) *Brown* v. *Carrington*, Cro. Jac. 502; 2 Ro. Rep. 48.
(*n*) Lit. Rep. 40, 304; 3 Leon. 149: *Jolliffe* v. *Langston*, 1 Ld. Raym. 342; *ante*, 59, 60.
(*o*) Bro. Conusance, 50: *Jennings* v. *Hankyn*, Carth. 12: *Jones* v. *Bodenner*, 1 Ld. Raym. 135.
(*p*) See Lit. Rep. 352; *Halley's case*, Cro. Car. 87, 88: *Thornton* v. *Ford & Serle*, 15 East, 634: *Williams* v. *Brickenden*, 11 East, 543.
(*q*) 4 Inst. 213; Tidd, 691.
(*r*) 14 H. 4, 20; see 22 E. 4, 23; 2 Bac. Abr., Courts, (D) 3.
(*s*) *Wells* v. *Trehern*, Barnes, 346.
(*t*) *Welles* v. *Trehern*, Willes, 233.
(*u*) *Leasinby* v. *Smith*, 9 Wils. 405, 413: *R.* v. *Agar*, 5 Burr. 2920. See *Browne* v. *Rancourd*, 12 East, 12.

How made.]—The claim must be entered on a roll (*x*); and if the franchise were immemorial and not founded upon any express charter, a former allowance of it in the superior court, or in eyre, must be stated (*y*). Such allowance, or, in the case of an express charter or private statute, then the charter itself, or an exemplification of it under the great seal, or an exemplification (*z*) or copy of the private statute, must be produced in court. Also, where the claim is made by one of the universities, a certificate of the chancellor of such university, that the defendant is a resident member, and also an affidavit to the same effect, must be produced (*a*). How made.

The claim is exhibited in court, and the motion is made that it be allowed. Then, upon the claim and the other documents above mentioned being read, the Court grant a rule upon the plaintiff to shew cause why the *conusance* should not be allowed; and upon cause shewn or default made, the Court make the rule absolute, or discharge it, as in ordinary cases (*b*). Motion and rule for allowance of.

Conusance may be claimed by the bailiff of the franchise (*c*), or by the chancellor, vice-chancellor (*d*), or even the deputy of the vice-chancellor of either of the universities (*e*). If made by attorney, the letter of attorney must be produced in court and filed (*f*). By whom made.

If *conusance* be allowed, a transcript of the record is sent to the inferior court, but the record itself remains in the superior court; and if the plaintiff afterwards cannot have justice done him in the court below, he may have a re-summons upon the record remaining in the superior court (*g*). Record, how disposed of. Re-summons.

(*x*) *Paternoster* v. *Graham*, 2 Str. 810: *Lessingby* v. *Smith*, 2 Wils. 409. See the form of the entry, *Browne* v. *Renouard*, 12 East, 15.

(*y*) *Foster* v. *Hexam*, 1 Ld. Raym. 427: *Foster* v. *Mitton*, 1 Salk. 183; 9 Co. 27 b, 28 a.

(*z*) See *Kendrick* v. *Kynaston*, 1 W. Bl. 454.

(*a*) *Paternoster* v. *Graham*, 2 Str. 810: *Dormer* v. *Howard*, 9 Jur. 737, Exch., where a plea to the jurisdiction, on the ground that the cause of action arose in Oxford, was held bad.

(*b*) See *Browne* v. *Renouard*, 12 East, 12: see *Lessingby* v. *Smith*, 2 Wils. 409; Comb. 119.

(*c*) Bro. Conusance, 36, 50.

(*d*) *Williams* v. *Brickenden*, 11 East, 543.

(*e*) Hardr. 505. See *Dormer* v. *Howard*, *supra*.

(*f*) *Bishop of Ely's case*, 1 Sid. 103; 1 Lev. 87. And see *Williams* v. *Brickenden*, 11 East, 543: *Browne* v. *Renouard*, 12 East, 12 to 15.

(*g*) 1 Sellon, 257; Tidd, 634.

CHAPTER VI.

CHANGE OF VENUE.

PART V.

IT should be premised that the Court will, in some cases in local and other actions, order the issue or inquiry to be tried or executed in another county than that in which the venue is laid, but this practice is distinct from that of changing the venue, noticed *ante, Vol.* 1. 994

1. *By Defendant on the common Affidavit*, 1164.
2. *By Defendant on Special Grounds*, 1170.
3. *By Plaintiff*, 1172.

1. *By Defendant on the common Affidavit.*

In what cases.

In what Cases.]—Local actions must be brought in the county in which the cause of action arose; transitory actions, in any county, at the option of the plaintiff. But if the plaintiff bring a transitory action in any other county than that in which the cause of action arose, the defendant, upon application to the Court or a judge, founded upon an affidavit, "that the plaintiff's cause of action (*a*) (if any) arose in the county of B., and not in the county of A.," (where the action is brought), "or elsewhere out of the said county of B.," can have the venue changed to the county where the cause of action really arose (*b*). The affidavit must expressly state that the cause of action did not arise in the county in which the venue is laid, and that it did arise in the county to which the venue is sought to be changed, and not elsewhere (*c*). It may, it seems, be made either by the defendant or his attorney (*d*), or, perhaps, any other person who can swear to the facts; but, except under peculiar circumstances, it had better be made by the former. It seems that it cannot be made by the defendant's wife, though it may, if it be shewn that he is too unwell to attend before a commissioner, and that she understands the nature and particulars of the action (*e*). It may be made by

(*a*) As to the meaning of this, see *Gerard* v. *Hodge*, 10 East, 32: *Clarke* v. *Wood*, 1 N. R. 310. It will not suffice to swear that "the promises in the declaration mentioned" were made, &c.: *Cole* v. *Goring*, Barnes, 336: *White* v. *Love*, 2 Barnard. 74.

(*b*) See 1 Saund. 73, 74, n.: *Jones* v. *Pearce*, 2 Dowl. 54; Tidd, 9th ed., 609. See form of affidavit, Chit. Forms, 559.

(*c*) *Jones* v. *Pearce*, 2 Dowl. 54: *Palmer* v. *Terry*, 2 Dowl. 566: *Allen* v. *Griffiths*, 3 T. R. 495: *Walker* v. *Wright*, 4 East, 495.

(*d*) *Biddell* v. *Smith*, 2 Dowl. 219. See *King* v. *Turner*, 1 Chit. Rep. 58, 161: *Shearburn* v. *Shubrick*, 6 Scott, N. R., 133.

(*e*) *Williams* v. *Higges*, 8 Dowl. 165; 6 M. & W. 133, *S. C.* The application in this case seems to have been to bring back the venue.

one of several defendants (*f*). One of several defendants, however, cannot change the venue without the consent of the others; but if there be reason to infer their consent, it may be changed upon the application of one of them, though the others have, by pleading, obtaining time on terms, or even suffering judgment by default, lost their privilege (*g*). Several defendants.

In what actions.

In an action for criminal conversation (*h*), or for an assault (*i*), or for negligence in driving, &c. (*k*), the venue may be changed, as of course, upon the common affidavit: but not so, it seems, in an action on the case for running down a ship (*l*). So, according to the recent decision of the Court of Exchequer in *Mondel* v. *Steel*, the venue may, it seems, be changed, on the common affidavit, in all actions upon contracts, though in writing, except on specialties (*m*), bills of exchange, and promissory notes (*n*). And although it would seem, from some prior decisions, that it cannot be changed in an action on a policy of insurance (*o*), or other instrument, though not under seal, if the declaration be special on the written instrument, and the instrument be not merely incidental to the action, as an I. O. U., or the like (*p*), yet, according to that decision, this is not correct. At all events, it may be changed in an action on a contract to be performed in a particular place (*q*). It cannot be changed in an action of debt on a demise for rent (*r*), or in an action on an award (*s*). There are some other cases, also, in which the venue will not be allowed to be changed on the common affidavit; as in actions for *scandalum magnatum* (*t*), actions for the infringement of a patent, where the venue is laid in Middlesex (*u*); actions for escapes, or false returns (*x*); and, as is reported, actions against carriers (*y*). It may be added, that, if the declaration contain one count on a *bonâ fide* (*z*) cause of action, in respect of which the venue cannot be changed, the insertion of other counts on causes of action, in which the venue can be changed, will make no difference (*a*).

(*f*) *Box* v. *Reed*, Barnes, 343.

(*g*) See *Eccles* v. *Holland*, 4 M. & Selw. 233: *Bradsley* v. *Rippon*, 5 Taunt. 87: *Green* v. *Thackeray*, Id. 631. *Anon.*, 2 Chit. 417.

(*h*) *Guard* v. *Hodge*, 10 East, 32.

(*i*) *Shephaard* v. *Hall*, 2 Chit. Rep. 417.

(*k*) *Williams* v. *Land*, 4 Taunt. 729.

(*l*) *Flecke* v. *Godfrey*, 1 T. R. 782, n. But it does not appear from the report where the accident took place.

(*m*) *Mondel* v. *Steel*, 8 M. & W. 644: *Slade* v. *Trow*, 1 C. & M. 584: *Nash* v. *Breeze*, 12 Law J., N. S., 162: *Foster* v. *Taylor*, 1 T. R. 781: *Watt* v. *Daniel*, 1 B. & P. 425: *Youde* v. *Youde*, 4 Dowl. 22; 3 Ad. & El. 311, *S. C.*: *Bates* or *Meade* v. *Sessions*, 1 C., M., & R. 86; 2 Dowl. 680, *S. C.*

(*n*) *Mondel* v. *Steel*, *supra*: *Parmeter* v. *Otway*, 3 Dowl. 66: *Walthew* v. *Syers*, Id. 160: *Pinkney* v. *Collins*, 1 T. R. 571: *Evans* v. *Weaver*, 1 B. & B. 20: *Shephard* v. *Green*, 5 Taunt. 576: *Smith* v. *Elkins*, 1 Dowl. 426.

(*o*) *Smith* v. *Stansfield*, 1 M'Clel. & Y. 212, *per curiam*.

(*p*) *Pickard* v. *Featherstone*, 4 Bing. 39; 12 Moore, 161, *S. C.*: *Slade* v. *Trow*, 2 Dowl. 65; 1 C. & M. 584, *S. C.*: *Roberts* v. *Wright*, 1 Tyr. 532; 2 C. & J. 547; 1 Dowl. 294, *S. C.*

(*q*) *Mondel* v. *Steel*, *supra*.

(*r*) *Duplessis* v. *Chalk*, 2 Str. 878. It may in debt for use and occupation: *Herring* v. *Watts*, 2 Dowl. & L. 609; 8 Scott, N. R., 755, *S. C.*

(*s*) *Whitburn* v. *Staines*, 2 B. & P. 355: *Stanway* v. *Hislop*, 4 D. & R. 635; 3 B. & C. 9, *S. C.*: *Martin* v. *Dance*, 1 Dowl. & L. 279; 11 M. & W. 734, *S. C.*

(*t*) *Griffin* v. *Walker*, 7 Scott, 846: *Duke of Norfolk* v. *Alderton*, 2 Salk. 668: *Lady Falconbridge* v. *Forrest*, 2 Str. 807.

(*u*) *Brunton* v. *White*, 7 D. & R. 103: *Anon.*, 2 Chit. Rep. 418: *Cameron* v. *Gray*, 6 T. R. 363.

(*x*) *Anon.*, 2 Salk. 669, 670. See *Pitcher* v. *Sheriff of Middlesex*, 2 Marsh. 152.

(*y*) *Heathcote's case*, 2 Salk. 670; *sed quære*.

(*z*) See *Shephard* v. *Green*, 5 Taunt. 576: *Hart* v. *Taylor*, 2 D. & R. 164: *Richards* v. *Furnieu*, 2 M. & P. 318.

(*a*) *Parmeter* v. *Otway*, 3 Dowl. 66: *Walthew* v. *Syers*, Id. 160; 1 C., M., & R.

PART V.

Where cause of action arose in several counties.

If the cause of action be such that the above common affidavit (*viz.*, that the cause of action, if any, arose in the county into which the defendant proposes to change the venue, and not elsewhere) cannot be made, the Court or judge will not order the venue to be changed, unless under particular circumstances hereafter noticed, or by the consent of the parties. Therefore, if the cause of action have arisen in two counties, as in an action for a libel published in two or more counties (*b*), or written in one and published in another county (*c*), the venue cannot be changed (*d*); but where the libel was written and published in one county only (*e*), or written here and published only abroad (*f*), the venue may be changed.

Persons privileged as to venue.

Serjeants-at-law, barristers (*g*), attornies (*h*), and officers of the court, have the privilege, in personal actions (*i*), of laying their venue in Middlesex; and the defendant will not be allowed to change it, upon the usual affidavit (*k*); provided they sue in their own right (*l*), and not jointly with others (*m*). But if they lay the venue in any other county, they have no privilege as to retaining it (*n*). And a plaintiff, who becomes a barrister *during* the action, cannot bring back the venue, though originally laid in Middlesex (*o*). And if an attorney sue by another attorney, he thereby waives his privilege as to venue (*p*). And none of the above persons can, as *defendants*, have the venue changed to Middlesex without the usual affidavit (*q*).

Into what counties.

Into what Counties.]—When the venue is changed upon the common affidavit, it is always changed to the county in which the cause of action arose. It may be changed to Chester (*r*), Durham, or Lancaster, and the record sent down by *mittimus* into the latter counties. The venue might even, before the 11 *G.* 4 & 1 *W.* 4, *c.* 70, be changed to a Welsh county (*s*); and if it be desired afterwards to have the cause tried in the next English county, it might be done by a suggestion upon the issue as directed *ante*, *Vol.* 1, 285 (*t*). So, it may be changed to a city; after which the party may, on motion, have a *venire* to the sheriff of the next adjoining county, under stat. 38 *G.* 3, *c.* 52 (*u*).

596, *S. C.*: *Dawson* v. *Bowman*, 3 Dowl. 160: 1 C., M., & R. 894, *S. C.*: *Arden* v. *Mornington*, 4 Tyr. 56.

(*b*) *Pinkney* v. *Collins*, 1 T. R. 571: *Hobart* v. *Wilkens*, 1 Dowl. 460: *Clementson* v. *Newcombe*, 3 Dowl. 425.

(*c*) *Chisold* v. *Chisold*, 1 T. R. 647: *Hitchen* v. *Best*, 1 B. & B. 299.

(*d*) See 2 Saund. 5 e: *Neale* v. *Neville*, 6 Taunt. 565: *Cameron* v. *Gray*, 6 T. R. 363: *Robson* v. *Blackwell*, 2 Dowl. 645.

(*e*) *Freeman* v. *Norris*, 3 T. R. 306.

(*f*) *Metcalfe* v. *Markham*, 3 T. R. 632: but see *Walker* v. *Wright*, 4 East, 495.

(*g*) See *Newton* v. *Harland*, 6 Dowl. 630: 4 Bing N. S. 406, *S. C.*

(*h*) See Vol. 1, 59, 60.

(*i*) See *Att.-Gen.* v. *Lord Churchill*, 9 Dowl. 789, per *Alderson*, B.: *ante*, 59.

(*k*) *Pope* v. *Redfearne*, 4 Burr. 2027: 2 Show. 242, 176: *Burroughs* v. *Willis*, 2 Str. 892: *Knight* v. *Barnaby*, 2 Ld. Raym. 1253: 2 Salk. 670, *S. C.*: *Pye* v. *Leigh*, 2 W. Bl. 1065: *Downes* v. *Bruan*, Id. 993.

(*l*) See *Newton* v. *Rowland*, 1 Salk. 2.

(*m*) See Vol. 1, 60, and *ante*, 1047: *Newton & Wife* v. *Harland*, 6 Dowl. 630.

(*n*) *Lewis* v. *Shelley*, 7 Taunt. 146.

(*o*) *Newton* v. *Harland*, *supra*.

(*p*) Vol. 1, 60.

(*q*) *Yeardley* v. *Roe*. 3 T. R. 573: *Pope* v. *Redfearne*, 4 Burr. 2028. And see *Lewis* v. *Shelley*, 7 Taunt. 146.

(*r*) *Godfrey* v. *Philpot*, 2 Ld. Raym. 1418: *Price* v. *Griffith*, 1 Wils. 222; which cases were decided before the 1 W. 4, c. 70.

(*s*) *Hopkins* v. *Lloyd*, 6 East, 385.

(*t*) See *Freeman* v. *Gwynn*, 2 W. Bl. 963.

(*u*) *Bird* v. *Morse*, 7 Taunt. 385. It may, since the 5 & 6 W. 4, c. 76, s. 109, be changed to Bristol in Michaelmas or Hilary, as well as other terms: *Cole* v. *Greene*, 3 Dowl. & L. 368; 15 Law J., N.S., Q. B., *S. C.* Before that act, this was otherwise, unless the plaintiff would consent: see *Moor* v. *Fearnhaugh*, 1 Wils. 138; 2 Str. 1258, *S. C.*: *Howarth* v. *Willett*, 2 Str. 1180.

At what time applied for.

At what Time, and how changed, and Effect of Rule, &c.]—The application to the Court or a judge to change the venue on the common affidavit may be made any time after declaration, and before the defendant has pleaded (*x*); but not after plea (even a plea in abatement (*y*)) pleaded. It cannot be made after time has been obtained to plead, upon the terms of taking short notice of trial (*z*), or upon "the usual terms" (*a*), whether or not the trial would be lost by the changing (*b*). If it is intended, therefore, to apply to change the venue, the defendant should endeavour to get into the order for time to plead the words "without prejudice to any application to change the venue;" or, if the plaintiff will not be materially delayed by changing the venue, the Court or a judge may direct that the order for time should be amended in that respect (*c*) It may be made after an order for time to plead, if the terms be merely to plead issuably, or if merely a consent to be indorsed on a summons for time on the terms of taking short notice of trial, but no order drawn up upon it (*d*). The motion cannot be made by defendant after a new trial granted (*e*). Also, where one defendant has allowed judgment to go by default, it may be doubtful if the Court or judge would change the venue at the instance of the other defendant who had pleaded; for it might be imposing a hardship upon the former, to have damages assessed by a jury of a different county, without his assent (*f*).

How changed.

The venue is changed by a rule of court for that purpose.—In term, *this rule may be obtained from the proper clerk at the Master's Office, who, upon producing the usual affidavit before mentioned, and the declaration, and a motion-paper signed by counsel, will draw up the rule, which is absolute in the first instance* (*g*). *Serve a copy of the rule on the plaintiff's attorney or agent, who will thereupon alter the declaration.* In vacation, in the Common Pleas and Exchequer, *you may obtain a judge's order to the same effect, which is granted, as of course, without summons, upon the production of the affidavit and declaration* (*h*). *The judge's order is taken with the affidavit, and a motion-paper signed by counsel, to the proper clerk at the Master's Office, who will thereupon draw up the rule.* In the Queen's Bench there is no occasion for this order, and the rule will be drawn up without it, on production of the affidavit, declaration, and mo-

(*x*) *Smith* v. *Walker*, 8 Taunt. 169; 2 Moore, 64, *S. C.*: *Talmar* v. *Reuner*, 3 B. & P. 13.

(*y*) *Wigley* v. *Dubbins*, 12 Moore, 91; 4 Bing. 394, *S. C.*

(*z*) *Shipley* v. *Cooper*, 7 T. R. 698: *Nun* v. *Taylor*, 1 Bing. 166; 7 Moore, 598, *S. C.*: *Gitton* v. *Randall*, 1 M. & R. 142: *Waring* v. *Holt*, 3 Price, 3.

(*a*) *Russell* v. *Hurst*, 1 C. & M. 184: *Waring* v. *Holt*, 3 Price, 3: *Brettargh* v. *Deardon*, M'Clel. & Y. 106.

(*b*) *Notts* v. *Curtis*, 1 Dowl. 319; 2 C. & J. 345, *S. C.*: *Tonks* v. *Fisher*, 2 Dowl. 22: *Shipley* v. *Cooper*, 7 T. R. 698: *Petyt* v. *Berkeley*, Cowp. 511. And see *Ford* v. *Gaimar*, Sayer, 207: *Nun* v. *Taylor*, 1 Bing. 166; 7 Moore, 598, *S. C.*

(*c*) *Notts* v. *Curtis*, 2 C. & J. 345; 1 Dowl. 320, *S. C.* See *Kaynes* v. *Kaynes*, 1 Dowl., N. S., 287.

(*d*) *Wilson* v. *Harris*, 2 B & P. 320.

(*e*) *Palmer* v. *Marshall*, 1 Dowl. 256; 1 Moo. & Sc. 252; 8 Bing. 155, *S. C.*

(*f*) See *Eccles* v. *Holland*, 4 Moo. & Sc. 233: *Groves* v. *Thackery*, 5 Taunt. 631.

(*g*) R. H., 2 W. 4, r. 103. By that rule, "In cases where the application for a rule to change the venue is made upon the usual affidavit only, the rule shall be absolute in the first instance." By rule of T. T., 49 G. 3, (11 East, 273; 1 Chit. Rep. 691), the rule shall be drawn up "on reading the declaration." See the form of the rule, Chit. Forms, 559.

(*h*) See form of order, Chit. Forms, 559.

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tion paper signed by counsel. The rule may be served at the same time as the plea (*i*).

Effect of rule as to stay of proceedings.

A rule or order to change the venue does not, in general, operate as a stay of proceedings, and the parties are bound to take the next step as if no such order had been made (*j*).

Bringing back venue on an undertaking, &c.

Bringing back the Venue on the usual Undertaking, &c.]—The plaintiff may bring back the venue to the county in which he has already laid it, and obtain a rule for discharging the rule to change the venue: but by *R. H.*, 2 *W.* 4, *r.* 103, "the venue shall not be brought back, except upon an undertaking of the plaintiff to give material evidence in the county in which the venue was originally laid" (*k*). *The application in this case is for a rule to discharge the rule to change the venue, and the rule is obtained as of course from the proper clerk at the Master's Office, upon the production of a motion-paper signed by counsel.* The plaintiff's undertaking is embodied in the rule (*l*). The application should, in strictness, be made before the venue has been altered in the issue under the rule to change the venue (*m*); yet it has been allowed, even after the cause has been carried down to trial, and been made a *remanet* (*n*). In practice, however, it is usual to apply for this rule as soon as the rule to change the venue has been served, and at all events before notice of trial. Sometimes the undertaking above mentioned may, as we shall presently shew, be dispensed with.

Consequences of non-compliance with undertaking.

If the plaintiff fail in doing that which he has undertaken, namely, to give material evidence at the trial of some matter in issue arising in the county where the venue is laid, he will be nonsuited (*o*), if the objection be taken at the trial (*p*). It was made a question, but not decided in a recent case, whether the rule containing the undertaking ought not to be produced on the trial (*q*).

What a compliance with it.

As to what is a compliance with the undertaking, it will be sufficient to prove any fact material to the cause or right of action, that took place in the county, though it do not go to the entire cause of action (*r*); for instance, that the deed upon which the action is founded was inrolled within the county (*s*); or, in an action by the assignees of a bankrupt, that the fiat of bankruptcy issued, and the bankruptcy was declared in the county (*t*); or in an action for *crim. con.*, that the defendant received a letter in the county, having reference to a plan to carry on the *crim. con.* (*u*); or that letters containing the promise on which the action is founded were put into the post-office in the county (*x*); or, in an action for goods sold and de-

(*i*) *Phillips* v. *Chapman*, 5 Dowl. 250.
(*j*) *Post*, Pt. 6, ch. 2. And see *Nichols* v. *Stockbridge*, 2 Dowl., N. S., 96; 5 Scott, N. R., 176; *ante*, Vol. 1, 212.
(*k*) See *Wood* v. *Perkes*, 2 B. & Ald. 618: *Hill* v. *Payne*, 3 Dowl. 695.
(*l*) See form of rule, Chit. Forms, 560.
(*m*) 1 Cromp. 114.
(*n*) *Bruckshaw* v. *Hopkins*, 1 Cowp. 409: see *Dickinson* v. *Fisher*, 2 Str. 856; Price, Notes, Pr. 177.
(*o*) *Santler* v. *Heard*, 2 W. Bl. 1031. See *Clarke* v. *Dunsford*, 15 Law J., N. S., 146, C. P.
(*p*) *How* v. *Pickard*, 2 M. & W. 373; 5 Dowl. 606, *S. C.*
(*q*) *Clarke* v. *Dunsford*, *supra*.
(*r*) See *Santler* v. *Heard*, *Clarke* v. *Dunsford*, *supra*: *Anon.*, 2 Chit. Rep. 418.
(*s*) Peake, Ev. 213.
(*t*) *Kensington* v. *Chantler*, 2 Moo. & Sc. 36: see *Clarke* v. *Read*, 1 New Rep. 310, *contra*.
(*u*) See *Clarke* v. *Dunsford*, 15 Law J., N. S., 146, C. P.
(*x*) *Smith* v. *Walker*, 8 Taunt. 169; 2 Moore, 64, *S. C.*: *Gilling* v. *Dugan*, 1 Com. B. 8.

livered, that letters containing invoices of goods had been put into the post-office in the county at the time the goods were forwarded (*y*), or a delivery of the goods in the county to a carrier for the defendant (*z*); or to prove, in an action for an escape, the issuing of the writ on which the party was taken (*a*); or, in an action on the warranty of a horse, that plaintiff's attorney wrote defendant a letter in the county, apprising him of a breach of warranty, and that the horse was standing at livery at the defendant's expense, coupled with an admission of the receipt of the letter in the county (*b*); or, in an action against coach proprietors for negligence and injuring plaintiff, to prove that expense of medical attendance, &c., was incurred in the county (*c*); or, it seems, anything tending to increase the damages (*d*); or, perhaps, to prove that the cause of action arose abroad (*e*). The production of a rule to pay money into court has been deemed sufficient to satisfy the undertaking, although the rule was not obtained until after the undertaking had been given (*f*). Evidence must be given to satisfy the judge that the evidence adduced comes from within the county (*g*). It will not suffice, to satisfy the undertaking, that the witnesses to prove the case, or any part of it, reside in the county (*h*).

To what time the undertaking refers.

It is sufficient to satisfy the undertaking, if the matter which the plaintiff can prove to have happened within the county was at any time substantially important with reference to the issue; and if it became material in the course of the cause, or if it were material at the time the undertaking was given, it will suffice; for it would be a hard thing, if, from some subsequent proceeding on the part of the defendant, or by his mode of pleading, the plaintiff might be taken *ex improviso* (*i*).

Plaintiff setting aside his own rule to bring back.

If the plaintiff has obtained the rule giving the undertaking on a misapprehension of facts, or finds he cannot comply with it, he should apply to the Court or a judge to discharge or set aside the rule, and the application will generally be granted on payment of costs; and if a rule *nisi* for discharging or setting aside the rule be drawn up on the terms of paying to the defendant the costs of, and occasioned by, the rule to change the venue, as well as the costs of the application, the Court will not grant the defendant the costs of shewing cause (*j*).

Setting aside rule, &c. or bringing

Setting aside Rule, or bringing back Venue without an Undertaking.]—If the rule has been obtained in a case where it

(*y*) *Linley* v. *Bates*, 2 C. & J. 659. *Quære*, whether the mere writing of a letter in the county is sufficient. (*Greenway* v. *Titchmarsh*, 7 M. & W. 221).

(*z*) *Powell* v. *Rich*, 7 Taunt. 178.

(*a*) *Neale* v. *Nevill*, 6 Taunt. 565.

(*b*) *Collins* v. *Jenkins*, 4 Bing. N. C. But it seems doubtful whether the mere writing of such a letter within the county would be sufficient if posted in another county. (*Greenway* v. *Titchmarsh*, 7 M. & W. 221).

(*c*) *Curtis* v. *Drinkwater*, 2 B. & Ad. 169.

(*d*) See *Collins* v. *Jenkins*, 4 Bing. N. C. 225: *Greenway* v. *Titchmarsh*, 7 M. & W. 109: *Gilling* v. *Dugan*, 1 Com. B., 11, per *Erle*, J.

(*e*) *Garrard* v. *De Rosbeck*, 1 H. Bl. 230: *Neale* v. *Nevill*, 6 Taunt. 565: *sed quære*, since the R. H., 2 W. 4, s. 103.

(*f*) *Watkins* v. *Towers*, 2 T. R. 275.

(*g*) *Brune* v. *Thompson*, 2 G. & D. 110; 2 Q. B. 789, S. C.; where the judge would not take judicial notice that a particular place was within the county.

(*h*) See *Santlar* v. *Heard*, 2 W. Bla. 1031.

(*i*) See per *Tindal*, C. J., in *Clarke* v. *Dunsford*, 15 Law J., N. S., 149, C. P. And see *Cockerell* v. *Chamberlain*, 1 Taunt. 518: *Smalley* v. *Lea*, 3 Taunt. 86: *Phillips* v. *Chapman*, 5 Dowl. 250: *Lawson* v. *Maughes*, 2 M. & Rob. 427, per *Parke*, B.

(*j*) *Robinson* v. *Crowdson*, 15 Law J., N. S., 152, C. P.

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back venue without an undertaking.

ought not to have been, the Court in term, or a judge in vacation, will, on application for that purpose, discharge it, or set it aside. They will do so where it has been obtained at an improper time (*k*); or on a defective affidavit (*l*); or where the case is one in which it ought not to have been granted, as if it be in an action on a bill, note, or specialty, or where the cause of action must have arisen in several counties, as in the case of a libel in a newspaper (*m*); or if it arose partly in a foreign country, or partly in Scotland or Ireland (*n*); or where the plaintiff is privileged as to the venue (*o*), or the like. But the rule will not be set aside by merely falsifying the defendant's affidavit as to the cause of action having arisen in several counties (*p*). If, from the declaration of the defendant, or his attorney or agent, or otherwise, it be clearly made out that the rule was obtained to delay or defeat the plaintiff, perhaps the Court or a judge would set it aside (*q*). If the defendant has any special grounds to shew that the venue ought to be changed, they should form the ground of a separate application to change it, and cannot, in general, be shewn in answer to the application to set aside the rule (*r*).

Where rule regularly obtained.

The Court or a judge, in vacation also, will, under special circumstances, discharge the rule to change the venue without the undertaking above mentioned, although in every respect regularly obtained: thus, when a fair and impartial trial cannot be had in the county to which it has been changed (*s*), or where the plaintiff would otherwise fail in the action (*t*). But in an action by the assignees of a bankrupt, the Court have refused to discharge the rule, (without the usual undertaking), on the ground that delay in winding up the bankrupt's affairs will be occasioned by allowing the venue to remain changed (*u*).

Affidavit.

The affidavit in support of the application, on these or similar grounds, had better be made by the plaintiff himself, if possible (*x*).

2. *By Defendant, on Special Grounds.*

In what cases.

In what Cases.]—Where a transitory action is brought in the county in which the cause of action arose, or in the other cases already mentioned, in which the venue cannot be changed upon the common affidavit, or in which, although it might have been so changed, yet the application has not been made in proper time, &c., the Court or a judge may still, on special grounds, make a rule or order for changing the venue. Thus, they will do

(*k*) *Smith* v. *Walker*, 2 Moore, 64. *Petyt* v. *Berkeley*, Cowp. 510: *Dawson* v. *Bowman*, 1 C., M., & R. 594, *ante*, 1167.

(*l*) Tidd, 9th ed., 610: *Allen* v. *Griffiths*, 3 T. R. 495.

(*m*) *Clements* v. *Newcome*, 1 C., M., & R. 776: *Hobart* v. *Wilkins*, 1 Dowl. 480: *ante*, 1166.

(*n*) *Cailland* v. *Champion*, 7 T. R. 205: *Hope* v. *Bennett*, 2 N. R. 397.

(*o*) See *ante*, 1166.

(*p*) *Price* v. *Woodburne*, 7 East, 433; *Wood* v. *Perkes*, 2 B. & Ald. 618: *Savory* v. *Parmore*, 6 Taunt. 565. But see *Cailland* v. *Champion*, 7 T. R. 205.

(*q*) See *Amner* v. *Cattell*, 5 Bing. 208.

(*r*) See *Dawson* v. *Bowman*, 1 C., M., & R. 594; 3 Dowl. 160, *S. C.*: *Dawson* v. *Trevillian*, 5 Tyrw. 216.

(*s*) *Petyt* v. *Berkeley*, 1 Cowp. 510: *Doe Herdman* v. *Pilkington*, 4 Burr. 2447. This must clearly appear: *Seeley* v. *Ellison*, 8 Scott, 498. See *Pybus* v. *Scudamore*, 7 Scott. 194.

(*t*) *Amner* v. *Cattell*, 5 Bing. 203: 2 Moo. & P. 367, *S. C.*: *Cook* v. *Shene*, Barnes, 12.

(*u*) *Nicholson* v. *Allcroft*, 12 Law J., N. S., 45, Exch.

(*x*) See *Williams* v. *Higgs*, 6 M. & W. 133.

so where it is most clearly and satisfactorily made out by affidavit (*y*), that, from political excitement and the general interest taken in the case, or other causes, a fair and impartial trial cannot be had in the county where it is already laid (*z*). So, they will change it where the expense of trying the cause in the county where the venue is laid greatly preponderates; as, where the witnesses on both sides reside out of the county, and at a great distance from the place of trial, and the trial where the venue is laid will be attended with very great additional expense (*a*). It will not suffice for the defendant to allege that all his witnesses reside in the county to which he seeks to have the venue changed (*b*); he must shew how many witnesses he will probably call to support his defence, and where they reside (*c*); and if, on the other hand, it appears that the plaintiff has many witnesses residing in the county where the venue is, and who are material to support his case, the Court or judge will not grant the application (*d*). The defendant should also, on his affidavit, shew concisely the nature of the action and his defence (*e*). The Court or judge, in granting the application, frequently impose terms on the defendant to counterbalance any real disadvantage which the plaintiff is likely to suffer from the change (*f*). Thus, they will frequently make the defendant pay the plaintiff any extra expense that may be occasioned to him by it, and relieve plaintiff from paying any extra expense occasioned to defendant by it, in the event of defendant succeeding in the action (*g*). It will also be changed under other special circumstances; as where it is necessary to have a view (*h*). Where the venue was laid in Yorkshire, and the witnesses, from the nature of their occupation, would necessarily be abroad at the time of the York assizes, the Court granted a rule *nisi* to change the venue to London (*i*). Where, in a country cause, the cause was not tried for defect of jurors, and the defendant was rendered by his bail, so that he would have been detained in prison till the following assizes, had not the venue been changed to Middlesex, the Court changed it (*k*). The mere circumstance of there being only twenty-nine special jurors in

To have a fair trial.

Extra expense of witnesses.

Other special circumstances.

(*y*) *Doe Hickman* v. *Hickman*, 9 Dowl. 364: *Seeley* v. *Ellison*, 6 Bing. N. S. 229; 8 Dowl. 266, *S. C.*: *Thornton* v. *Jennings*, 7 Dowl. 449; 5 Bing. N. S. 485, *S. C.*

(*z*) See *Anon.*, Lofft, 49: *Mayor of Poole* v. *Bennet*, 2 Stra. 874: *R.* v. *Harris*, 3 Burr. 1333: *Mylocke* v. *Saladin*, Id. 1564: *Mayor &c. of Bristol* v. *Proctor*, 1 Wils. 298: *Lewis* v. *Morris*, 2 Dowl. 60: *Hill* v. *Payne*, 3 Dowl. 695: *Pybus* v. *Scudamore*, 7 Scott, 124.

(*a*) *Alcock* v. *Cook*, 6 Bing. 733: 4 M. & P. 593, *S. C*: *Holmes* v. *Wainright*, 3 East, 329: *Johnson* v. *Nevison*, 2 Dowl. 260. And see *Foster* v. *Taylor*, 1 T. R. 781: *Anon.*, 2 Chit. Rep. 418: *Fenwick* v. *Farrow*, 1 Chit. Rep. 334: *Crompton* v. *Stewart*, 1 Dowl. 567; 2 C. & J. 473, *S. C.*, 10 Price, 171: *Palmer* v. *Marshall*, 8 Bing. 155: *Pugh* v. *Kerr*, 6 M. & W. 17: *Thornhill* v. *Oastler*, 7 Scott, 272.

(*b*) *Tonks* v. *Fisher*, 2 Dowl. 22.

(*c*) *Evans* v. *Weaver*, 1 B. & P. 20: *Ladbury* v. *Richards*, 7 Moore, 82: *Parmeter* v. *Otway*, 3 Dowl. 66: *Thornhill* v. *Oastler*, 7 Scott, 272: *Clifton* v. *Sayer*, 7 Jur. 1139, Exch.

(*d*) *Flecke* v. *Godfrey*, 1 T. R. 782: *Jenkins* v. *Halton*, 7 Moore, 520: *Holmes* v. *Wainright*, 3 East, 329: *Higgins* v. *Houseman*, 3 Dowl. 549.

(*e*) See *Watt* v. *Daniel*, 1 B. & P. 425: *Evans* v. *Weaver*, Id. 20: *Anon.*, 2 Tyrw. 501: *Johnson* v. *Beresford*, 2 C. & M. 222: *Ladbury* v. *Richards*, 7 Moore, 82.

(*f*) See *Bowring* v. *Bignold*, 1 Dowl. 685: *Pybus* v. *Scudamore*, 7 Scott, 124.

(*g*) See *Keys* v. *Smith*, 10 Bing. 1; 3 M. & Scott, 338, *S.C.*: *Wing* v. *Jenkins*, 7 Moore, 62: *Attwood* v. *Ridley*, 2 M. & G. 893; 3 Scott, N. R., 319, *S. C.*

(*h*) *Hodinott* v. *Cox*, 8 East, 268: *Phybus* v. *Scudamore*, 8 Law J., N. S., 159, C. P.: 7 Scott, 124. The Court would impose such terms on the defendant as would be fair and reasonable in such a case.

(*i*) *Atkinson* v. *Sadler*, 2 Chit. R. 419.

(*k*) *Keys* v. *Smith*, 10 Bing. 1; 3 M. & Scott, 338; 2 Dowl. 210, *S. C.*

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a county (*l*), or that the defendant intended to call as witnesses persons in official situations, whose absence might be detrimental to the public service (*m*), is no ground for changing the venue.

Time for applying.

The application should be made after issue joined, and not before (*n*). Where, however, the pleadings and facts of the case were such, that the Court could not fail to see what the issues joined must be, and the only matter in dispute was as to costs, a change of venue was allowed before issue joined (*o*). It is, it seems, no answer to the application, that the defendant is under an undertaking to try at a particular sittings, or the like (*p*).

Affidavit.

The affidavit in support of the application should state the nature of the cause of action, and of the defence thereto, and the grounds for the application (*q*). It should shew specific grounds to satisfy the Court that justice requires their interference (*r*). We have just seen (*ante*, 1171) what the affidavit should state, where the ground of application is the extra expense of witnesses, &c.

Terms imposed.

The Court or judge, in granting the application, will, in general, impose on the defendant such terms, as to payment of costs or expenses (*s*), admissions (*t*), and other matters (*u*), as they consider just to the plaintiff.

In local actions.

We have seen (*ante, Vol.* 1, 284), that, by the 3 & 4 *W.* 4, *c.* 42, *s.* 22, the *venue* may be changed even in *local* actions, where it is more convenient that the trial should take place in another county. The application to change the *venue* in this case cannot be made till after issue joined (*x*). In local actions, when an impartial trial cannot be had in the county where the action is brought, instead of moving to change the venue, it is more usual to apply for leave to enter a suggestion upon the issue, in order to have a trial in the adjoining county, as directed *ante, Vol.* 1, 284.

3. *Change of Venue by Plantiff.*

In what case.

In transitory actions, the plaintiff may lay his venue where he will; but if from circumstances he should afterwards desire to change it, he may obtain leave to amend his declaration, by altering the venue (*x*), upon stating to the Court or judge any

(*l*) *Doe Lloyd* v. *Williams*, 5 Bing. N. C. 205: nom. *Doe Williams* v. *Lloyd*, 7 Scott, 143, *S. C.*

(*m*) *Bucknell* v. *Phillips*, 7 Scott, 274.

(*n*) *Youde* v. *Youde*, 4 Dowl. 32; 3 Ad. & Ell. 311, *S. C.*: *Catterill* v. *Dixon*, 1 C. & M. 661: *Bohrs* v. *Sessions*, 1 C., M., & R. 86. *Weatherby* v. *Goring*, 3 B. & C. 552; 5 D. & R. 441, *S. C.*: *Parmeter* v. *Otway*, 3 Dowl. 66: see *Foster* v. *Taylor*, 1 T. R. 781: *Mylocke* v. *Saladine*, 3 Burr. 1561: *Bayley* v. *Beaumont*, 11 Moore, 384: *Dowler* v. *Caller*, 7 Dowl. 55: *Griffin* v. *Walker*, 7 Scott, 846; *Keynes* v. *Keynes*, 1 Dowl., N. S., 287.

(*o*) See *Dowler* v. *Collis* (or *Caller*), 4 M. & W. 531; 7 Dowl. 56, *S. C.*: but not so clear as to the point in the text.

(*p*) *Johnson* v. *Nevison*, 2 Dowl. 260. But see *Haythorn* v. *Birch*, Id. 240: *Tonks* v. *Fisher*, Id. 22.

(*q*) *Ladbury* v. *Richards*, 7 Moore, 82: see *Johnson* v. *Beresford*, 2 C. & M. 222.

(*r*) *Thornhill* v. *Castler*, 7 Scott, 272.

(*s*) See *Bowring* v. *Bignold*, 1 Dowl. 685, *per cur.* And see *Attwood* v. *Ridley*, and other cases cited in notes (*f*) and (*g*), *ante*, 1171.

(*t*) See *Holmes* v. *Wainwright*, 3 East, 329: *Hodnett* v. *Cox*, 8 East, 268.

(*u*) See *Bowring* v. *Bignold*, 1 Dowl. 685, *per cur.*: *Evans* v. *Weaver*, 1 B. & P. 20.

(*x*) *Bell* v. *Harrison*, 2 C., M., & R. 733; 4 Dowl. 181, *S. C.*

(*y*) *Stroud* v. *Tiley*, 2 Str. 1162: *Petre* v. *Craft*, 4 East, 433: *Dover* v. *Mestaer*, Id. 435.

reasonable ground for the application (*z*); and this even after plea pleaded and issue joined (*a*), or even after the venue has been changed on the usual affidavit (*b*), or after a nonsuit on the trial, where it had been changed by plaintiff (*c*). In local actions, we have seen (*ante, Vol.* 1, 284) that the Court or a judge may allow the trial or inquiry to take place in another county than that in which the venue is laid. And the Court allowed a suggestion to be entered for this purpose in an action of trespass *quare clausum fregit*, where it was sworn that the defendant and others riotously and tumultuously assembled, and broke down the fences, &c., without imposing any terms upon the plaintiff (*d*).

By Crown.

In an information of intrusion, the Crown has not the right, as of its prerogative, to lay the venue in any county, or to issue the *venire facias juratores* into a different county from that in which the venue is laid (*e*).

(*z*) *Ayres* v. *Buston*, 6 Taunt. 408. *Fife* v. *Beaufield*, 12 Law J., N. S., 186, Q. B.; 2 Dowl., N. S., 705, S. C. It is frequently changed where the defendant has, by a special demurrer, or the like, delayed the trial.

(*a*) *Cook* v. *Shone*, Barnes, 12. But see *Bird* v. *Foster*, Id. 19.

(*b*) *Rivet* v. *Cholmondeley*, 2 Str. 1202.

(*c*) Price's Notes, P. Pr. 177: *sed quære.*

(*d*) *Jones* v. *Price*, 7 Dowl. 103.

(*e*) *Att.-Gen.* v. *Lord Churchill*, 8 M. & W. 171.

CHAPTER VII.

CONSOLIDATING ACTIONS.

PART V.

In general.

IF two or more actions be brought by the same plaintiff, at the same time, against the same defendant, for causes of action which might have been joined in the same action, the Court or a judge, if they deem the proceedings vexatious or oppressive, will in general compel the plaintiff to consolidate them, and to pay the costs of the application (*a*). On a rule to shew cause why the proceedings in thirty-seven actions of ejectment, brought against the occupiers of so many houses in Sackville-street, should not be stayed, and abide the event of a special verdict in another action upon the same title, Lord *Kenyon* said, it was a scandalous proceeding; that as all the causes depended on the same title, they ought to be tried by the same record; and the rule was made absolute (*b*). So, three actions against different persons for the same assault were ordered to be consolidated (*c*); but in another and similar case the application was refused (*d*). The Court have refused to consolidate an action against husband and wife, and an action against the husband alone (*e*). And it seems that the rule will seldom be granted in penal actions (*f*). Where six actions of trover had been brought against the same defendant by different plaintiffs employing the same attorney, the Court refused to order the proceedings in five of them to be stayed to abide the result of one, it being sworn that the causes of action were different in all of them, and that the witnesses were different (*g*). Where three actions were successively brought by the same plaintiff against the same defendant, upon three promissory notes which became due at different times, the Court of King's Bench refused to consolidate them (*h*). Upon the question, whether the causes of action must be such as could have been joined in the same action, the decisions seem to be conflicting. In one case, where five separate actions had been brought against five different individuals, upon five several guarantees given to secure distinct portions of the same debt, a judge made an order

(*a*) *Ward* v. *Pomfret*, 1 Scott, N. R., 403: 1 M. & Gr. 539, *S. C.*: *Cecil* v. *Brigges*, 2 T. R. 639: see *Benton* v. *Praed*, Smith, 423.

(*b*) 2 Sellon, 144: *Doe Pulteney* v. *Cavan*, Imp. K. B. 731. And see *Grimstone* v. *Burgers*, Barnes, 176: *Doe* v. *Brenton*, 6 Bing. 469. But see *Smith* v. *Crabb*, 2 Str. 1149, *contra*, in which case, however, it does not appear, but that there was some satisfactory ground for bringing the several actions.

(*c*) Prac. Reg. 151: *Anon.*, 1 Chit. Rep. 709, n.; Barnes, 341. And see *Kay* v. *Hill*, 2 B. & Ald. 596.

(*d*) *Catlin* v. *Elliott*, 1 Str. 420.

(*e*) *Swithin* v. *Vincent*, 2 Wils. 227.

(*f*) See *Benton* v. *Praed*, 1 Smith, 423.

(*g*) *Nicholls* v. *Lefevre*, 3 Dowl. 135.

(*h*) *Mussenden* v. *O'Hara*, Tidd's Prac. 614. But, in a case at *Nisi Prius*, it was intimated by Lord *Tenterden*, C. J., that if a party sue on a bill of exchange, and, after the action is commenced, another bill accepted by the same defendant, of which the plaintiff is holder, is dishonoured, and he bring a second action on that, a judge would, on application being made, direct the two actions to be consolidated; (*Oldershaw* v. *Tregoweth*, 3 C. & P. 58); *sed quære*.

for consolidating them, and the Court refused to rescind the order (*i*). But where the plaintiffs had brought ten separate actions of *indebitatus assumpsit* against ten separate defendants, for certain tolls, port dues, anchorage, buoyage, and other duties alleged to be incurred by them individually as commanders of their respective vessels, it was held that the Court had no power, at the request of the defendants, to consolidate the above actions; although it was sworn that the actions were brought in respect of the same right, and that the trial of one would decide the right in all (*k*). Where actions were brought for the purpose of trying issues, under the 46th section of 6 & 7 *W.* 4, *c.* 71, by the vicar against one of the landowners, and by seventy-four landowners against the vicar, the Court considered they had no power, at the instance of the vicar, to direct the proceedings in the seventy-four actions against him to abide the event of the issues to be directed in the action brought by him (*l*).

Several actions on one policy of insurance.

Where several actions are brought upon the same policy of insurance, the Court or a judge, upon application of the defendants, will grant a rule or order to stay the proceedings in all the actions but one, the defendants undertaking to be bound by the verdict in such action, and to pay the amount of their several subscriptions and costs if the plaintiff should recover, together with such other terms as the Court or judge may think proper to impose upon them (*m*). The rule or order may be obtained, notwithstanding the plaintiff refuses his consent to it (*n*); and if the action which is tried be determined in favour of the plaintiff, the other defendants may (if necessary) obtain a stay of proceedings in their several actions, upon payment of the amount of their subscriptions and costs.

Effect of the rule.

Formerly, it was thought that a consolidation rule bound the plaintiff as well as the defendant, and the Court could not, though fresh evidence had been discovered, permit the plaintiff to try the other actions (*o*). But now a different doctrine is established (*p*), the rule being for the benefit of the defendant. And where actions against underwriters had been consolidated by rule of court, and the defendant had obtained a verdict in one, the Court refused to restrain the plaintiff from trying a second cause included in the same rule, till the costs of the first were paid (*q*). The plaintiff, however, by proceeding in a second consolidated action, without applying to the court, loses the benefit of any terms which were imposed on the defendants by the consolidation rule (*q*). Where one of two actions is stayed, upon the defendants undertaking to be bound by the

(*i*) *Sharpe* v. *Lethbridge*, 4 Scott, N. R., 722; 4 M. & G. 7. See *Anderson* v. *Toogood*, 1 Q. B. 945.

(*k*) *Corporation of Saltash* v. *Jackman*, 1 Dowl. & L. 851.

(*l*) *Ward* v. *Pomfret*, 1 Scott, N. R., 403; 1 M. & G. 559, *S. C.*

(*m*) *Doyle* v. *Anderson*, 1 Ad. & El. 636; 4 Nev. & M. 873, *S. C.* See *Sharpe* v. *Lethbridge*, 4 Scott, N. R., 722; where, per *Erskine*, J., the general rule, that only actions which might have been joined in the same action can be consolidated, does not apply in the case of policies of insurance.

(*n*) *Hollingsworth* v. *Brodrick*, 4 Ad. & El. 646; 6 Nev. & M. 240, *S. C.* And see *Ohrly* v. *Dumbar*, 1 Nev. & P. 944. See the form of the rule, 6 Nev. & M. 243, n.; Chit. Forms, p. 561; from the terms of which the practice in these cases may be collected. And see the former practice, Park, Ins., Introd.

(*o*) *Doyle* v. *Douglas*, 4 B. & Ad. 544.

(*p*) See *M'Gregor* v. *Horsfall*, 4 M. & W. 390.

(*q*) See *Long* v. *Douglas*, 4 B. & Ad. 545, n.

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verdict in the other, this means the ultimate event of the action (*r*); and if error be brought in the action tried, the proceedings in the other will be stayed on the defendants giving security to abide by the decision of the court of error (*s*).

Rule, when opened.

The Court or judge, under circumstances, may open the consolidation rule for the defendant, and permit a second cause to be tried; if they do, they will in general extend to the second trial all such terms made compulsory on the party successful in the first cause, as are requisite for attaining the merits (*t*). Where a cause has been tried twice by special juries, and a verdict for the plaintiff returned on both occasions, the Court will not open a consolidation rule for the trial of a second cause, unless it be shewn that the cause has not been fully brought before the jury (*u*). The Court have also refused to allow one of the other defendants to have his cause tried, which involved merely the same point as the first action (*x*).

At what time applied for.

Formerly, before the recent rules of pleading were introduced, the consolidation was not granted until after plea pleaded; but latterly, the practice has been to consolidate at an earlier stage; and in a recent case, two actions having been brought by the same plaintiff against different defendants on the same policy of insurance, the Court consolidated them after a declaration had been delivered in one, and an appearance entered in the other at the instance of the defendant in the latter action, though the plaintiff objected (*y*): it seems therefore that the actions may now be consolidated at any time after appearance, though before declaration. In two actions between the same parties on different bills of exchange, the Court consolidated them after issue joined and notice of trial given, upon payment of all the costs in the second action (*z*).

How applied for.

The application for the consolidation rule is to be made to the Court or to a judge. If made to the Court, *draw up a motion-paper, inserting thereon or in it the titles of the several causes (a); and indorse on it the counsel's name, requiring him "to move for a rule to shew cause why the within actions should not be consolidated."* If made to a judge, *there is no need for a motion-paper, and a summons will suffice, which should be intitled in the several causes, and be "for the plaintiff to shew cause why the within actions should not be consolidated."* The rule is made absolute, or an order made, as above mentioned (*b*).

Application for leave to sign judgment in actions not tried.

After verdict for plaintiff, (if the actions have been consolidated by order), and judgment signed thereon, take out a summons before a judge, and obtain his order to enter up judgment in the several other actions which were consolidated, and that the plaintiff be at liberty to sue out execution thereon; also, that one of the Masters may tax the costs in all the causes, and that the defendants may also pay the costs of the application to be taxed.

(*r*) *Hodson* v. *Richardson*, 3 Burr. 1477.
(*s*) *Gill* v. *Hindley*, 1 Moore, 79: *Alwyn* v. *Favine*, 2 New Rep. 430.
(*t*) *Cohen* v. *Bulkeley*, 5 Taunt. 165.
(*u*) *Foster* v. *Allenby*, 5 Dowl. 619; 3 Bing. N. C. 892, *S. C.*, nom. *Foster* v. *Steele*.
(*x*) *Foster* v. *Alves*, 3 Bing. N. C. 896.
(*y*) *Hollingsworth* v. *Brodrick*, 4 Ad. & El. 646; 6 Nev. & M. 240, *S. C.*
(*z*) *Booth* v. *Payne*, 1 Dowl., N. S., 349. See *Hollingsworth* v. *Brodrick*, *supra*.
(*a*) *Ward* v. *Pomfret*, 1 Scott, N. R., 410, n.; 1 M. & G. 559, *S. C.*
(*b*) See forms, Chit. Forms, 561, 562.

You must sign judgment, tax your costs, and sue out execution, (according to the terms of the order), as in other cases (*c*). Formerly, it was usual to make a motion to the Court for this purpose, but now a judge will make the order at chambers, as above noticed.

Costs on payment into court.

By *R. H.*, 2 *W.* 4, *r.* 104, "where money is paid into court in several actions, which are consolidated, and the plaintiff without taxing costs, proceeds to trial on one, and fails, he shall be entitled to costs on the others up to the time of paying money into court" (*d*).

(*c*) See form of judgment, Chit Forms, 562. (*d*) See this rule noticed, *post*, 1188.

CHAPTER VIII.

PAYMENT OF MONEY INTO COURT.

PART V.

General observations as to.

WHEN a person is satisfied that he is indebted to another upon a claim for a sum certain, or capable of being ascertained by mere computation, but disputes the amount claimed of him, then, before action brought, he may generally (*a*) tender to his creditor the sum which he admits he owes, and then plead the tender in bar of the action. Or, after action brought, he may, even though the claim be for an unliquidated amount, apply to a judge to stay the proceedings, upon payment of the sum the defendant admits to be recoverable, and to shew cause why, upon default of plaintiff accepting it, he should not pay to defendant his costs subsequent to the application, if the plaintiff afterwards accepts that sum in satisfaction, as noticed in the next Chapter. Or, after action brought, and after, or in some cases before, declaration (*b*), he may, as subsequently pointed out in this Chapter, pay that sum into court, and plead the payment of it, and the plaintiff will afterwards proceed in the action at his peril. But if neither the existence of the debt, nor the amount claimed, be controverted, the defendant should pay the sum indorsed on the writ within four days of the execution of it, or after that time should apply to a judge for an order to stay the proceedings, upon payment of debt and costs, as directed in the next Chapter. In all cases where there has been a tender, but there is some doubt as to its sufficiency, it is safest to pay the money into court without pleading the tender (*c*); for though the payment of money into court subjects the defendant to costs up to the time of paying it in if the plaintiff do not proceed further, nevertheless, if the defendant plead a tender, and plaintiff take issue thereon, and the defendant fail in proving it, he will thereby, at all events, subject himself to the costs of the trial and the general costs of the cause. We will proceed to consider, under the following heads, the practice as to the payment of money into court:—

In what Cases allowed, 1179.

At what Time, and how paid in, 1182.

Plea of, 1183.

Replication and subsequent Proceedings, 1185.

Costs on, 1186.

Effect of it as an Admission of the Cause of Action, &c., 1190.

Payment into Court upon a Plea of Tender, and other Cases, 1193.

Payment into Court in lieu of Bail, 1193.

(*a*) A tender after the day of payment cannot be pleaded in an action on a bill or note, (*Hume* v. *Peploe*, 8 East, 168: *Poole* v. *Turnbridge*, 2 M. & W. 223); nor can a tender of principal and interest due on a bond after the day of payment. (*Marshall* v. *Matthews*, Bull. N. P. 271). As to the mode of pleading a plea of tender, see *post*, 1193.

(*b*) *Post*, 1182.

(*c*) See per Lord *Tenterden*, C. J., *Leatherdale* v. *Sweepstone*, 3 C. & P. 342.

In what cases allowed before the 3 & 4 W. 4, c. 42.

In what Cases allowed.]—Prior to the stat. 3 & 4 *W.* 4, *c.* 42, *s.* 21, the general rule was, as it still is, that, where the sum demanded is a *sum certain*, or capable of being ascertained by *mere computation*, without leaving any other sort of discretion to be exercised by the jury, the defendant may pay money into court (*d*). Therefore, in an action on promises, where the breach was substantially for the non-payment of money (*e*), but not otherwise (*f*), money might be paid into court as of course, before that act. So, in debt on simple contract, the defendant might pay money into court as of course (*g*); so, in debt for rent (*h*); so, in debt on a policy of insurance (*i*), or for non-residence (*k*). But, generally, in debt on record or specialty, he could not do so as of course; because in these cases the amount of the debt is ascertained, and cannot be varied from by the jury in their verdict (*l*): the defendant's course in these cases was, as it still is, to obtain a judge's order to stay the proceedings on payment of the debt or penalty and costs, (and as to which see the next Chapter), unless, indeed, the defendant is willing to pay the whole debt or penalty declared for, in which case, perhaps, a judge's order for payment of it into court might be obtained. As to staying the proceedings on paying the penalty, &c., in a penal action, see also the next Chapter. In covenant, where the breach assigned was the non-payment of a sum of money, the defendant might pay money into court as of course (*m*), but not in other cases (*n*), as in an action for dilapidations, or the like (*o*). In trespass, the defendant could not pay money into court as of course (*p*); nor could this be done even in trespass for *mesne* profits (*q*); nor in case (*r*); nor in trover or replevin. In ejectment for non-payment of rent the Court will allow the defendant, (*ante*, 970), and in replevin the plaintiff, (*ante*, 998), to bring into court the amount of the rent for the non-payment of which the ejectment is brought, or the distress was made, respectively.

By stat. 3 & 4 W. 4, c. 42.

By the stat. 3 & 4 *W.* 4, *c.* 42, *s.* 21, "it shall be lawful for the defendant *in all personal actions*, (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching of the plaintiff's daughter or servant), by leave of any of the superior courts where such action is pending, or a judge of any of the superior courts, to pay into court a sum of money by way of compensation or amends, in such manner and under such regulations, as to the payment of costs and the form of pleading, as

(*d*) *Hallett* v. *East India Company*, 2 Burr. 1120. And see *Hodges* v. *Lord Litchfield*, 9 Bing. 713; 3 M. & Scott, 201, S. C.

(*e*) *Gregg's case*, 2 Salk. 596.

(*f*) *Strong* v. *Simpson*, 3 B. & P. 15; 5 B. & Ald. 93: *Hatton* v. *Botton*, 1 H. Bl. 299, n.: *Fail* v. *Pickford*, 2 B. & P. 234: *Hodges* v. *Lord Litchfield*, 3 M. & Scott, 201; 9 Bing. 713, S. C.

(*g*) *Macquillan* v. *Cox*, 1 H. Bl. 240.

(*h*) *Gregg's case*, 2 Salk. 596; Pr. Reg. 257.

(*i*) 19 G. 2, c. 37, s. 7.

(*k*) 57 G. 3, c. 99, s. 43.

(*l*) See *Leapidge* v. *Pengillione*, 2 Str. 890. See *Hodgkinson* v. *Wyatt*, 1 Dowl. & L. 668: *England* v. *Watson*, 1 Dowl., N. S., 306; 9 M. & W. 333, S. C.

(*m*) *Gregg's case*, 2 Salk. 596: *Hallett* v. *East India Company*, 2 Burr. 1120: *Walsmouth* v. *Houghton*, Barnes, 282, 284: 19 G. 2, c. 37, s. 7.

(*n*) *Fullwell* v. *Hall*, 2 W. Bl. 837.

(*o*) *Salt* v. *Salt*, 8 T. R. 47. See *Smith* v. *King*, 3 M. & Scott, 729.

(*p*) *Squire* v. *Archer*, 2 Str. 906.

(*q*) *Holdfast* v. *Morris*, 2 Wils. 115.

(*r*) *White* v. *Woodhouse*, 2 Str. 767: *Squire* v. *Archer*, Id. 906: *Salt* v. *Salt*, 8 T. R. 47; *Bowles* v. *Fuller*, 7 T. R. 335: *Calvert* v. *Jolliffe*, 2 B. & Ad. 418.

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the said judges, or such eight or more of them as aforesaid, shall, by any rules or orders by them to be from time to time made, order and direct." The defendant may, therefore, now pay money into court in all personal actions, excepting those expressly excepted in the above enactment. The exception does not extend to an action for an assault and battery on the plaintiff's son (*s*). It may be added, that, notwithstanding this enactment, in an action on a bond, if the defendant has not paid all that is due on it, he should apply to the Court for leave to bring the residue into court, with costs, under the 4 & 5 *Anne*, *c.* 16, *s.* 13, and that further proceedings be stayed; he cannot *plead* such payment (*t*). It is open to doubt whether payment into court can be allowed in an action of *detinue*, and, regarding the form of the judgment in such action, it is conceived it cannot (*u*).

By particular statutes.

There are various statutory provisions expressly allowing the defendant to pay money into court in particular cases, independently of the stat. 3 & 4 *W.* 4, *c.* 42. Thus, in actions against mail-coach contractors, stage-coach proprietors, or common carriers by land, for the loss of or injury to goods, the defendants may pay money into court (*x*). So may justices of peace, or constables, or officers of the excise or customs, in actions against them, for anything done by them in the execution of their respective duties (*y*). So, in actions against commissioners of bankrupt (*z*). As to payment of money into court in actions by the assignees of a bankrupt, when the defendant is sued within the time limited for the bankrupt to dispute the commission, &c., see *ante*, 1103. By the 6 & 7 *Vict. c.* 96, *s.* 2, in an action against a newspaper or other periodical publication, the defendant may plead that it was inserted without malice and without neglect, and may pay money into court as amends, "and such payment into court shall be of the same effect, and be available in the same manner and to the same extent, and be subject to the same rules and regulations as to the payment of costs and the form of pleading, except so far as regards the pleading of the additional facts hereinbefore required to be pleaded by such defendants, as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into court" under the 3 & 4 *W.* 4, *c.* 42; and to such plea to such action it shall be competent to the plaintiff to reply generally, denying the whole of such plea.

Assignees of bankrupt.

Libel in newspaper, &c.

As to part of declaration.

If there be two or more counts in a declaration, the defendant may, under the above statute of 3 & 4 *W.* 4, *c.* 42, pay money into court upon one of them, and plead it as in other cases (*a*). In replevin for goods taken in closes A. and B., defendant may pay money into court as to the goods taken in A., and to some of those taken in B., and avow and make cog-

(*s*) *Newton* v. *Holford*, 2 Dowl. & L. 884; 14 Law J., N. S., Q. B., 9, *S. C.*

(*t*) *England* v. *Watson*, 9 M. & W. 233; 1 Dowl., N. S., 308, *S. C.*: *Hodgkinson* v. *Wyatt*, 1 Dowl. & L. 668; 13 Law J., N. S., Q. B., 73, *S. C.*

(*u*) See the next chapter as to staying proceedings on delivering up of the goods, *post*, 1197.

(*x*) 11 G. 4 & 1 W. 4, c. 68, s. 10.

(*y*) See *ante*, 1115, 1116.

(*z*) 6 G. 4, c. 16, *s.* 43.

(*a*) See *Baillie* v. *Gamsler*, 4 T. R. 579: *Fulwell* v. *Hall*, 2 W. Bl. 837: *Hallett* v. *East India Company*, 2 Burr. 1120.

nizance as to the residue taken in B. (*b*). And where there are several counts for several causes of action, or several breaches are assigned in covenant, the defendant may plead payment into court of one entire sum, in satisfaction of all the counts or breaches (*c*). The Court, in a case decided before the above statute, refused to allow money to be paid into court on part of a count, where the claim was for unliquidated damages (*d*). They also, in another case, refused to allow payment into court upon some of the counts of a declaration, and a demurrer to the rest (*e*). It may be added, that, where the plaintiff has two counts in his declaration, upon either of which he can recover his demand,—as a count for goods sold, and a count on account stated as to the prices,—it will, perhaps, suffice to pay money into court on one of these counts, though this is not free from doubt (*g*). And where, in *indebitatus assumpsit*, with counts for port tolls, for manor tolls, and for tolls generally, the defendant pleaded payment of 10*l.* into court, as to all but the count on port tolls, and as to the rest *non assumpsit;* the plaintiff accepted the 10*l.*, and joined issue on *non assumpsit;* the contest on the trial was, whether the plaintiff was entitled to a port toll, or to a manor toll only: the jury found plaintiff entitled to port tolls to the amount of 8*l.*: it was held, that the plaintiff might take his verdict for the count for port tolls, and that defendant could not avail himself of the payment of money into court, though the plaintiff might have recovered the 8*l.* under the count for tolls generally (*h*).

Where two counts for same cause.

The defendant will not be allowed to pay money into court, and also plead a defence to the same part of the declaration to which the money is to be paid in (*i*).

Not allowed with a plea in denial to same part.

It is very questionable whether one of several defendants alone can, as of course, pay money into court. And the Court of Common Pleas refused, before the rules of *H. T.*, 4 *W.* 4, to allow one of three defendants, who alone appeared, (one of the others having suffered judgment by default, and the other being outlawed), to pay money into court, even although he offered to pay all the costs up to that time (*k*). And it has been the practice since those rules not to allow one of several defendants to pay money into court, unless under peculiar circumstances, and on special terms.

By one of several defendants.

If the defendant pay money into court, and plead it in a case where he cannot properly do so, and this necessarily appears on the face of the declaration, the plaintiff might, it would seem, demur to the plea; or, if defendant gets a verdict on an issue joined on it, the plaintiff may obtain a rule for judg-

Consequences of improper payment into court.

(*b*) *Lambert* v. *Epworth*, 2 Q. B. 729; 2 G. & D. 112, *S. C.*

(*c*) *Marshall* v. *Whiteside*, 4 Dowl. 766; 1 M. & W. 188, *S. C.*; *Mitchell* v. *Townley*, 7 Ad. & El. 164; (*semble*, overruling *Mee* v. *Tomlinson*, 5 Nev. & M. 624; 1 H. & W. 614, *S. C.*; and *Lorymer* v. *Vizell*, 3 Bing. N. C. 222). And see *Jourdain* v. *Johnson*, 2 C., M., & R. 564: *Noel* v. *Davies*, 4 M. & W. 136: *Beesley* v. *Dolley*, 8 Scott, 243.

(*d*) *Hodges* v. *Lord Litchfield*, 3 M. & Scott, 201; 2 Dowl. 741, *S. C.*

(*e*) Pr. Reg. 256; 1 Sellon, 286. *Sed quære.*

(*g*) *Early* v. *Bowman*, 1 B. & Ad. 89: *Churchill* v. *Day*, 3 M. & R. 81: *Stafford* v. *Clarke*, 2 Bing. 377.

(*h*) *Brune* v. *Thompson*, 4 Q B. 543; 1 D. & M. 221, *S. C.*

(*i*) *Thompson* v. *Jackson*, 2 M. & G. 242; 1 Scott, N. R., 157; 8 Dowl. 591. As to the effect of so pleading, if allowed, see *Fisher* v. *Arde*, 3 M. & W. 486; 6 Dowl. 594: *Twemlow* v. *Ashay*, 3 M. & W. 495; 6 Dowl. 597, *S. C.* See *Deable* v. *Rowett*, 2 Ad. & E. 83, as to pleading both payment into court and tender.

(*k*) *Hay* v. *Pancklenan*, 2 W. Bla. 1029.

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ment *non obstante veredicto*, or for a repleader; but not so, if the objection does not necessarily appear on the face of the declaration: and, therefore, where, to trespass for assault and battery, defendant, by leave of a judge, paid money into court, and succeeded in an issue on it at the trial, it was held, that, as this plea to such an action, although prohibited by the 3 & 4 *W.* 4, *c.* 42, might be pleaded under the statutes, *e. g.* against justices and officers, &c., the plaintiff was not entitled to judgment *non obstante veredicto* (*l*). The plaintiff, by taking the money out of court, waives any irregularity as to its being paid in (*m*).

At what time paid in.

At what Time, and how paid in.]—The order for payment of money into court, under the 3 & 4 *W.* 4, *c.* 42, *s.* 21, may be obtained, it seems, at any time; even immediately after the writ issued (*n*); and, at all events, at any time after declaration, and before plea pleaded. Even after plea, a judge's order may be obtained to withdraw it, in order to pay money into court, and plead such payment (*o*). Money has been allowed to be paid into court even after granting a new trial (*p*), and even after setting aside the execution of a writ of inquiry (*q*). *Where the money has been paid into court by leave of a judge before the time for pleading, the officer will write a receipt for it on the judge's order; and, on the plea being afterwards brought to him, and the order produced with the receipt indorsed, he will transfer the receipt to the margin of the plea, in pursuance of R. H.*, 4 *W.* 4, *s.* 18, *infra*.

How paid in.

By *R. H.*, 2 *W.* 4, *s.* 55, "in all cases in which money shall be paid into court, leave to pay it in may be obtained by a side-bar rule." But, by rule of *H. T.*, 2 *W.* 4, *s.* 18, "*no rule or judge's order to pay money into court shall be necessary*, except under the 3 & 4 *W.* 4, *c.* 42, *s.* 21; *but the money shall be paid to the proper officer of each court, who shall give a receipt for the amount in the margin of the plea, and the said sum shall be paid out to the plaintiff on demand.*" We have already considered in what cases money may be paid in as of course independent of that act; and in those cases, by this rule, no rule or order to pay the money in is requisite. In cases within that act, *the rule or order must be obtained in the usual way, by application to the court on motion, or by summons before a judge; usually the latter* (*r*). *Serve a copy of the rule or order on the plaintiff's attorney or agent. Prepare the plea, and get it signed by counsel. Take the money and plea to one of the Masters, who will write a receipt in the margin of the plea* (*s*); (*or, if the money has previously been paid in by leave of a judge, he will transfer the receipt from the order to the plea on producing the order with the receipt indorsed*). *Deliver the plea to the plaintiff's attorney or*

(*l*) *Aston* v. *Parkes*, 15 Law J., N. S., 241, Exch.
(*m*) *Griffiths* v. *Williams*, 1 T. R. 710.
(*n*) *Edwards* v. *Price*, 6 Dowl. 487.
(*o*) *Griffiths* v. *Williams*, 1 T. R. 710, 711: *Turton* v. *Wragg*, 2 Str. 1271.
(*p*) *Anon.*, 1 Tidd., 9th ed., 672.
(*q*) *Day* v. *Edwards*, 1 Taunt. 491.
(*r*) See the form, Chit. Forms, 364.
(*s*) By stat. 7 W. 4 & 1 Vict. c. 30, s. 9, the money must be paid in at the Masters' Office, and the Masters must pay it into the Bank of England, to the credit of the "Suitor's Fund;" and the money is afterwards paid to the party entitled to it by a cheque on the Bank of England, signed by two or more of the Masters.

agent, as in ordinary cases. Take care to pay in enough to satisfy the damages, or debt and damages, in respect of which it is paid in, up to the time of pleading the plea. If interest be due, you should calculate it up to the time of the payment into court, and not merely to the commencement of the action(*t*). If the defendant find he has not paid in a sufficient sum, an amendment will, in general, be allowed him to pay in a further sum upon payment of costs, and other reasonable terms. It may be added, that an abandoned summons, by defendant's offering more than he afterwards pays into court, may be used as evidence against him at the trial (*u*).

Amount to be paid in.

Paying in additional sum.

Abandoned summons.

When the defendant has previously paid money into court in lieu of bail, he may, it seems, according to the practice of the Queen's Bench and Exchequer, apply to have the sum paid in, or part of it, considered as so much paid in on account of the cause of action; and the order for this purpose is said to be of course (*v*). But the Court of Common Pleas have since refused to permit this, either in the case of a plea of tender, or of payment into court (*x*).

Transferring money paid in lieu of bail.

Plea of.]—By the rule of all the courts, *T. T.*, 1 *Vict.*, it is ordered, amongst other things, that the 17th of the general rules and regulations, made pursuant to the statute 3 & 4 *W.* 4, *c.* 42, *s.* 1, be repealed; and that, in the place thereof, the following amended rule be substituted: viz.—

Plea of payment into court.

"When money is paid into court, such payment shall be pleaded in all cases, and as near as may be in the following form, *mutatis mutandis:*—

Form of, &c.

C. D. ats. A. B. } The ——— day of ———, A. D. ——— The defendant, by ———, his attorney [*or*, "in person," &c.], says [*or, in case it be pleaded as to part only, add*, "as to £——, being part of the sum in the declaration," *or*, "——— count mentioned," *or*, "as to the residue of the sum of £———"] that the plaintiff ought not further to maintain his action, because the defendant now brings into court the sum of £——, ready to be paid to the plaintiff; and the defendant further says, that the plaintiff has not sustained damages [*or, in actions of debt*, "that he never was indebted (*y*) to the plaintiff"] to a greater amount than the said sum, &c. in respect of the cause of action in the declaration mentioned [*or*, "in the introductory part of this plea mentioned"]; and this he is ready to verify; wherefore he prays judgment if the plaintiff ought further to maintain his action thereof."

Take care that the plea contains the receipt of the money by the officer in the margin, or the plaintiff may sign judgment as for want of a plea, but he cannot demur (z). The plea should be pleaded within the same time, and delivered in the same manner, as other pleas. As it concludes with a verification, it should be signed by counsel. It must not be pleaded without a rule of court

Practical directions as to.

(*t*) *Kidd* v. *Walker*, 2 B. & Ad. 705; 1 Dowl. 331, *S. C.*

(*u*) *Domett* v. *Young*, 1 Car. & M. 465.

(*v* Price, New Prac., 304. See *Hubbard* v. *Wilkinson*, 8 B. & C. 496. But see *Ball* v. *Stafford*, 4 Dowl. 327.

(*x*) *Stultz* v. *Heneage*, 10 Bing. 561; 4 Moo. & Scott, 472; 2 Dowl. 806, *S. C.*: *Ball* v. *Stafford*, 2 Scott, 426; 4 Dowl. 327; 1 Hodges, 316, *S. C.*

(*y*) See *post*, 1183, shewing this must be varied.

(*z*) *Harcant* v. *Busk*, 6 Jur. 1110, Q. B.

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ment *non obstante veredicto*, or for a [illegible] *it to which as the plea as* [illegible] *it to plead this* [illegible] costs from the [illegible] into court must

the objection does not necessarily [illegible]
declaration: and, therefore, wher[illegible]
battery, defendant, by leave of a [illegible]
and succeeded in an issue on it[illegible]
as this plea to such an acti[illegible] of payment of money
3 & 4 *W.* 4, *c.* 42, might be [illegible] the character of the de
against justices and officers [illegible] ove rule, that the plea is
to judgment *non obstante* [illegible] rm, and "*mutatis mutandis*
the money out of court, [illegible] ion as may be necessary in ord
paid in (*m*). [illegible] ies of the parties to the form

At what time paid in.

At what Time, a[illegible] and the like (*b*). For this reason,
money into court. [illegible] urt in an action of assault and batter
obtained, it seem[illegible] ything that appears to the contrary,
writ issued (*n*): [illegible] ded by a justice of the peace, or officer (*c*)
tion, and befo[illegible] plea, so far as it regards actions of debt, is in
order may be [illegible] making any mention of the damages accruin
into court, [illegible] ment of the debt; and it should be altered accord
allowed to [illegible] judgment might be signed for the residue of th
trial (*p*), [illegible] answered by the plea *i. e.* the damages (*d*). Where
of inqui[illegible]tion of debt, the defendant pleaded as to 21*l.* 9*s.* pay
leave o[illegible] of that amount into court, and "that he never was in
a recov[illegible] to the plaintiffs to a greater amount than 21*l.* 9*s.* in re
ware[illegible] of the said sum, parcel &c.; and that the plaintiffs have
ind[illegible] sustained damage, by reason of the detention thereof, to a
p[illegible]ater amount than the sum of sixpence," the plea was held

How paid in.

[illegible] on special demurrer, for it admitted some damage beyond
the debt, and gave no answer to such damage (*e*). The proper
form seems to be, to allege that the defendant "never was in-
debted to the plaintiff, nor has the plaintiff sustained damages
to a greater amount than the sum paid into court," &c. In a
declaration containing several counts or breaches, if one plea
of payment into court be pleaded to the whole or part, it is
not necessary to state in it how much of the sum paid into
court is meant to be applied to each particular count or
breach (*f*). But when one of the counts is on a bill or note,
and the full amount is not paid, the plea must specify how
much of the money paid in is meant to apply to that count,
and shew a defence, if any, specially for the residue; for the
plea, being in the nature of a plea of *non assumpsit* or *nunquam*
indebitatus as to the residue not paid into court, is not appli-
cable to a count on a bill or note (*g*). If, however, the
plaintiff join issue on such a plea, the defendant may give in
evidence any defence that would have been admissible under

(*a*) *Allard* v. *Booth*, 1 Bing. N. C. 693; 1 Scott, 644, *S. C.*

(*b*) See, *per Cur.*, *Aston* v. *Perkes*, 15 Law J., N. S., 241, Exch.

(*c*) Id.

(*d*) *Lowe* v. *Steele*, 15 Law J., N. S., 244, Exch.: *Henry* v. *Earl*, 8 M. & W. 298; 9 Dowl. 725, *S. C.*

(*e*) *Bailey* v. *Sweeting*, 1 D. & L. 653; 13 Law J., N. S., 128, Exch.; 12 M. & W. 616, *S. C.*

(*f*) *Ante*, 1181.

(*g*) *Armfield* v. *Burgis*, 6 M. & W. 201; 8 Dowl. 247, *S. C.* And see *Jourdain* v. *Johnson*, 2 C., M., & R. 870; 1 Gaund. 6th ed., 33 l. On such a plea of a de-fence as to part, and payment into court as to the residue, the concluding averment of never indebted, &c. would be sur-plusage. See a form of plea held bad, pleaded, *Bailey* v. *Sweeting*, 12 M. & W. 616; 1 D. & L. 653, *S. C.*

Other parts, as to form of.

…lea must, in all cases, con- …he further maintenance of …rrer (*i*). It has been …aded than the pay- …he record; but …erhaps is not …r judgment *non* …ground of demur- …nave been paid into …ation (*l*).

Replication and subsequent proceedings.

…*roceedings.*]—By *R. T.*, 1 … the delivery of a plea of pay- …shall be at liberty to reply to the …n so paid into court in full satisfac- …ne cause of action in respect of which … and he shall be at liberty in that case to …t, and, in case of non-payment thereof with- …ours, to sign judgment for his costs of suit so …e plaintiff may reply, '*that he has sustained da-* …, '*that the defendant was and is* (*n*) *indebted to him,*' case may be] *to a greater amount than the said sum;*' in the event of an issue thereon being found for the de- …nt, the defendant shall be entitled to judgment and his …ts of suit" (*o*).

Plaintiff's course of proceeding.

The plaintiff may at once take the money out of court, which he obtain on producing to one of the Masters the copy of the … or order (if any) for paying it in, and the plea of payment …ered in the cause. The taking the money out waives any …gularity in paying it in (*p*). The defendant cannot avail …self of the act as evidence upon the trial of any issues …d in the cause (*q*). *The plaintiff must reply within the … limited in ordinary cases*, otherwise the defendant may … judgment of *nonpros* (*r*). It is, however, no discon- …nce, if the plaintiff does not reply to the plea of payment …court before going to trial on the other issues, as he may …r a *nol. pros.* on the former, even after verdict (*s*). If the …of payment into court be to the whole declaration, and …plaintiff determines upon not accepting the money in …ction of his claim, *he should reply accordingly in the man- …inted out by the above rule, and make up the issue, and pro- …e trial, &c., as in ordinary cases.* If the plea be only to …of the declaration, and there be any other plea to the rest …, and the plaintiff determines upon proceeding to trial …the cause of action to which the plea of payment into

…*Pidgeon* v. *Mackenzie*, 3 Bing., N. …*Harris* v. *Bushell*, 2 Dowl., N. S., …*man* v. *Stevenson*, 2 C., M., & R. …*l*, 769; 1 Gale, 74, S. C. And …*v. Best*, 1 T. & G. 630. …*Sherman* v. *Stevenson*, *supra*: …*Stevens*, 3 Dowl. 784. …*ood* v. *Price*, 6 Dowl. 487. …the former rule, H., 4 W. 4, r. …which this is substituted. …*Bousfield* v. *Ashley*, 1 Q. B. 183; …184, & C., where the word "is" …*ted*, and the replication was held bad; *sed quære.*

(*o*) This means the ordinary costs of suit. (*Hendrick* v. *Foulkes*, 9 M. & W. 431). This rule supersedes that of H. T., 2 W. 4, r. 56. And see the former practice, Tidd's New Pract. 315. See the forms, Chit. Forms, 566.

(*p*) *Griffith* v. *Williams*, 1 T. R. 710.

(*q*) *Gould* v. *Oliver*, 2 Scott, N. R., 241.

(*r*) *Emmott* v. *Standen*, 3 M. & W. 497: *Topham* v. *Kidmore*, 5 Dowl. 676.

(*s*) See *Fallowes* v. *Bird*, 2 C., M., & R. 457.

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or a judge's order, allowing the payment of the money into court in those cases, where such rule or order is necessary, as to which see ante, 1779, 1182, *otherwise the plaintiff may treat the plea as a nullity, and sign judgment.* If the defendant omit to plead this plea, he can, it seems, derive no benefit as to costs from the payment into court (*a*), and such payment into court must now, in all cases, be specially pleaded.

The form should be followed.

It should not allege the character in which defendant is sued.

This form is to be adopted in all cases of payment of money into court in any action, without stating the character of the defendant; and the provision in the above rule, that the plea is to be "as near as may be" in that form, and "*mutatis mutandis*," is only to authorise such alteration as may be necessary in order to adapt the plea to the names of the parties to the form of action, to the sums paid, and the like (*b*). For this reason, a plea of payment into court in an action of assault and battery may be good; for anything that appears to the contrary, it may have been pleaded by a justice of the peace, or officer (*c*).

In debt the form is bad, and not to be followed.

The form of the plea, so far as it regards actions of debt, is imperfect, it not making any mention of the damages accruing from non-payment of the debt; and it should be altered accordingly, or judgment might be signed for the residue of the claim not answered by the plea *i. e.* the damages (*d*). Where, to an action of debt, the defendant pleaded as to 21*l.* 9*s.* payment of that amount into court, and "that he never was indebted to the plaintiffs to a greater amount than 21*l.* 9*s.* in respect of the said sum, parcel &c.; and that the plaintiffs have not sustained damage, by reason of the detention thereof, to a greater amount than the sum of sixpence," the plea was held bad on special demurrer, for it admitted some damage beyond the debt, and gave no answer to such damage (*e*). The proper form seems to be, to allege that the defendant "never was indebted to the plaintiff, nor has the plaintiff sustained damages to a greater amount than the sum paid into court," &c.

Where several counts.

In a declaration containing several counts or breaches, if one plea of payment into court be pleaded to the whole or part, it is not necessary to state in it how much of the sum paid into court is meant to be applied to each particular count or breach (*f*).

In action on bill or note.

But when one of the counts is on a bill or note, and the full amount is not paid, the plea must specify how much of the money paid in is meant to apply to that count, and shew a defence, if any, specially for the residue; for the plea, being in the nature of a plea of *non assumpsit* or *nunquam indebitatus* as to the residue not paid into court, is not applicable to a count on a bill or note (*g*). If, however, the plaintiff join issue on such a plea, the defendant may give in evidence any defence that would have been admissible under

(*a*) *Allard* v. *Booth*, 1 Bing. N. C. 693; 1 Scott, 644, *S. C.*

(*b*) See, *per Cur.*, *Aston* v. *Perkes*, 15 Law J., N. S., 241, Exch.

(*c*) Id.

(*d*) *Lowe* v. *Steele*, 15 Law J., N. S., 244, Exch.: *Henry* v. *Earl*, 8 M. & W. 238; 9 Dowl. 725, *S. C.*

(*e*) *Bailey* v. *Sweeting*, 1 D. & L. 653; 13 Law J., N. S., 198, Exch.; 12 M. & W. 616, *S. C.*

(*f*) *Ante*, 1181.

(*g*) *Armfield* v. *Burgin*, 6 M. & W. 281; 8 Dowl. 247, *S. C.* And see *Jourdain* v. *Johnson*, 2 C., M., & R. 570; 1 Saund., 6th ed., 33 l. On such a plea of a defence as to part, and payment into court as to the residue, the concluding averment of never indebted, &c. would be surplusage. See a form of plea held badly pleaded, *Bailey* v. *Sweeting*, 12 M. & W. 616; 1 D. & L. 653, *S. C.*

Other parts, as to form of.

the old general issue (*h*). The plea must, in all cases, conclude with a prayer of judgment to the further maintenance of the action, or it is bad on special demurrer (*i*). It has been considered, that, where other matters are pleaded than the payment into court, they should stand first on the record; but this is not always followed in practice, and perhaps is not strictly necessary (*k*). It is not a ground for judgment *non obstante veredicto*, and, it seems, not even a ground of demurrer, that the plea alleges the money to have been paid into court by leave of a judge before declaration (*l*).

Replication and subsequent proceedings.

Replication and subsequent Proceedings.]—By *R. T.*, 1 *Vict.* (*m*), "the plaintiff, after the delivery of a plea of payment of money into court, shall be at liberty to reply to the same by accepting the sum so paid into court in full satisfaction and discharge of the cause of action in respect of which it has been paid in; and he shall be at liberty in that case to tax his costs of suit, and, in case of non-payment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed; or the plaintiff may reply, '*that he has sustained damages*' [or, '*that the defendant was and is* (*n*) *indebted to him*,' as the case may be] *to a greater amount than the said sum*;' and, in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit" (*o*).

Plaintiff's course of proceeding.

The plaintiff may at once take the money out of court, which he may obtain on producing to one of the Masters the copy of the rule or order (if any) for paying it in, and the plea of payment delivered in the cause. The taking the money out waives any irregularity in paying it in (*p*). The defendant cannot avail himself of the act as evidence upon the trial of any issues joined in the cause (*q*). *The plaintiff must reply within the time limited in ordinary cases*, otherwise the defendant may sign judgment of *nonpros* (*r*). It is, however, no discontinuance, if the plaintiff does not reply to the plea of payment into court before going to trial on the other issues, as he may enter a *nol. pros.* on the former, even after verdict (*s*). If the plea of payment into court be to the whole declaration, and the plaintiff determines upon not accepting the money in satisfaction of his claim, *he should reply accordingly in the manner pointed out by the above rule, and make up the issue, and proceed to trial, &c., as in ordinary cases.* If the plea be only to part of the declaration, and there be any other plea to the rest of it, and the plaintiff determines upon proceeding to trial upon the cause of action to which the plea of payment into

(*h*) *Finlayson* v. *Mackenzie*, 3 Bing., N. S., 224: *Harris* v. *Bushell*, 2 Dowl., N. S., 514.

(*i*) *Sharman* v. *Stevenson*, 2 C., M., & R. 75; 3 Dowl. 709; 1 Gale, 74, *S. C.* And see *Porter* v. *Izat*, 1 T. & G. 639.

(*k*) See *Sharman* v. *Stevenson*, *supra*: *Oates* v. *Stevens*, 3 Dowl. 784.

(*l*) *Edwards* v. *Price*, 6 Dowl. 487.

(*m*) See the former rule, H., 4 W. 4, r. 17, for which this is substituted.

(*n*) See *Faithfull* v. *Ashley*, 1 Q. B. 183; 4 P. & D. 524, *S. C.*, where the word "is" was omitted, and the replication was held bad; *sed quære*.

(*o*) This means the ordinary costs of suit. (*Hendrick* v. *Foulkes*, 9 M. & W. 431). This rule supersedes that of H. T., 2 W. 4, r. 56. And see the former practice, Tidd's New Pract. 315. See the forms, Chit. Forms, 566.

(*p*) *Griffith* v. *Williams*, 1 T. R. 710.

(*q*) *Gould* v. *Oliver*, 2 Scott, N. R., 241.

(*r*) *Emmott* v. *Standen*, 3 M. & W. 497: *Topham* v. *Kidmore*, 5 Dowl. 676.

(*s*) See *Fallowes* v. *Bird*, 2 C., M., & R. 457.

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court is not pleaded, *he should reply that he accepts the money in satisfaction of that part of the cause of action to which it is paid in, (or, if he has sustained damages to a greater amount, then he should reply that fact), and he should reply to the other plea or pleas, and proceed to trial as in ordinary cases.* In this case, the plaintiff cannot tax his costs under the above rule (*t*). If the plea of payment of money into court be to the whole of the declaration, and the plaintiff determines upon accepting the money in satisfaction of the whole causes of action, *he should reply that acceptance, and in that case he may at once proceed to a taxation of costs, and sign final judgment for them if not paid in forty-eight hours after taxation.* If the plea be only to part of the declaration, and there be other pleas to the residue, and the plaintiff determines upon accepting the money, and proceeding no further in the action, *he should then reply the acceptance of the money in satisfaction to the part of the cause of action to which it is paid in, and enter a nolle prosequi to the rest, and proceed to a taxation, &c., as just pointed out* (*u*). In this case, the plaintiff will be liable to the defendant's costs on the *nolle prosequi*, though he will be entitled to the general costs of the action. *The nolle prosequi need merely be inserted in the replication delivered: there is no occasion to enter it on any roll until the judgment-roll be carried in.*

The money, in general, conclusively belongs to plaintiff.

In general, in any event, the money paid into court belongs to the plaintiff, whatever may be the result of the action; and he is entitled to it, though he be nonsuit (*x*), or though the defendant die (*y*) during the action; and, if the plaintiff dies, his executors will be entitled to it (*z*). It has been said, that the defendant can in no case recover it back (*a*). To this, however, there is an exception, in case it is paid in under a mistake; and if the defendant can clearly and satisfactorily establish that it was so, the Court or a judge may order it, or part of it, to be repaid or refunded to him (*b*). The Court or a judge may also, if the plaintiff fail in his action, and the money has not been taken out of court by him, impound it to answer the defendant's costs (*c*).

Costs on. In general.

Costs on.]—If the plea of payment into court be to the whole declaration, and the plaintiff replies that he accepts it in satisfaction of the cause of action, he will, in general, be entitled to his costs. If the plea be only to part of the declaration, and there be another plea or pleas to the rest, and the plaintiff is not willing to proceed further, he will then have to enter a *nolle prosequi* to that part of the cause of action to which the

(*t*) *Cauty* v. *Gyll*, 5 Scott, N. R., 819.

(*u*) Plaintiff could not in this case pass over the defendant's other pleas unnoticed: if he did, the Court would give defendant liberty to sign judgment of *non-pros.*, unless plaintiff amended his replication on payment of costs, or consent to a taxation of costs, as upon a *nol. pros.*, in respect of the unanswered pleas. See *Topham* v. *Kidmore*, 5 Dowl. 676: *Emmott* v. *Standen*, 3 M. & W. 497; 6 Dowl. 591, *S. C.*

(*x*) *Elliott* v. *Callow*, 2 Salk. 597.

(*y*) *Knapton* v. *Dreve*, Pr. Reg. 251.

(*z*) *Cockray* v. *Martin*, Barnes, 279.

(*a*) See per *Buller*, J., in *Malcolm* v. *Fullarton*, 2 T. R., 648. And see *Cas* v. *Robinson*, 2 Str. 1027: *Vaughan* v. *Barnes*, 2 B. & P. 392.

(*b*) *Colyer* v. *Selby*, 5 December, 1840, cor. *Parke*, B., at chambers. The learned judge, after fully going into the point, said, that all the above cases were distinguishable, except the dictum of *Buller*, J., and that that was extra-judicial; and that he could not understand why a payment into court should be more binding than a judgment by default, which, no doubt, the Court would set aside on the ground of mistake.

(*c*) See *Anon.*, Barnes, 280. And see *Green* v. *Coughlan*, 1 Jones, Rep. Exch. Ir., 263.

latter plea or pleas are pleaded, and be liable to the defendant's costs in respect of it (*d*). If, indeed, a defendant plead payment of money into court to the *whole* declaration, and also other pleas, (but which, in general, cannot be done), the plaintiff may, it seems, accept the sums paid in satisfaction of the whole cause of action, and tax his costs accordingly, without replying or entering a *nol. pros.* as to the other pleas, and defendant could not sign judgment of *nonpros* as to those pleas (*e*). But if payment into court is pleaded only to part, this cannot be done; and if there are other pleas to the rest, plaintiff must reply to or enter a *nol. pros.* as to them, otherwise defendant may sign judgment of *nonpros* for want of a replication to the latter pleas (*f*). Where the defendant pleads a special plea, and plaintiff new assigns, and defendant pays money into court on the new assignment, and plaintiff takes it out in satisfaction of the action, the plaintiff is entitled to the general costs of the cause (*g*). The plaintiff may, it should seem, at any time before the trial, if he choose not to proceed further, obtain the costs up to the time of the defendant paying the money into court; but if the defendant has incurred any subsequent costs, he must be allowed them (*h*). Where the plaintiff replied further damage, but, in shewing cause against a rule for judgment as in case of a nonsuit, he expressed a wish to take the money out of court, the Court allowed him to do so, on his amending his replication by accepting the money in satisfaction of the cause of action, and paying the costs incurred by the defendant since the payment of the money into court (*i*). If the money have been paid in on one count only of the declaration, the plaintiff (if he accept of the money so paid in) will be entitled to the costs of that count only, and not of the others (*k*). And if the money be paid into court on any one count, which may be applicable to the plaintiff's demand, and the plaintiff has no further demand, he will, it seems, proceed at his peril of costs on the other counts, notwithstanding they may be also applicable to the demand (*l*). If the plaintiff proceed to trial and obtain a verdict, he will be entitled to costs, as in ordinary cases; but if the verdict be given against him, the defendant will be entitled to judgment and his costs generally, and not merely to his costs incurred since the payment of money into court (*m*). If a juror be withdrawn (*n*), or if plaintiff, after proceeding in the action, discontinue (*o*), or be nonsuit (*p*), or even if the defendant obtain judgment of *nonpros* or judgment

(*d*) *Goodes* v. *Goldsmith*, 2 M. & W. 202: 5 Dowl. 233, S. C.: *Emmott* v. *Standen*, 3 M. & W. 497.

(*e*) *Coates* v. *Stevens*, 3 Dowl. 784; 5 Tyr. 764; 1 Gale, 75; 2 C., M., & R. 118, S. C.: see *Goodes* v. *Goldsmith*, 5 Dowl. 226; 2 M. & W. 288, S. C.: *sed quære*, see *Burden* v. *Flower*, 7 Dowl. 786; 1 Saund., 6th ed., 33, n. l.

(*f*) *Topham* v. *Kidmore*, 5 Dowl. 676: *Emmott* v. *Standen*, 3 M. & W. 497; 6 Dowl. 891, S. C.: *Goodes* v. *Goldsmith*, 3 M. & W. 288; 5 Dowl. 288, S. C.

(*g*) See *Benn* v. *Bateman*, 8 M. & W. 696: *Griffiths* v. *Jones*, 1 M. & W. 731; 5 Dowl. 167, S. C. The marginal note to the latter case is incorrect.

(*h*) *Hartley* v. *Bateson*, 1 T. R. 629: *Griffiths* v. *Williams*, Id. 710: *Davis* v. *Maxwell*, Willes, 191. And see *James* v. *Baggett*, 2 B. & Ald. 776; 1 Chit. Rep. 471, S. C.

(*i*) *Kelly* v. *Flint*, 5 Dowl. 293: *Vane* v. *Mitchell*, Barnes, 294.

(*k*) *Baillie* v. *Gezelet*, 4 T. R. 579: *Skarratt* v. *Vaughan*, 2 Taunt. 266.

(*l*) *Ante*, 1181.

(*m*) See R. H., 1 Vict., *ante*, 1183. And see *Stevenson* v. *Yorke*, 4 T. R. 10: *Griffiths* v. *Williams*, 1 T. R. 710; 1 Saund. 33 c.: *Wilton* v. *Place*, 2 B. & P. 56: *Edwards* v. *Harris*, 11 Price, 533.

(*n*) *Stodhart* v. *Johnson*, 3 T. R. 657.

(*o*) *Berwick* v. *Symonds*, Say. 196.

(*p*) *Rabell* v. *Hudson*, 4 T. R. 10.

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as in case of a nonsuit (*q*); the plaintiff will be liable to costs as in other cases.

Where declaration amended.

After a case stood for trial, and was made a *remanet*, the plaintiff obtained leave to amend his declaration and particulars; the defendant to be at liberty to plead *de novo* to the amended declaration. The defendant paid money into court, which the plaintiff took out. It was held, that the plaintiff was not entitled to the costs of preparing for the trial (*r*).

Defendant may take advantage of Court of Requests Act.

The form of the plea does not preclude a defendant from applying to enter a suggestion to deprive the plaintiff of costs (*s*). But where the sum paid in was under 5*l.*, which the plaintiff took out in full satisfaction of his demand, and entered a *nolle prosequi* as to the residue, it was held that the acceptance by the plaintiff of the smaller sum was not of itself sufficient evidence that no more was due, so as to entitle the defendant to enter a suggestion, under a Court of Requests Act giving jurisdiction over debts to the amount of 5*l.* (*t*).

Costs where several actions are consolidated.

Formerly, in the Queen's Bench, where the defendants in several actions on a policy of insurance paid money into court, which the plaintiff took out without taxing costs at that time, and afterwards the defendants entered into the common consolidation rule, and the plaintiff was nonsuited in the action that was tried, the Court held that the latter was not entitled to costs in any of the actions up to the time of paying money into court (*u*). But, in the Common Pleas, where there was a consolidation rule, and money paid into court, although the cause tried followed the general practice, and the defendant, if he succeeded, was entitled to the whole costs of that cause, yet the plaintiff was entitled to the costs of the short causes, up to the time when the money was paid in (*x*). And now, by a general rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 1, *s.* 104,—"where money is paid into court in several actions which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one, and fails, he shall be entitled to costs on the others, up to the time of paying money into court."

When allowed to be paid in without costs.

Under special circumstances, perhaps, the money may be allowed to be paid into court without the defendant's being liable to costs. In a case in the King's Bench, before the above rules of *H. T.*, 4 *W.* 4, although it appeared that a certain sum had been offered to the plaintiff before declaration, and refused, yet the Court would not allow the defendant to pay that sum of money into court after declaration, upon the terms of the plain-

(*q*) *Crosby* v. *Glorenshaw*, 2 M. & Sel. 335: *Postle* v. *Beckington*, 6 Taunt. 158: but see *Seamour* v. *Bridge*, 8 T. R. 408: *Lorck* v. *Wright*, Id. 486.

(*r*) *Wilton* v. *Snook*, 1 D. & L. 964; 13 Law J., N. S., Exch., 236. See *Jackson* v. *Nunn*, 3 G. & D. 543; 4 Q. B. 909, where the plaintiff amended by striking out the names of some of the defendants; and the defendants whose names were not struck out paid money into court.

(*s*) *Jorden* v. *Berwick*, 9 M. & W. 3; 1 Dowl., N. S., 102, *S. C.*: *Turner* v. *Barnard*, 5 Dowl. 170; 1 H. & W. 580, *S. C.*

(*t*) *Jorden* v. *Berwick*, *supra*. And per *Parke*, B., "If the plaintiff brings his action for more than 5*l.*, and is content to take less, there is no reason why he should proceed and incur risk and trouble in recovering the whole of his demand. I think, too, he may explain the amount of his demand by affidavit; and, as he has shewn that he sued the defendant for more than 5*l.*, and the defendant has not shewn that the subject-matter of the action is less than that sum, I think the defendant is not entitled to enter a suggestion." And see *Farrand* v. *Morgan*, 3 Dowl. 792; 2 C., M., & R. 252; 2 Tyr. 790, *S. C.*

(*u*) *Burstall* v. *Horner*, 7 T. R. 372: see *Powell* v. *Parkinson*, 6 M. & Selw. 107: Tidd's New Pract. 317.

(*x*) *Twemlow* v. *Brock*, 2 Taunt. 261. And see *Wilton* v. *Place*, 2 B. & P. 56: *Muller* v. *Hartshorne*, 3 B. & P. 536.

tiff's being obliged to relinquish the costs of the declaration if he afterwards took the money out: they said, that the defendant should have tendered the money and pleaded the tender (*y*). But where the conduct of the plaintiff appeared to have been oppressive, and that the defendant was willing and offered to pay the money before action brought, the Court, before the above rule of *H. T.*, 4 *W.* 4, upon application of the defendant, (even after he had paid the money into court), ordered that so much of the rule then in practice as obliged him to pay costs should be discharged (*z*). And where an action was brought for two separate sums of money, and the defendant, having offered to pay the amount of one of them, with costs up to that time, which was refused by the plaintiff, paid the amount into court, but the plaintiff, afterwards finding that he could not maintain his action as to the second sum, took the money out of court, and proceeded no further: the Court allowed the defendant his costs from the date of his offer to pay the sum afterwards paid into court, and directed these costs to be deducted from the costs of the plaintiff (*a*).

Where summons taken out to stay proceedings on payment of a certain sum.

And in another case, the defendant obtained a judge's summons to stay proceedings upon payment of a certain sum and costs; but, the plaintiff claiming more than the sum offered, no order was made, and the action proceeded; the defendant afterwards paid the same sum into court, and the plaintiff thereupon took the money out and discontinued the action: the Court, upon application of the defendant, allowed the plaintiff his costs only up to the time of his attendance upon the summons, and ordered the costs subsequently incurred by the defendant, and the costs of the application, to be deducted from them, even although it appeared that the plaintiff was induced from poverty to accept the money paid into court, and relinquish his action for the balance (*b*). But where, in a country cause, the defendant took out a summons before declaration, to stay proceedings upon payment of a less sum than the plaintiff's demand and costs, upon which no order was made, and the defendant afterwards paid that sum into court, which the plaintiff's agent, having, in the meantime, consulted his principal in the country, took out of court, it was holden, that the plaintiff, not having been guilty of vexation, was entitled to costs up to the time at which he took the money out of court (*c*). And, in general, as the Court order the plaintiff to pay the costs subsequent to the offer, upon the presumption that he refused the sum offered merely for the purpose of making costs, if the plaintiff can rebut this presumption, and satisfactorily explain the reason of his refusal of the money offered, and of his afterwards taking the same or a less sum out of court, so as to satisfy the Court that it did not proceed from

(*y*) *Burmester* v. *Hitch*, 13 East, 551: see Pr. Reg. 258: *Gibbon* v. *Copeman*, 5 Taunt. 840: but see *Sewin* v. *Cowell*, 2 Taunt. 203: *Roberts* v. *Lambert*, Id. 283.

(*z*) *Johnson* v. *Houlditch*, 1 Burr. 578. And see *Hale* v. *Baker*, 2 Dowl. 125.

(*a*) *James* v. *Raggett*, 2 B. & Ald. 776; 1 Chit. Rep. 471, *S. C.*: *Parsons* v. *Pitcher*, 4 Bing. N. C. 306; 6 Dowl. 432, *S. C.* And see *Merryott* v. *Clapp*, 1 Dowl. 701: *Jones* v. *Owen*, 2 C. & J. 476; 1 Dowl. 555, *S. C.* It seems that the Court will not interfere to give the defendant his costs unless the case has been previously before the Master. (*Roe* v. *Cobham*, 6 Dowl. 628).

(*b*) MS., T. 1825; *Hale* v. *Baker*, 2 Dowl. 125: *semble*, overruling *Edwards* v. *Harrison*, 11 Price, 533. And see *Jones* v. *Owen*, note (*c*), *post*, 1190.

(*c*) *Haworth* v. *Holgate*, 2 Y. & J. 257.

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a wish to create costs, the Court will allow the plaintiff his costs up to the time of paying the money into court (*d*). Where an order was made for the defendant to pay four guineas into court, but the plaintiff's agent refused to tax the costs under that order, the Court permitted the defendant to pay the money into court without being liable to the costs (*e*).

Costs where, in trespass or case, plaintiff recovers less than 40*s*.

It seems, that if, in an action of trespass or on the case, defendant pays money into court, to which the plaintiff replies damages *ultra*, and upon the trial he recovers less than 40*s*., he will not be entitled to costs unless the judge certifies, under the 3 & 4 *Vict. c.* 24 (*f*).

Double costs.

A defendant who pays money into court in an action for an illegal distress, and succeeds upon the issue of damages *ultra*, is not entitled to double costs, under the 11 *G.* 2, *c.* 19, *s.* 21 (*g*).

Effect of it as an admission of cause of action, &c.

On a special count ex contractu.

Effect of it as an Admission of the Cause of Action, &c.]—By paying money into court on the whole of a special declaration, or on a special count setting forth a contract, the defendant impliedly (*h*) admits the contract as declared on, and that the plaintiff is entitled to recover on all the breaches on which it is paid in (*i*). Thus, if it be paid into court on a count on a bill of exchange, the defendant's handwriting (*k*), and the sufficiency of the stamp is admitted (*l*): so, if paid in in an action of covenant, the execution of the deed is admitted (*m*); so, if paid in on a count on a guarantee, it admits an agreement signed according to the Statute of Frauds (*n*); so, if paid in on one entire contract, it admits the contract, though it would be otherwise if the contract were not entire (*o*). But although the payment is an acknowledgment by the defendant of the contract alleged, it does not preclude him from taking any objection limiting the operation of the contract, in order to bar the plaintiff from recovering more than he has paid into court; and, therefore, the defendant may plead the Statute of Limitations or any other defence to part of the claim on the contract, and payment into court to the residue (*p*). In a case before the New Rules, where two breaches were assigned in one count on a contract, and the defendant paid money into court upon one of them, it was held that he thereby admitted the whole contract as set forth in that count (*q*). But it is said, that, in this respect, the plea of payment into court is distinguished from the old payment of money into court; and it has been held accordingly, that, if there is a plea of payment into court as to a breach of

(*d*) *Ackroyd* v. *Read*, 5 M. & W. 542; 7 Dowl. 810, *S. C.* And see *Watson* v. *Coleman*, 8 Scott, N. R., 169.

(*e*) *Anon.*, T. T. 1832, Exch., Jervis's Rules, 75. And see *Jones* v. *Owen*, Exch. T. T. 1832, Jervis's Rules, 75; 1 Dowl. 565; 2 C. & J. 476, *S. C.*

(*f*) *Taylor* v. *Rolfe*, 13 Law J., N. S., 39, Q. B.: *Tennant* v. *Parker*, Exch., 23 April, 1846.

(*g*) *Hancock* v. *Foulkes*, 1 Dowl., N. S., 659; 9 M. & W. 431, *S. C.*

(*h*) *Burrough* v. *Skinner*, 5 Burr. 2640: *Gulliod* v. *Nock*, 1 Esp. 347: *Seaton* v. *Benedict*, 5 Bing. 28; 2 Moo. & P. 66, *S. C.*: see *Bayfield* v. *Porter*, 13 East, 202: *Leggett* v. *Cooper*, 2 Stark. 103: *Everth* v. *Bell*, 7 Taunt. 450: *Stafford* v. *Clarke*, 2 Bing. 377; 9 Moore, 794, *S. C.*, (all cases decided before the New Rules): *Archer* v. *English*, 2 Scott, N. R., 156; 9 Dowl. 11, *S. C.*

(*i*) *Wright* v. *Goddard*, 8 Ad. & El. 144; 3 Nev. & P. 361, *S. C.*: *Hingham* (or *Kingham*) v. *Robins*, 7 Dowl. 352; 5 M. & W. 94, *S. C.*, per *Parke*, B.

(*k*) *Gutteridge* v. *Smith*, 2 H. Bl. 374.

(*l*) *Israel* v. *Benjamin*, 3 Camp. 40.

(*m*) *Randal* v. *Lynch*, 2 Camp. 357.

(*n*) *Middleton* v. *Brewer*, Peake, 15.

(*o*) See *Meager* v. *Smith*, 4 B. & Ad. 673; 1 Nev. & M. 449, *S. C.*

(*p*) *Reid* v. *Dickons*, 5 B. & Adol. 499; and see 1 Saund., 6th ed., 33 *m.*

(*q*) *Dyer* v. *Ashton*, 3 B. & Cres. 3; 2 D. & Ry. 19, *S. C.*

one part of the entire contract alleged, and a plea of *non assumpsit* as to the residue, the former plea is not such an admission by the defendant of the whole contract as to entitle the plaintiff to a verdict on the latter plea, for that each plea must be taken separately, and as if it were the sole plea on the record (*r*). The payment into court does not admit the correctness of immaterial averments (*s*). Thus, where the declaration is for goods sold, to be paid for at the average price, to be ascertained on a day specified, payment into court does not, if stated under a *videlicet*, admit the average price to be as stated in the declaration (*t*). Payment into court on a count on a valued policy, in which the loss is averred to be total, does not admit a total loss (*u*). Where a defendant pays money into court on a special contract, he cannot prove, in mitigation of damages, any fact which would be an answer to the action (*x*). And where he paid it in on a special contract, it was doubted whether it was competent to him to set up a proviso in the contract which the declaration omitted to notice, in order to qualify the amount of damages (*y*). By paying money into court on the common *indebitatus* counts, the defendant, in ordinary cases, admits that the sum paid in is due to plaintiff, by virtue of some contract of the nature declared on; but it does not admit his liability on any particular contract on which the plaintiff may choose to rely; and it lies upon the plaintiff to prove *aliunde* some contract by which he is entitled, under such a form of declaration, to recover a larger amount from the defendant (*z*). It is no admission of the plaintiff's right of action beyond the sum paid into court (*a*), and, consequently, in a divisible claim, does not preclude the defendant from pleading or setting up any defence he may think fit to the residue of the plaintiff's demand (*b*). If the particulars contain various causes of action, it does not preclude the defendant from contesting his liability in respect of any items beyond the amount paid in, the particulars not being considered as part of the declaration (*c*). And where in debt for rent on a demise, with a count for fixtures sold, the plaintiff claimed by his particulars 5*l.* 5*s.* for rent, and 12*l.* for fixtures, the defendant paid 11*l.* 5*s.* into court: it was held no admission of the defendant's liability, in respect of fixtures

On indebitatus counts.

(*r*) *Emmett* v. *Standen*, 3 M. & W. 497; 1 Saund., 6th ed., 33 m.

(*s*) *Cooper* v. *Blick*, 2 Q. B. 915; 2 G. & D. 295, *S. C.*, where a sum was laid under a *videlicet*.

(*t*) *Stovold* v. *Brewin*, 2 B. & Ald. 116. And see *Everth* v. *Bell*, 7 Taunt. 450; 1 Moore, 158, *S. C.*; *Lechmere* v. *Fletcher*, 1 C. & M. 623.

(*u*) *Rucker* v. *Palgrave*, 1 Camp. 557; 1 Taunt. 419, *S. C.*: see *Muller* v. *Hartshorne*, 3 B. & P. 556, before the new rules, where the court, in an action on a policy where money had been paid into court, allowed the defendant to give evidence of fraud. And see *Mellish* v. *Allnutt*, 2 M. & Sel. 106: *Andrews* v. *Palgrave*, 9 East, 325: *Rucker* v. *Palgrave*, 1 Camp. 557.

(*x*) *Speck* v. *Phillips*, 5 M. & W. 279: see *Leggett* v. *Cooper*, 2 Stark. 103.

(*y*) *Attwood* v. *Taylor*, 1 Scott, N. R., 611; 1 M. & Gr. 280, *S. C.*

(*z*) *Hingham* (or *Kingham*) v. *Robins*, 7 Dowl. 352; 5 M. & W. 94, *S. C.*, expressly overruling *Walker* v. *Rawson*, 1 M. & Rob. 250; and the dicta of *Parke* and *Littledale*, JJ., in *Meager* v. *Smith*, 4 B. & Ad. 673; and, in effect, *Ravenscroft* v. *Wise*, 1 C., M., & R. 203. See also *Stapleton* v. *Nowell*, 6 M. & W. 9; 8 Dowl. 196: *Goff* v. *Harris*, 5 M. & G. 573: *Archer* v. *English*, 1 M. & Gr. 873; 2 Scott, N. R., 150, *S. C.*: *Stevenson* v. *Corporation of Berwick*, 1 Q. B. 154; 4 P. & D. 546, *S. C.*

(*a*) 2 Esp. Rep. 482, n.: *Blackburne* v. *Scholes*, 2 Camp. 341; *Rucker* v. *Palgrave*, 1 Taunt. 419: *Everth* v. *Bell*, 7 Id. 450: *Stovold* v. *Brewin*, 2 B. & Ald. 116: *Stapleton* v. *Nowell*, 6 M. & W. 9; 8 Dowl. 196: *Archer* v. *English*, 2 Scott, N. R., 156.

(*b*) *Long* v. *Greville*, 4 D. & R. 632; 3 B. & Cres. 10, *S. C.*: *Reid* v. *Dickons*, 5 B. & Ad. 499, *ante*, 1160, 1181.

(*c*) *Booth* v. *Howard*, 5 Dowl. 438: 1 W., W. & D. 54, *S. C.*: see *Stevenson* v. *Berwick* (*Mayor, &c.*), 4 P. & D. 546; 1 Q. B. 154. And see *Elgar* v. *Watson*, 1 C. & M. 494.

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to a greater amount than had been paid into court (*d*). Paying money into court on several counts, one of which only is applicable to the plaintiff's demand, admits a cause of action on that count only (*e*). Where a declaration contains a special count against the defendants as partners, and also the *indebitatus* counts, payment of money into court under the latter counts is not an admission of the partnership alleged in the former count (*f*). Where a declaration contains inconsistent counts, and the defendant pays money into court on the second count, which the plaintiff accepts, the defendant cannot read the second count, and the proceedings thereon, to the jury as evidence to negative an allegation in the first count (*g*). It is a conclusive admission, in an indivisible claim, of the plaintiff's right to sue in the court in which the action is brought (*h*); and of his right to sue in the character in which he sues (*i*); but not of his right to sue alone without joining another party (*k*); or of the defendant's joint liability in an action against several (*l*); also of the action not being brought too soon (*m*). In an action for a tort, payment into court admits the cause of action as alleged (*n*). In an action upon the statute of *E.* 6, it admits the plaintiff's title (*o*).

Several counts.

Admission of the character, &c. in which plaintiff sues, &c.

In action for a tort.

Debt on statute.

It should be observed, however, that where payment into court is pleaded together with other pleas, each issue, as in other cases, must be tried by itself; and, consequently, where the plaintiff replies damages *ultra*, and succeeds on that issue, although the defendant succeeds on all the other pleas, yet, unless the pleas on which he succeeds cover the entire cause of action, to which payment into court is not pleaded, the plaintiff will be entitled to a verdict for nominal damages on that plea (*p*). But if the issue found for the defendant goes to the entire cause of action, to which the payment into court is not pleaded, the admission in that plea will not entitle the plaintiff to have a verdict entered for him on the other issue (*q*).

Plaintiff, when entitled to nominal damages, though other issues found against him.

If the plaintiff take the money out of court, and it amount to less than the sum stated in the affidavit to hold to bail, he does not, it would seem, thereby subject himself to an action for a malicious arrest (*r*).

Action for malicious arrest after.

The plaintiff may be nonsuit after payment of money into court (*s*); but it is doubtful whether the defendant can demur to evidence after it (*t*).

Plaintiff may be nonsuit after.

It seems the defendant cannot move in arrest of judgment for a defect in a breach in respect of which he has paid money into court (*u*).

Arrest of judgment.

(*d*) *Goff* v. *Harris*, 5 Man. & G. 573.
(*e*) *Stafford* v. *Clarke*, 2 Bing. 377; 9 Moore, 724; 1 C. & P. 703, *S. C.*: *Everth* v. *Bell*, 7 Taunt. 450; 1 Moore, 156, *S. C.*
(*f*) *Charles* v. *Branker*, 1 Dowl. & L. 960; 12 M. & W. 743, *S. C.*
(*g*) *Gould* v. *Oliver*, 2 Scott, N. R., 242; 2 M. & G. 208, *S. C.*
(*h*) *Miller* v. *Williams*, 5 Esp. 19.
(*i*) *Lipscombe* v. *Holmes*, 2 Camp. 441.
(*k*) *Hingham* (or *Kingham*) v. *Robins*, 7 Dowl. 362; 5 M. & W. 94, *S. C.*
(*l*) *Stapleton* v. *Nowell*, *Archer* v. *English*, *supra*.
(*m*) *Harrison* v. *Douglas*, 3 Ad. & El. 396, (an action on a policy of insurance).
(*n*) *Lloyd* v. *Wakley*, 9 C. & P. 771: but see *Cooke* v. *Hartle*, 5 C. & P. 569.
(*o*) *Broadhurst* v. *Baldwin*, 4 Price, 89.
(*p*) *Fisher* v. *Aide*, 3 M. & W. 495. see *Thompson* v. *Jackson*, 3 M. & G. 621.
(*q*) *Twemlow* v. *Ashay*, 3 M. & W. 495.
(*r*) *Jackson* v. *Burleigh*, 3 Esp. 34: see *Hubbard* v. *Blowers*, 5 Esp. 62: *Butler* v. *Brown*, 1 B. & B. 66; 3 Moore, 327, *S. C.*; but see *Laidlaw* v. *Cockburn*, 2 New Rep. 76.
(*s*) *Ante*, Vol. 1, 398.
(*t*) *Jenkins* v. *Tucker*, 1 H. Bl. 93.
(*u*) *Wright* v. *Goddard*, 8 Ad. & El. 144; 3 Nev. & P. 361, *S. C.*

Payment into court on a plea of tender.

Payment into Court upon a Plea of Tender.]—If you intend to plead a tender, *pay the money tendered into court, in the manner directed, ante*, 1182, *and get a receipt for it in the margin of the plea, from the Master, &c.* A tender and refusal may be pleaded to an avowry or cognizance for rent or *damage feasant*, without bringing the money into court; for if the distress be not rightfully taken, the defendant must answer to the plaintiff his damages (*x*); and it may be pleaded in this way to an action for an involuntary trespass (*y*), or in actions against magistrates, or excise or customs officers, and other persons in official situations (*z*).

How take out, &c.

After paying money into court on a plea of tender, the defendant can never take it out, even although he have a verdict (*a*). But the plaintiff may take it out, whether he confess or deny the tender in his replication (*b*). The plaintiff had better confess the tender, if it was a legal one and the evidence that it was made be clear.

Effect of not paying in the money.

If the defendant plead a tender without paying the money into court, the plea, as far as it respects the tender, may be treated as a nullity; and the plaintiff may sign judgment for the amount of the tender pleaded (*c*).

Payment into court in lieu of bail.

Payment into Court in lieu of Bail.]—As to this, see *ante*, *Vol.* 1, 774.

(*x*) Gilb. Rep. 88, 179.
(*y*) 21 Jac. 1, c. 16, s. 5.
(*z*) *Ante*, 1116.
(*a*) *Cox* v. *Robinson*, 2 Str. 1027; but see *Elliott* v. *Callow*, 2 Salk. 507, *ante*, 1186.
(*b*) *Le Grew* v. *Cooke*, 1 B. & P. 333.
(*c*) Vol. 1, 267.

CHAPTER IX.

STAYING PROCEEDINGS.

Upon Payment of Sum indorsed on Writ and Costs, 1194.
Upon Payment, &c. of Debt or Damages, and Costs, where the Amount is not disputed, 1194.
The like, where the Amount is disputed, 1198.
The like, without Costs, 1200.
On Equitable Grounds, 1200.
In second Actions for same Cause, 1201.
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Where Action, &c. against good Faith, &c., 1207.
In Penal Actions, 1208.
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Upon payment of sum indorsed on writ and costs.

Upon Payment of Sum indorsed on Writ and Costs.]—As to payment of the amount of debt and costs indorsed on the writ of summons within four days from the service of the writ, where the action is brought for a debt, operating as a stay of proceedings, see *Vol.* 1, 151. And as to staying proceedings after such four days upon payment of debt and costs, see *Vol.* 1, 153.

Upon payment of debt, &c., and costs, where amount not disputed.

Upon Payment, &c. of Debt or Damages and Costs, where the Amount is not disputed.]—It may be laid down as a general rule, that the defendant will be allowed to stay proceedings upon payment of debt and costs, in all cases where, at common law, he may pay money into court. This is, however, a matter of favour to the defendant, and not of right; and, therefore, the Court or a judge, in allowing it, may impose on the defendant such reasonable terms as they think proper. And, for the same reason, they cannot, without the plaintiff's consent, make an order for a stay of the proceedings on payment of the debt and costs on a future day (*a*). An order of the latter description does not operate as a stay of proceedings during the time given by it, unless it in express terms orders such stay, which, in general, is not the case (*b*). If the rule or order be, that, *upon payment* of debt and costs within a certain time, the pro-

Effect of order, and proceedings on.

(*a*) *Norton* v. *Fraser*, 2 M. & G. 916; 3 Scott, N. R., 293, *S. C.*
(*b*) *Filmer* v. *Burnby*, 2 M. & G. 529; 9 Dowl. 466, *S. C.*: *Michael* v. *Myers*, 13 Law J., N. S., 15, C. P.; 6 M. & G. 702, *S. C.*

ceedings be stayed, and the debt and (*c*) costs be not paid within the time so limited, the plaintiff may proceed in the action; the order being *conditional*, he cannot obtain an attachment (*d*). But, generally, the order is drawn up so as to make it absolutely binding on the defendant to pay the debt and costs, in which case the plaintiff may proceed by attachment or execution for the recovery of them (*e*), or may sign judgment if the order warrant it, as it now generally does (*f*). An appearance must be entered before signing the judgment (*g*). The costs are frequently agreed on; if not, they must be taxed in the usual manner, the same as on a *cognovit*, as to which see *ante*, 849. If the sum paid be under 20*l*., the costs will be taxed on the reduced scale, unless the order provide otherwise (*h*). If the action be against one defendant only, his death before the judgment signed under the order, will abate the action, unless otherwise expressly provided for by the order (*i*). We will proceed to point out in what cases orders of this description, for a stay of proceedings, may be obtained.

In assumpsit.

Where several actions on same bill, &c.

In *assumpsit* for a money demand, the defendant may have the proceedings stayed upon payment of the sum demanded and costs (*j*), but not so where the action is for unliquidated damages, as on a guarantie (*k*), or the like. Where several actions are brought against the acceptor and indorsers of a bill of exchange, any of the parties, before judgment, may obtain a judge's order for a stay of the proceedings, on payment of the debt and costs in the action against him, or, after judgment obtained in the action against him, may prevent execution from being sued out thereon, upon payment of the debt and costs (*l*). Formerly, the acceptor of a bill of exchange, or the maker of a promissory note, could not obtain a stay of proceedings before judgment, except upon the terms of paying, not only the debt and costs in the action against him, but also the costs in all the other actions against the indorsers, &c., unless it appeared clearly that the other actions were brought for the purpose of creating costs, or the like (*m*). But now, by the rule of *T. T.*, 1 *Vict.*, "it is ordered that, in future, in any action against an acceptor of a bill of exchange, or the maker of a promissory note, the defendant shall be at liberty to stay proceedings, on payment of the debt and costs in that action only." If the bill has been paid by one of the other parties, the acceptor, if he contests his liability, may compel the plaintiff to proceed in the action; and where, in such a case, the plaintiff obtained a judge's order to stay proceedings without costs, the Court set aside the order.

In debt on simple contract, bond, &c.

So, in debt on simple contract, the proceedings may be stayed on payment of debt and costs. So, in debt for rent (*n*). So, by 4 & 5 *Anne*, *c.* 16, *s.* 13, in debt on bond in a penal sum,

(*c*) See *Smith* v. *Smith*, 2 N. R. 473.
(*d*) *Fricker* v. *Eastman*, 11 East, 319: *Hand* v. *Lady Dinely*, 2 Str. 1220.
(*e*) *Fricker* v. *Eastman*, 11 East, 21: *Scarrall* v. *Horton*, Barnes, 283.
(*f*) See form of order, Chit. Forms, 568; form of the judgment, Chit. Forms, 318, &c.
(*g*) *Ante*, 877.
(*h*) *Cook* v. *Hunt*, 7 Dowl. 397; 5 M. & W. 161, *S. C.*
(*i*) *Wilkins* v. *Casty*, 1 Dowl., N. S., 855.
(*j*) *Gibbon* v. *Copeman*, 5 Taunt. 840.
(*k*) *Fisher* v. *Pyne*, 1 M. & G. 265.
(*l*) *Smith* v. *Woodcock*, 4 T. R. 691: per Lord *Tenterden*, in *Dawson* v. *Morgan*, 9 B. & Cres. 620. And see per *Parke*, B., in *Jones* v. *Shepherd*, 3 Dowl. 421.
(*m*) *Rex* v. *Sheriffs of London*, 2 B. & Ald. 192: *Ball* v. *Blackwood*, 6 Dowl. 589: *Hodson* v. *Gunn*, 2 D. & R. 57: cases decided before this rule.
(*n*) *Lee* v. *Irish*, H & rdw. 173.

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conditioned for the payment of a less sum, the defendant may bring into court the principal and interest (*n*), and also, it seems, such costs as have been expended in any suit in law or equity concerning the same (*o*), which shall be deemed and taken to be in full satisfaction and discharge of the said bond (*p*). So, in debt on bond conditioned for the payment of an annuity, or of money by instalments, the defendant may obtain a stay of proceedings, upon payment of the arrears and costs, provided he give the plaintiff judgment in the action as a security for the future payments (*q*), but not otherwise (*r*). But where the bond was conditioned for the payment of a sum in gross, and by a subsequent agreement that sum was to be paid by instalments, the Court would not stay proceedings on the bond upon payment of the instalment, but required the defendant to pay in the whole sum mentioned in the condition of the bond, with costs (*s*); and the same where it was expressly stated in the bond that the whole sum should become due upon default made in the payment of any one instalment (*t*). In these cases the application is *for a rule to shew cause why it should not be referred to one of the Masters to compute the principal and interest due upon the bond (as the case may be); and why, upon payment of such sum, with costs to be taxed, &c., the proceedings in the action should not be stayed.* So, in debt on bond conditioned to perform covenants, or for the performance of any specific act, the defendant may obtain a stay of proceedings upon payment of the penalty of the bond and costs (*u*). So, by the 7 *G.* 2, *c.* 20, *s.* 1, in debt on bond conditioned for the payment of mortgage money, or for the performance of covenants in a mortgage deed, where no suit for foreclosure or redemption is depending, a payment to the mortgagee, or, in case of his refusal, a payment into court, of principal and interest due on the mortgage, and costs, shall be deemed to be in full satisfaction of the mortgage, and the Court shall discharge the mortgagor of and from the same accordingly (*x*). As to staying proceedings in debt on replevin-bond, see *ante*, 1005. As to staying proceedings in debt on bail-bond, see *Vol.* 1, 729. As to staying proceedings against bail upon their recognisance, see *Vol.* 1, 779, &c. So, in debt on judgment, the Court will stay proceedings, upon payment of the sum recovered by the judgment and costs (*y*); and, perhaps, since the 43 *G.* 3, *c.* 46, *s.* 4, without costs. So, in debt on statute for a penalty (unless, perhaps, a *qui tam* action) the proceedings may be stayed upon payment of the penalty and costs (*z*); or, if the action be for several penalties, the defend-

On judgment.

On statute.

(*n*) See *England* v. *Watson*, 9 M. & W. 333; 1 Dowl., N. S., 398, *S. C.*: *Farquhar* v. *Morris*, 7 T. R. 124: *Hogan* v. *Page*, 1 B. & P. 337. It seems that both principal and interest must be brought in, though the principal be payable on a future day, and the breach be only in payment of interest. (See *Vansandau* v. ——, 1 B. & Ald. 214).

(*o*) *Locke* v. *Shermer*, Hard. 116. And see *Stoney* v. *Nevinson*, 2 Str. 609.

(*p*) See *Bonafous* v. *Rybot*, 3 Burr. 1373; *Lord Lonsdale* v. *Church*, 2 T. R. 388: *Wilde* v. *Clarkson*, 6 T. R. 303.

(*q*) *Darby* v. *Wilkins*, 2 Str. 987: *Bridges* v. *Williamson*, Id. 814: *Bonafous* v. *Rybot*, 3 Burr. 1370.

(*r*) *Vansandau* v. ——, 1 B. & Ald. 214: *Tighe* v. *Crafter*, 2 Taunt. 367. See *Steel* v. *Bradfield*, 4 Taunt. 227: *Macdonald* v. *Passley*, 1 B. & P. 161.

(*s*) *Bonafous* v. *Rybot*, 3 Burr. 1374.

(*t*) *Gowlett* v. *Hanforth*, 2 W. Bl. 968.

(*u*) *Ante*, 903.

(*x*) See *ante*. See *Barthan* v. *Street*, 8 T. R. 336: *Skinner* v. *Stacey*, 1 Wils. 80.

(*y*) See *Simpson* v. *Stone*, 2 W. Bl. 788: *Thomas* v. *Edwards*, 2 Anst. 558.

(*z*) *Webb* v. *Punter*, 2 Str. 1217: *Stock* v. *Eagle*, 2 W. Bl. 1062. And see *Rex* v. *Strong*, 1 Burr. 431.

ant may have the proceedings upon one or more of the counts stayed upon paying into court the penalties claimed in such counts, and allowing the plaintiff to proceed upon the other counts if he wish it (*a*).

In covenant.

So, in covenant, where the breach assigned is the non-payment of the money, proceedings may be stayed upon payment of the amount claimed and costs.

In trespass or case.

In trespass or case, the Court or judge will not, in general, stay the proceedings upon payment of a sum of money and costs, not even in an action of trespass for *mesne* profits; because the damages in these cases cannot be ascertained without the intervention of a jury; and they will rarely, if ever, do so where there is any uncertainty as to the amount of the damages (*b*). And where a sheriff sold goods under a *fi. fa.* without paying the rent due to the landlord, the Court refused to stay proceedings in an action against him by the landlord on payment of the sum for which the goods were sold into court, or to bind the plaintiff to pay costs in case of his not recovering more than the sum paid into Court (*c*). Yet, in one case, under particular circumstances, the court ordered the proceedings to be stayed in an action of trespass, where no special damage was laid, upon the defendant's restoring the goods seized, or paying the full value of them, with costs (*d*). But the Court refused to do so upon payment of the sum for which the goods were sold, or even upon restoring the goods, where the parties could not be thereby placed in as good a situation as before the goods were taken (*e*).

In trover or detinue.

In trover for money, the Court or a judge will stay the proceedings, perhaps, upon payment of the amount with interest and costs, if there be no circumstances in the case calculated to enhance the damages beyond the mere interest. So, in detinue or trover, if no special damage be alleged, or be but colorably so, the defendant may in general obtain an order for a stay of the proceedings on the delivering up of the deeds or goods in question, and paying nominal damages (1*s.*) and costs; or, if the plaintiff insists on proceeding for damages, the order will be for the delivery up of the deeds, &c., and that the plaintiff shall be subject to the costs of the action, unless he recover damages beyond nominal damages for the detention of the deeds, &c. (*f*). Also, in detinue or trover for deeds, &c., where the defendant admits the plaintiff's right to part of the deeds, &c. in dispute, but disputes it as to the rest, the defendant may, on delivering up the deed, &c. which he admits to be the plaintiff's, and payment of costs, obtain a stay of proceedings; or if plaintiff still insists on proceeding for damages, or for the other deeds, &c., then he may obtain a rule or order, that the plaintiff shall be subject to the costs of the

(*a*) Tidd, 9th ed., 541.
(*b*) See *Calvert* v. *Joliffe*, 2 B. & Ad. 418, per *Littledale*, J.: *Squire* v. *Archer*, 2 Str. 906: *Bowles* v. *Fuller*, 7 T. R. 336: *Holdfast* v. *Morris*, 2 Wils. 115: *Bernasconi* v. *Fairbrother*, 7 B. & Cres. 379.
(*c*) *Calvert* v. *Joliffe*, 2 B. & Ad. 418.
(*d*) *Pickering* v. *Truste*, 7 T. R. 53. And see per *Bayley*, B., 2 Dowl. 69.
(*e*) *Gibson* v. *Humphrey*, 1 C. & M. 544; 2 Dowl. 68. And see *Kust* v. *Barker*, 3 Anst. 896: *Woodgate* v. *Baldock*, Id. 956.
(*f*) See Tidd, 9th ed., 945: *Phillips* v. *Heyward*, 3 Dowl. 362: *Rex* v. *Clarke*, 3 Burr. 1364; Ca. Pr. C. B. 59, 130: *Pickering* v. *Truste*, 7 T. R. 53: *Bowington* v. *Parry*, 2 Str. 822: *Olivant* v. *Perineau*, Id. 1191: *Olivant* v. *Berino*, 1 Wils. 23: *Earl* v. *Holdernesse*, 4 Bing. 462; 1 Moo. & P. 254, *S. C.*: *West* v. *Taunton*, 4 Moo. & P. 79; 6 Bing. 406, *S. C.*: *Lucas* v. *London Dock Company*, 4 B. & Ad. 378. And see form of rule there, Id. 380.

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action, unless he obtain a verdict for some of the other deeds, &c., or damages beyond nominal damages for the detention of the deed, &c., in question (*g*). Where trover was brought for title deeds, and a writ of inquiry executed, the Court permitted satisfaction to be entered up on the roll upon the terms of the defendant's delivering up of the deeds, &c., paying costs as between attorney and client, and putting the plaintiff in the same situation as before action brought, &c. (*h*) But where the goods have been sold by the defendant, and there is an uncertainty whether they were sold for the real value, the Court or a judge will not, in general, interfere to stay the proceedings (*i*).

In replevin.

As to staying proceeding in replevin, see *ante*, 998.

In ejectment.

As to staying proceedings in an ejectment for non-payment of rent, or by a mortgagee, &c., see *ante*, 946, 970.

On one of several counts.

Where there are two or more counts in a declaration, and any one of them is for a demand of a sum certain, such as is above described, the defendant may obtain a stay of proceedings as to that count, upon payment of the sum of money therein demanded; and the plaintiff may proceed on the other counts if he wish it. Formerly, if the plaintiff did not proceed on the other counts, the defendant, by the terms of the rule or order, must have also paid him the costs of the action as far as it had proceeded; but this is now otherwise.

Where the amount is disputed.

Upon Payment, &c. of Debt or Damages and Costs, where the Amount is disputed.]—It may be premised that the Court will not, in general, interfere to stay proceedings merely on affidavit that there is no debt due, or no cause of action (*k*). And, in general, where the defendant *disputes the amount* of the sum claimed, and the nature of the claim is such that he may pay money into court on it, he should pay the sum actually due into court accordingly, and defend for the rest of the claim; or, if he cannot pay it, or the nature of the claim be such that he cannot pay money into court on it, then his course is either to plead to that part of the claim which he disputes, and, as to the residue, to allow judgment to pass against him by default, and have the damages ascertained by an inquest, or, in some cases, as on bills of exchange, &c., or the like (*l*), by a reference to the Master.

Order to pay in part, and plaintiff to proceed at peril of costs.

But even in cases where the amount of the sum claimed is *disputed*, and the defendant is ready to pay it, he may, at any time after the service of the writ, obtain a summons (*m*), calling upon the plaintiff to shew cause why, upon payment of a certain sum, (namely, the sum actually due, or which you think he can recover), and costs, the proceedings in the action should not be stayed. If, on attending before the judge, the

(*g*) *Phillips* v. *Hayward*, 3 Dowl. 362, where see the form of order: *Peacock* v. *Nichols*, 8 Dowl. 367, where, in an action of trover, the defendant obtained a rule as above on delivery of a portion of the goods, and payment of costs, and any damage.

(*h*) *Coombe* v. *Samson*, 1 D. & R. 201. See a case after verdict, &c., *Yates* v. *Dublin Steam Packet Company*, 6 M. & W. 77.

(*i*) *Gibson* v. *Humphrey*, 2 Dowl. 68; 1 C. & M. 544, *S. C.*

(*k*) *Smith* v. *Curtis*, 2 Dowl. 223: *Sherwood* v. *Benson*, 4 Taunt. 631. See Tidd., 9th ed., 530.

(*l*) *Ante*, 1178, 886, 910.

(*m*) See the form, Chit. Forms, 568. And see *Saunderson* v. *Piper*, 7 Scott, 421; 7 Dowl. 632, as to the insufficiency of mere readiness to pay a certain sum, without taking out such a summons.

plaintiff refuse to receive the amount mentioned in the summons, the judge will indorse such refusal. If after this the plaintiff proceeds, and he recovers no more than the sum offered, he will in general not only have to bear his own costs incurred subsequently to the offer, but also have to pay the defendant's subsequent costs (*n*). The defendant should, to entitle himself to these costs, afterwards pay the amount offered into court (*o*), upon the plaintiff's declaration then already or subsequently delivered (*p*). If the plaintiff afterwards take the money out in satisfaction, and the Master, on the case being fully laid before him (*q*), allows the plaintiff any costs subsequent to the offer, or disallow the defendant's subsequent costs, the defendant should apply to the Court or a judge for an order for the Master to review his taxation, and disallow the plaintiff those costs, and tax for the defendant his costs subsequent to the offer, and why such costs, when ascertained and taxed, should not be paid by the plaintiff to the defendant or his attorney; or why the balance of such last-mentioned costs, after deducting the plaintiff's costs already taxed, should not be in like manner paid by the defendant. The ground, however, upon which the plaintiff is thus made to pay defendant's subsequent costs is this: if the defendant is once ready to pay a given sum, and the plaintiff refuses to receive it in satisfaction on the summons for that purpose, but afterwards does so, it is *primâ facie* evidence of oppressive and vexatious conduct on the part of the plaintiff, for which the defendant should not suffer. But the presumption of oppressive and vexatious conduct may be rebutted (*r*); and it is open to the plaintiff to shew that he acted not oppressively, and vexatiously, but under a mistake, or that he had reasonable grounds for the course he adopted, and then the case will not be governed by the general rule, and the plaintiff will be entitled to all his costs as in ordinary cases. Thus, where, in an action for a wrongful dismissal, and also for arrears of salary, a summons was taken out to stay proceedings on payment of arrears of salary only, and, on the plaintiff's refusal, the arrears were paid into court, and aferwards accepted by the plaintiff in full satisfaction; on a motion to tax the defendant his costs, *Parke*, B., held that the circumstance of the plaintiff's having obtained a more profitable employment after the payment into court, was sufficient to rebut the presumption of a vexatious refusal; and that the defendant was not entitled to his costs (*s*).

In other actions for unliquidated damages.

In actions *ex delicto* for unliquidated damages, the amount of which is disputed, the courts have not been in the habit of

(*n*) See per *Tindal*, C. J., in *Watson* v. *Coleman*, 7 M. & G. 424: *Parsons* v. *Pitcher*, 4 Bing. N. S. 306; 5 Scott, 571; 6 Dowl. 432, *S. C.*; and the various cases cited in the notes, *infra*.

(*o*) *Clark* v. *Dann*, 3 Dowl. & L. 513: *Gower* or *Gower* v. *Elkins*, 3 M. & W. 216; 6 Dowl. 335, *S. C.* But it would seem, according to *Fisher* v. *Pyne*, 1 M. & G. 526, that such payment into court is not necessary in an action for unliquidated damages.

(*p*) The plaintiff must have declared to entitle defendant to apply for subsequent costs: see *Reynolds* v. *Sherwood*, 8 Dowl. 183.

(*q*) In one case, the Court refused to order the defendant's costs to be taxed to him, because the case had not previously been brought before the Master: see *Roe* v. *Cobham*, 6 Dowl. 628.

(*r*) Per *Parke*, B., in *Gower* v. *Elkins*, 6 Dowl. 335: *Ackwood* v. *Read*, 7 Dowl. 810: *Watson* v. *Coleman*, 7 M. & G. 423; 8 Scott, N. R., 169, *S. C.*

(*s*) *Cumming* v. *Columbine*, 6 Dowl. 373. And see another instance in *Watson* v. *Coleman*, *supra*.

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interfering to stay proceedings (*t*); but in some such cases the defendant may take out a summons to stay the proceedings on payment of a certain sum, and put the plaintiff at the peril of costs of further proceedings, as above mentioned.

Upon payment of debt, &c., without costs.

Upon Payment of Debt, &c., without Costs.]—If the plaintiff or his attorney has been guilty of oppressive or vexatious conduct, or gross misconduct, the Court or a judge will sometimes stay the proceedings on payment of the debt without costs (*u*). Where a sheriff levied under a *fi. fa.*, and the plaintiff brought an action for money had and received against him for the amount of the money levied, without having previously made a demand of it, the Court stayed the proceedings upon payment of the money levied, without costs (*x*). If no demand be made for payment of an acceptor of a bill before action brought, the proceedings might be stayed on payment of the debt without costs, if the application for such stay be made in an early stage of the action (*y*). And where the defendant, after an application by the plaintiff's attorney, paid the plaintiff the debt demanded, without knowing that a writ had been sued out, nor had the plaintiff said anything to him about it, and the attorney afterwards proceeded in the action for his costs, the Court ordered the proceedings to be stayed without costs (*z*). But where the defendant, having, on application by letter from the plaintiff's attorney, promised to remit the amount to him, and induced the attorney to suppose he would pay his charge for the letter, afterwards, and before writ issued, remitted the debt to the plaintiff without the costs, and the attorney, not knowing of the payment, to secure his costs, issued out the writ, and the money did not arrive to the plaintiff until after the writ issued, the Court refused to stay the proceedings unless defendant paid the costs of the writ, and 6*s.* 8*d.* for the instructions, together with the costs of the application (*a*).

Where inferior courts have jurisdiction.

We shall presently see, that, in actions for debts recoverable in courts of requests, where, after verdict, the plaintiff might be deprived of costs, the proceedings will, in clear cases, be stayed on payment of debt without costs (*b*). Also, that, in cases beneath the dignity of the Court to take cognizance of, the proceedings may be stayed without payment of either debt or costs (*b*).

On equitable grounds.

On equitable Grounds.]—The Court will not, in general, alter the terms ordinarily imposed on a party applying to stay proceedings, merely because he has a defence in equity. Thus, they have refused to stay proceedings on payment into court of part of the amount of a note sued on, though it appeared that the rest of the money, when recovered, would be held by

(*t*) *Ante*, 1197.

(*u*) *Adams* v. *Staton*, 1 Bing. 769; 7 Moore, 365, *S. C.*: *ante*, 1188.

(*x*) *Jefferies* v. *Sheppard*, 3 B. & Ald. 606.

(*y*) *Mackintosh* v. *Haydon*, R. & M. 363, per *Abbott*, C. J.: but see *Siggers* v. *Lewis*, 2 Dowl. 681.

(*z*) *Rooke* v. *Wasp*, 5 Bing. 190; 2 Moo. & P. 304, *S. C.* And see *Wyatt* v. *Phillips*, 3 Bing. N. C. 776: *Meakin* v. *Whalley*, 2 Dowl. 823; 1 Bing. N. S. 59, *S. C.*

(*a*) *Morrison* v. *Summers*, 1 B. & Ad. 559; 1 Dowl. 325, *S. C.*

(*b*) *Post*, 1205, 1206.

the plaintiff in trust for the defendant (*c*). So, where the payee of a promissory note indorsed upon it, that, if interest were paid on stipulated days during her life, the note was to be given up, a payment of interest having been omitted, and an action brought on the note, the Court refused to stay proceedings on payment of the interest and costs (*d*). Where, however, the plaintiff sued as trustee under suspicious circumstances, the Court stayed proceedings on payment of costs to the plaintiff, and payment of the debt into court instead of to the plaintiff (*e*). And although the Court will not stay proceedings for the purpose of allowing the defendant to file a bill in equity for relief (*f*), or for the purpose of enabling him to obtain an injunction to restrain the action (*g*), yet they have granted time to plead for the purpose of enabling him to file a bill for *discovery* (*h*). And on payment of the money recovered into court, and of the attorney's costs, they have stayed execution in an action by assignees of a bankrupt under a first commission, pending a petition to the Chancellor to supersede it (*i*).

In second actions for the same cause.

In ejectment, when stayed.

In second Actions for the same Cause.]—Upon the application of a defendant in a second action of ejectment, brought by a person claiming under the same title as the lessor of the plaintiff in the first action, the Court or a judge will stay the proceedings until the costs of the first action are paid (*k*). Thus, where the first action was brought by the father of the present lessor of the plaintiff claiming by the same title against the present defendant's father (*l*); and where the first action was brought by an insolvent, the second ejectment being by his assignee (*m*), the proceedings were so stayed. And the proceedings will be stayed, although the lessor in the first action was discharged as an insolvent, while in custody under an attachment for non-payment of such costs (*n*), or although the second action be not for the same lands as the first, provided the same title be in dispute (*o*). And it is not material, in this respect, in which court the former action was (*p*), or whether there was any plea or consent-rule in the former ejectment, or whether the lessor in the former ejectment ever entered into

(*c*) *Barlow* v. *Leeds*, 5 Nev. & M. 426; 1 H. & W. 479, *S. C.*

(*d*) *Steele* v. *Bradfield*, 4 Taunt. 227.

(*e*) *Jones* v. *Bramwell*, 3 Dowl. 483.

(*f*) *R.* v. *Peto*, 1 Y. & J. 169: *Murphy* v. *Cadell*, 2 B. & P. 137.

(*g*) *Vanderstegn* v. *Witham*, 6 M. & W. 457; 8 Dowl. 369, *S. C.*: but see *Best* v. *Argles*, 3 Dowl. 701; 4 Tyr. 256, *S. C.*, where a stay of the postea was obtained until an answer should be put in by the plaintiff to a bill in equity filed against him by the defendant.

(*h*) *Whitter* v. *Cazalet*, 2 T. R. 683.

(*i*) *Hodgkinson* v. *Travers*, 2 D. & R. 403; 1 B. & C. 257, *S. C.*

(*k*) *Harvey* d. *Beal* v. *Baker*, 2 Dowl., N. S., 75 And see *Doe Bailey* v. *Bennett*, 9 Dowl. 1012, in which case it was held that the lessor of the plaintiff, in answer to a rule to stay proceedings upon the above ground, need not shew under what title he claims: it is sufficient to shew, that he does not claim under the same title which was previously litigated: see also *Doe Mudd* v. *Roe*, 8 Dowl. 444: *Doe Pinchard* v. *Roe*, 4 East, 585: *Lord Coningsby's case*, 1 Str. 548.

(*l*) *Doe Feldon* v. *Roe*, 8 T. R. 645. And see *Doe Pinchard* v. *Roe*, 4 East, 585: *Doe Chambers* v. *Law*, 2 W. Bl. 1160: *Doe Hamilton* v. *Hatherly*, 2 Stra. 1152: *Doe Blackburn* v. *Standish*, 2 Dowl., N. S., 96.

(*m*) *Doe Standish* v. *Roe*, 5 B. & Ad. 878.

(*n*) *Doe Heighley* v. *Harland*, 10 Ad. & E. 761. And see *Benn* v. *Denn*, Barnes, 180: *post*, 1203.

(*o*) *Keene* d. *Angel* v. *Angel*, 6 T. R. 740: *Doe* d. *Heighley* v. *Harland*, 10 Ad. & E. 761.

(*p*) *Lord Coningsby's case*, 1 Stra. 548: *Grumble* v. *Bodilly*, Id. 554; 8 Mod. 225, *S. C.*: *Doe* v. *Law*, 2 W. Bl. 1158: *Anon.*, 1 Salk. 255: *Doe* v. *Brenton*, 6 Bing. 469: see *Wade* v. *Simeon*, 1 Com B. 610.

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the consent-rule (*q*). And where a defendant in ejectment, who had improperly obtained a tenant right to property sought to be recovered, was held estopped from disputing the lessor's title, and he afterwards brought another ejectment in respect of property part of the same estate, he was compelled to pay the costs of the action in which he had been defendant, before proceeding (*r*). Besides the cases above mentioned, the Court have stayed the proceedings in a second ejectment until the special verdict in the former one should be determined (*s*). Also, where the defendant, after verdict against him, brought a writ of error, and pending the writ brought a new ejectment to recover the same premises, the Court stayed proceedings in the new action until he quitted possession, or the tenants attorned to the lessor of plaintiff in the former action (*t*). Besides the costs of the former ejectment, the Court or a judge will in some cases also oblige the party to pay the *costs* of the action for *mesne* profits (*u*); but in no case will they oblige him to pay the *damages* in such action, however vexatious the proceedings of the present lessors of plaintiff may have been (*x*). But if the lessor of the plaintiff, upon discovering a material mistake before trial, abandon that ejectment and bring another (*y*), or abandon his suit in one court and bring a new action in another (*z*), the Court or a judge will not stay proceedings until the costs of the former action be paid, particularly if the proceedings do not appear to be vexatious. And it seems, that, where several successive ejectments have been brought to recover certain property, but none of them have been tried, the Court will not stay proceedings in a subsequent ejectment, until the costs of the former ones have been paid (*a*). Nor would they stay proceedings if the first action was brought without the authority of the plaintiff, so that he could have no control over it (*b*). So, if the plaintiff were nonsuit, &c., in the first action, by the fraud or perjury of the other party, the Court or a judge will not stay the proceedings in the second action (*c*). And the Court have refused to stay proceedings in an ejectment, until the taxed costs of a suit in equity, brought by the same party for the recovery of the same premises, were paid (*d*). And the Court have refused to stay the proceedings in a writ of right, until the costs of a prior ejectment for the same property were paid (*e*). And where an unsuccessful defendant in an action of ejectment brought an action against the lessors of the plaintiff for seizing goods on the land in question, the Court refused to stay pro-

When not.

(*q*) *Smith* v. *Barnardiston*, 2 W. Bl. 904: *Doe* v. *Langdon*, 5 B. & Ad. 864.

(*r*) *Doe* v. *Shadwell*, 7 Dowl. 527: *Thrustout* v. *Holdfast*, 6 T. R. 223: *Doe* v. *Stevenson*, 3 B. & P. 22.

(*s*) *Smith* d. *Dormer* v. *Parkhurst*, 2 Str. 1105: but see 5 Scott, N. R., 818.

(*t*) *Fenwick* v. *Grosvenor*, 1 Salk. 258.

(*u*) *Doe Pinchard* v. *Roe*, 4 East, 585: *Doe Green* v. *Packer*, 2 Dowl. 373, *S. C.*

(*x*) *Doe Church* v. *Barclay*, 15 East, 233.

(*y*) *Short* v. *King*, 2 Str. 681, 1099: *Brittain* v. *Greenville*, Id. 1121.

(*z*) *Doe Selby* v. *Alston*, 1 T. R. 491.

(*a*) *Doe Blackburn* v. *Standish*, 2 Dowl., N. S., 26. The defendant in this case was the heir of the defendant in the former ejectment, to whom the costs were payable in his lifetime, and whose executors were entitled to receive them.

(*b*) *Souter* v. *Watts*, 2 Dowl. 263.

(*c*) *Doe Rees* v. *Thomas*, 4 D. & R. 145; 2 B. & C. 622, *S. C.*

(*d*) *Doe Williams* v. *Winch*, 3 B. & Ald. 602. And see *Murphy* v. *Cadet*, 2 B. & P. 137: *Bowyear* v. *Bowyear*, 2 Dowl. 207.

(*e*) *Chatfield* v. *Souter*, 3 Bing. 167; 10 Moore, 572, *S. C.*: *Bowyear* v. *Bowyear*, 3 Moo. & Scott, 65; 9 Bing. 670; 2 Dowl. 207, *S. C.*

ceedings until the costs of the ejectment were paid (*f*). The Court of Common Pleas refused to stay the proceedings in an action of ejectment on a forfeiture for non-payment of rent, on the mere ground that another ejectment had previously been brought in the Queen's Bench in respect of a former forfeiture, in which action a rule for a nonsuit was pending (*g*). Where A., the defendant in ejectment for land in the county of C., had attorned and paid rent to B., who recovered, but did not pay costs, and A. afterwards succeeded in a second action brought by B. upon the same title for lands in the county of G., the costs of which had also not been paid, the Court would not stay proceedings in a subsequent action of ejectment brought by A. against the heirs of B., for the land in the county of C., till the costs of the former ejectment were paid, unless B.'s heir would undertake not to rely on his ancestor's title, save by estoppel only (*h*). The Court have refused to stay the proceedings in a second ejectment until the costs of the first were paid, where the lessor of the plaintiff was in custody for those costs (*i*). As to the time in which the application should be made, see *post*, 1025.

In other actions.

And not only in ejectment, but also in other actions, if the second action appear to have been brought *oppressively* or *vexatiously*, the Court or a judge will stay proceedings until the costs of the former action be paid (*k*), provided both actions are by and against the same parties, and for the same cause, or substantially so (*l*). Also, if several actions be brought and are pending for the same cause, proceedings may be stayed in all but one (*m*). And where an action was stayed in the King's Bench by a consolidation rule, and the plaintiff thereupon discontinued it, and commenced another action in the Common Pleas for the same cause, that Court stayed the proceedings until after the trial of the cause in the King's Bench with which the former action had been consolidated (*n*). Also, in another case, where the plaintiff brought an action in the Exchequer, against the hundred, pursuant to the 7 & 8 *G.* 4, *c.* 31, which requires such action to be brought within three months, and afterwards commenced another action in the Queen's Bench for the same cause, the latter Court ordered the proceedings in the second action to be stayed, unless plaintiff would discontinue the action in the Exchequer, the plaintiff not having declared in either action; but the Court would not grant the costs of the

(*f*) *Carnaby* v. *Welby*, 7 Dowl. 315.

(*g*) *Doe Henry* v. *Gastard*, 5 Scott, N. R., 118; 2 Dowl., N. S., 615.

(*h*) *Doe Evans* v. *Snead*, 2 Dowl. & L. 119.

(*i*) *Bann* v. *Dann*, Barnes, 180. See the remarks of *Denman*, C. J., on this case, in *Doe* v. *Harland*, 10 A. & E. 761, *ante*, 1201. See also *Beavan* v. *Robinson*, 8 D. & R. 49.

(*k*) *Baldwin* v. *Richards*, 2 T. R. 511, n.: *Melchart* v. *Halsey*, 2 W. Bl. 741; 3 Wils. 149, *S. C.*; *Crawley* v. *Impey*, 8 Taunt. 407; 2 Moore, 460, *S. C.*: *Weston* v. *Withers*, 2 T. R. 571. See *Winter* v. *Slow*, 2 Str. 878. See a case after verdict, *Yates* v. *Dublin Steam Packet Company*, 6 M. & W. 77: *Williams* v. *Thacker*, 1 B. & B. 514. A second action for the same cause will always be deemed vexatious, unless the contrary be shewn.

(*l*) *English* v. *Cox*, Cowp. 392. See *Dicas* v. *Jay*, 6 Bing. 519: *Wade* v. *Simeon*, 1 Com. B. 610.

(*m*) *Nichols* v. *Lefevre*, 3 Dowl. 135. And see *Carne* v. *Legh*, 6 B. & Cres. 124; 9 D. & R. 126, *S. C.* Or defendant might plead the pendency of the first in abatement, if between the same parties. If there was a writ in being at the time of suing out the second writ, it is plain that the second is vexatious and ill *ab initio*. (Bac. Abr., "Abatement," (M). See *Chamberlayne* v. *Green*, 9 M. & W. 792: per *Parke*, B.)

(*n*) *Parkin* v. *Scott*, 1 Taunt. 565.

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application (*o*). And an action by husband and wife has been stayed until the costs of a former action by the husband for the same cause were paid (*p*). But a stay of proceedings in a second action will not be granted until the costs of the former action are paid, if the plaintiff is in prison for those costs (*q*). Nor will such stay be in general granted, where the first action was not decided on the merits (*r*); or where it was *nonprossed*, or discontinued (*s*); or the proceedings set aside for irregularity (*t*). Nor will it be granted on the ground of the pendency of another action for the same cause against the defendant jointly with another person, except in the case of oppression or vexation; though, if such a case be made out, the Court will interfere in a summary way, or even, it seems, allow the party to plead in abatement, notwithstanding the four days have expired (*u*). If actions are brought for the purpose of trying issues under the 46th section of 6 & 7 *W.* 4, *c.* 71, by the vicar against one of the landowners, and by a great number of the landowners against the vicar, the Court has no power, at the instance of the vicar, to direct the proceedings in the actions against him to abide the event of the issues to be directed in the action brought by him (*x*). The Court have refused to stay proceedings against a defendant until the debt and costs recovered by him in a former action against the present plaintiff should be paid (*y*). And, in an action for penalties, the Court will not stay the proceedings upon an affidavit that the defendant had been sued by another person, and compounded for the same offence; at least, not unless the affidavit shew specifically what was the offence compounded for, that the Court may see that both offences are the same (*z*).

Action for penalties.

In actions against several defendants.

Where a person, however, who has a right of action against several for one specific damage, recovers and receives a satisfaction from any one of them, the Court will stay proceedings in any action he may bring, for the same cause, against the others (*a*). And, in a case where separate actions were brought against several persons for the same debt, who (if at all) were *jointly* liable, the defendant in one action having paid the debt and costs in that action, the Court stayed the proceedings in the others without costs, and even made the plaintiff pay the costs of the application (*b*).

After recovery in former action.

The Court have also, in some few instances, under peculiar circumstances, and where the proceedings were evidently vexatious, stayed the proceedings in a second action, after a recovery for the same cause in a former one. But this is very rare; and the Court usually refuse to interfere in this summary way, but put the defendant to plead the former recovery (*c*).

(*o*) *Miles* v. *Inhabitants of Bristol*, 3 B. & Ad. 945.
(*p*) *Lampley* v. *Sands*, 1 T. R. 584.
(*q*) *Beavan* v. *Robins*, 8 D. & R. 42. And see *Benn* v. *Denn*, Barnes, 190.
(*r*) *Pashley* v. *Poole*, 3 D. & R. 53.
(*s*) *Liversedge* v. *Goode*, 2 Dowl. 141.
(*t*) *Dawson* v. *Sampson*, 2 Chit. 146, *semb.*
(*u*) *Sawter* v. *Dunstan*, 1 M. & R. 508: *Carne* v. *Legh*, 6 B. & C. 124; 9 D. & R. 126, *S. C.*
(*x*) *Ward* v. *Pomfret*, 1 Scott, N. R., 403.
(*y*) *Cooke* v. *Dobree*, 1 H. Bl. 10. See *Smith* v. *Rolt*, 2 Dowl. 62.
(*z*) *Harrington* v. *Johnson*, Cowp. 744. See *Pechell* v. *Layton*, 2 T. R. 512, 712: *English* v. *Cox*, Cowp. 322.
(*a*) *Semb. Bird* v. *Randall*, 3 Burr. 1354; 1 W. Bl. 389, *S. C.*
(*b*) *Carne* v. *Legh*, 6 B. & C. 124; 9 D. & R. 126, *S. C.*
(*c*) *Ross* v. *Jacques*, 8 M. & W. 135: *Harrington* v. *Johnson*, Cowp. 744: *Pechell* v. *Layton*, 2 T. R. 512. And see Id. 712: *Liversedge* v. *Goode*, 2 Dowl. 141; where the plaintiff in replevin, after being

The Court will not interfere, under the 7 & 8 *Vict. c.* 96, *s.* 57, to stay the proceedings in an action upon a judgment for debt and costs in a former action, although it appears that the sum recovered in the original action did not exceed 20*l.* (*d*).

After reference to arbitration.

The Court of Common Pleas refused to stay proceedings on the ground that a former action for the same cause had been referred by rule of court to an arbitrator, by which the plaintiff was precluded from bringing a new action, it being doubtful whether the two actions were for the same cause (*e*). And the same where it was doubtful whether the award was made before revocation of not (*f*). But where a fresh action is brought after a withdrawal of a juror in a former action for the same cause, the proceedings in the second action may be stayed (*g*).

Effect of stay till payment of costs of former action.

When the proceedings in a second action are stayed until payment of the costs of the former action, if such costs be not paid, the Court will not interfere, but will allow the defendant (in case those costs are not paid before a certain day) to *non-pros* the second action (*h*); but if the plaintiff in such a case take any proceedings in the second action before the costs of the first are paid, the Court, upon application, will set them aside with costs.

Application, when to be made.

The application to stay the proceedings on any of these grounds should be made as soon as possible, and before the plaintiff has incurred further expenses. In ejectment, it cannot in general be made before the defendant has entered into the consent-rule (*i*). Where an order had been made for the devisee of the defendant in the former action to be admitted to defend, it was held that he was in a situation to make the application (*j*). The affidavit should, in such a case, be intitled in the cause with the casual ejector as the defendant (*j*). In one case of an ejectment, it was granted after notice of trial in the second action of ejectment had been given, and the plaintiff had been at the expense of preparing for trial, and bringing the witnesses to town (*k*). And in another case, where the declaration in ejectment was served on the 30th September, to appear in Michaelmas Term, and the issue was delivered, and notice of trial given for the assizes on the 28th December, and the application by summons was not made until the 6th January, the Court held it not too late, saying that the plaintiff need not have joined issue so soon for the spring assizes (*l*).

In trifling actions.

In trifling Actions.]—It is deemed beneath the dignity of the superior courts of Westminster to take conusance of pleas under 40*s.*; and in trespass for goods, it is expressly prohibited by stat. 6 *E.* 1, *c.* 8. Therefore, if it appear, either upon the

Where cause of action under 40*s.*

nonprossed, brought an action of trespass, and the Court refused to interfere. But had the plaintiff recovered in replevin, the Court might have stayed proceedings in an action of trespass for the same cause. (*Lamb* v. *Nutt*, 1 Tidd, 572).

(*d*) *Joseph* v. *Burton*, 2 Dowl. & L. 835. See the statute, Vol. 1, 611.

(*e*) *Dicas* v. *Jay*, 6 Bing. 519; 2 Moo. & P. 448, *S. C.* And see *Cocker* v. *Tempest*, 7 M. & W. 502; 9 Dowl. 306, *S. C.*

(*f*) *Louis* v. *Kermode*, 8 Taunt. 146; 2 Moore, 30, *S. C.*

(*g*) *Gibbs* v. *Ralph*, 15 Law J., N. S., 7, Exch.: *Moscati* v. *Lawson*, 1 H. & W. 574.

(*h*) *Sutton* d. *Doe* v. *Ridgway*, 5 B. & Ald. 523.

(*i*) *Doe Crockett* v. *Roe*, 1 H. & W. 351, *ante*, 937.

(*j*) *Doe Mudd* v. *Roe*, 8 Dowl. 444.

(*k*) *Doe Chadwick* v. *Law*, 2 W. Bl. 1158.

(*l*) *Doe Green* v. *Packer*, 2 Dowl. 373: 2 C. & M. 457, nom. *Doe Martin* v. *Packer*, *S. C.*

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face of the declaration (*m*) or by the plaintiff's acknowledgment (*n*), or even from the defendant's affidavit, if not denied by the plaintiff (*o*), that the sum for which the action is brought is really less than 40*s*., the Court or a judge will stay the proceedings, unless it appear that the debt is not recoverable in any county court, court of requests, or other inferior court (*p*). The plaintiff cannot evade this by suing for a larger colourable cause of action (*q*). But the Court will not thus stay the proceedings in an action of trover (*r*); or, perhaps, in any other action for unliquidated damages, on an affidavit from the defendant that the cause of action did not amount to 40*s*.

Where recoverable in court of requests, &c.

In an action for a debt of any amount recoverable in a court of requests, where the plaintiff might, after verdict, be deprived of the costs, the Court or a judge will, if the case be clear, stay the proceedings on payment of the debt without costs (*s*).

Application, when made, &c.

The application should be made as soon as possible, and before the plaintiff has incurred any further expense. It might, however, it seems, be made any time before trial (*t*). But if the suit be for a cause of action within the conusance of the Court of Requests of the district or place where the parties reside, and if there be a prohibitory clause in the statute, by which the jurisdiction of the inferior court is created, (as in the Tower Hamlets Act), the application should be made before plea pleaded; in other cases, usually before issue joined (*u*). The rule, if obtained in court, is a rule *nisi*, unless, perhaps, where the cause of action appears from the pleadings to be under 40*s*.

In actions brought without authority.

In Actions brought without Authority.]—As to when the Court will set aside or stay proceedings, where action is brought or defended by an attorney, without any authority for so doing, see *Vol.* 1, 74.

By wife.

Where an attorney brought an action for a wife, in her husband's name, for a trespass in entering her house and taking her goods, (the wife living apart from her husband), without authority from the latter, the Court refused to stay the proceedings, although the husband joined the defendants in the application (*y*); but the Court would order the proceedings to be stayed until an indemnity against costs, to the satisfaction of one of the Masters, was given to the husband (*z*). The wife of a lunatic, who has no committee, has a sufficient implied authority to sue in the name of the lunatic for debts due to him (*a*).

(*m*) *Oulton* v. *Perry*, 3 Burr. 1592.

(*n*) *Kennard* v. *Jones*, 4 T. R. 495. And see *Melton* v. *Garment*, 2 New Rep. 94: *Stean* v. *Holmes*, 2 W. Bl. 754: *Sandall* v. *Bennett*, 3 Dowl. 294.

(*o*) *Wellington* v. *Arters*, 5 T. R. 64. But see *Oulton* v. *Perry*, 3 Burr. 1592: *Anon.*, 2 Ld. Raym. 1304: *Welsh* v. *Troyte*, 2 H. Bl. 29: *Tubb* v. *Woodward*, 6 T. R. 175.

(*p*) *Ramus* v. *Williams*, 1 D. & R. 359: *Welsh* v. *Troyte*, 2 H. Bl. 29: *Tubb* v. *Woodward*, *supra*.

(*q*) *Thompson* v. *Gill*, 6 Dowl. 155.

(*r*) *Lowe* v. *Lowe*, 8 Moore, 220; 1 Bing. 270, *S. C.*

(*s*) *Cornforth* v. *Lowcock*, 1 M. & R. 321. See *Sandall* v. *Bennett*, 3 Dowl. 294.

(*t*) See *Kennard* v. *Jones*, 4 T. R. 495.

(*u*) MS., M. 1814: *vide post*, Ch. 32.

(*x*) See *Kennard* v. *Jones*, 4 T. R. 495.

(*y*) *Chambers* v. *Donaldson*, 9 East, 471. And see ——— v. *Smith*, 2 Chit. Rep. 392: *Auster* v. *Holland*, 15 Law J., N. S., 229, Q. B.

(*z*) *Morgan & Wife* v. *Thomas*, 2 Dowl. 332; 2 C. & M. 388, *S. C.*; see *Harrison* v. *Almond*, 4 Dowl. 321; 1 H. & W. 519, *S. C.* And see Vol. 1, 270, as to a plea of release by the husband.

(*a*) *Rock* v. *Slade*, 7 Dowl. 22, *ante*, 1111.

Where a *cestui que trust* brings an action in the name of his trustee (*b*), or in the case of joint-tenants or joint-contractors (*c*), or joint-contractors and the assignees of a bankrupt or an insolvent, or trustees, assignees of a bankrupt, or assignees of an insolvent debtor, or executors (*d*), where one is obliged to use the other's name in the action, the Court will not stay proceedings upon the application even of the trustee, &c., excepting, perhaps, temporarily, until such trustee, &c., be indemnified against the costs. In these cases, a demand of indemnity ought to be made before applying to the Court; otherwise, the costs of the application will not, in general, be given (*e*).

By cestui que trust.

By one of several plaintiffs.

So, if an assignee of a debt bring an action for it in the assignor's name, the Court would not, at the instance of the latter, stay the proceedings, excepting, perhaps, temporarily, until he be indemnified against the costs (*f*).

By assignee of debt.

Where a plaintiff had been delirious, and, on apparently recovering, he brought an action against his bankers to recover money belonging to him in their hands, the Court would not oblige him to give an indemnity to the bankers on payment by them to him of the sum for which the action was brought (*g*).

By lunatic, &c.

The amount and sufficiency of the indemnity against costs, when ordered, is generally left to the Master, and if so, he is the sole judge in the matter, and the Court will not interfere with his decision (*h*).

Amount, &c. of indemnity.

Where Action, &c. against good Faith.]—The Court has an unlimited power over its own process (*i*): therefore, if an action be brought pending a reference, which it has been agreed shall operate as a stay of proceedings, or otherwise contrary to good faith (*k*), though the agreement in fraud of which the action is brought was made while the parties were not under the authority of the Court (*l*), the Court or a judge will stay the proceedings. So, where a juror has been withdrawn by the plaintiff, at the suggestion of the judge, on the understanding that the cause was to be put an end to, the Court will not allow the plaintiff afterwards to proceed in that (*m*), or in a second action (*n*). But the Court will not interfere unless the facts of the case be very clear (*o*). The application to stay the proceed-

In action against good faith.

(*b*) *Spicer* v. *Todd*, 2 C. & J. 165; 2 Tyr. 172; 1 Dowl. 306, *S. C.*: *Orchard* v. *Coulsting*, 6 Scott, N. R., 843: and see *Auster* v. *Holland*, 15 Law J., N. S., 229, Q. B. See as to the striking out a demise in an ejectment in name of trustee, *ante*, 948.

(*c*) *Whitehead* v. *Hughes*, 2 Dowl. 258; 2 C. & M. 318, *S. C.*: *Saville* v. *Roberts*, 1 Ld. Raym. 380.

(*d*) *Emery* v. *Mucklow*, 10 Bing. 23; 3 M. & Scott, 364; 2 Dowl. 735, *S. C.*

(*e*) See as to the demand requisite, where a *defendant* applies for security, *Huntley* v. *Bulmer*, 6 Dowl. 633. In *Morgan* v. *Thomas*, 2 Dowl. 332, where no demand was made upon the application, the costs were ordered to be costs in the cause.

(*f*) *Pickford* v. *Evington*, 4 Dowl. 453. And see *Baxter* v. *Taylor*, 4 B. & Ad. 72: *Britton* v. *Perrott*, 2 C. & M. 597.

(*g*) *Williams* v. *Smith*, 1 Dowl. 632. See *ante*, 1111.

(*h*) See *Orchard* v. *Coulsting*, 7 Scott, N. R., 414.

(*i*) *Cocker* v. *Tempest*, 7 M. & W. 502; 9 Dowl. 306, *S. C.*

(*k*) Tidd, 9th ed., 599; 2 Ld. Raym. 789. See *Moscati* v. *Lawson*, 1 H. & W. 582: *Clavorth* v. *Pickford*, 7 M. & W. 321, per *Abinger*, C. B.: *Philpot* v. *Thompson*, 2 Dowl. & L. 18; where an action was brought upon a judgment signed against good faith, and the proceedings were stayed.

(*l*) *Cocker* v. *Tempest*, *ubi supra*.

(*m*) *Harries* v. *Thomas*, 2 M. & W. 32: *Moscati* v. *Lawson*, 1 H. & W. 572. See Vol. 1, 397.

(*n*) *Gibbs* v. *Ralph*, 15 Law J., N. S., 7, Exch.

(*o*) *Cocker* v. *Tempest*, *ubi supra*.

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ings must be made to the court in which the proceedings are pending (*p*).

In penal actions by common informers.

In Penal Actions by Common Informers.]—In all suits by a common informer, within stat. 21 *J.* 1, *c.* 4 (*q*), commenced in the superior courts, the proceedings may be stayed (*r*). So, if an action on a penal statute be brought when the proper mode of proceeding is by information and conviction before a justice of peace, the Court will stay the proceedings (*s*). In an action on stat. 2 *G.* 2, *c.* 24, for bribery at an election, the Court stayed the proceedings, because the plaintiff had been guilty of a wilful delay in prosecuting the action (*t*); and even after verdict, they have stayed proceedings upon the clause of discovery (*u*). But in a *qui tam* action for penalties, the Court refused to stay proceedings, upon a suggestion by affidavit that an act of Parliament was likely to be passed, the effect of which would be to relieve the defendant from the penalties (*x*).

Pending criminal proceedings.

Pending Criminal Proceedings.]—The Court will not compel a plaintiff to elect between an action and an indictment for the same cause (*y*). In an action commenced before the 1 & 2 *Vict. c.* 110, by bailable process, the Court refused to stay proceedings until after the trial of an indictment for perjury founded on the plaintiff's affidavit of debt (*z*). So, in an action for money won at play, the Court refused to stay the proceedings until after the trial of an indictment against the parties for a cheat (*a*). So, after verdict and judgment, the Court refused to stay proceedings until after the trial of an indictment for perjury then pending against the plaintiff's witnesses (*b*). But where the plaintiff, who was indicted for felony, brought an action to recover money he had deposited with a banker, and which was surmised to be the produce of the felony, the Court of Common Pleas stayed the proceedings in the action until after the trial of the indictment (*c*). In an action for slander, imputing felony, where the plaintiff obtained a verdict, the Court refused to stay judgment or execution, although it appeared that the plaintiff had since been convicted of the felony imputed to him; it appearing, also, that the defendant was examined as a witness against him (*d*).

In actions pending error, &c.

In Actions pending Error, &c.]—It is entirely in the discretion of the Court to stay proceedings pending a writ of error. Where judgment was obtained in the Court of Exchequer in an action on a foreign judgment, the Court refused to prevent the plaintiff from charging the defendant in execution, though it was sworn that an appeal was pending in the foreign court; and *Parke*, B., said, that it would be time enough to apply

(*p*) *Cocker* v. *Tempest*, *ubi supra*.
(*q*) See Vol. 1, 2.
(*r*) See *Smith* v. *Potter*, 1 Str. 415: *White* v. *Boot*, 2 T. R. 274: *Leigh* v. *Kent*, 3 T. R. 363.
(*s*) 36 G. 3, c. 104, s. 38. See 44 G. 3, c. 98, s. 10. And see the clauses in the Excise and Customs acts.
(*t*) *Petrie* v. *White*, 3 T. R. 5.
(*u*) *Sutton* v. *Bishop*, 4 Burr. 2287.
(*x*) *Grant* v. *Ridley*, 5 M. & G. 901: 6 Scott, N. R., 176, *S. C.*
(*y*) *Jones* v. *Clay*, 1 B. & P. 191.
(*z*) *Johnson* v. *Wardle*, 3 Dowl. 530. And see *Rex* v. *Boston*, 4 East, 572.
(*a*) *Anon.*, 2 Salk. 649.
(*b*) *Warwick* v. *Bruce*, 4 M. & Sel. 140. See also Lofft, 436: *Rex* v. *Tremearn*, 5 B. & C. 761; 8 D. & R. 590, *S. C.*
(*c*) *Deakin* v. *Prasd*, 4 Taunt. 825.
(*d*) *Symons* v. *Blake*, 2 C., M., & R. 416.

when the judgment of the foreign court was reversed (*e*). As to staying proceedings in an action upon a judgment pending error, see *Vol.* 1, 491. And as to staying proceedings against bail upon their recognisance, pending error, in the action against the principal, see *Vol.* 1, 491. And as to postponing trial of issues in fact, until the decision of a court of error is obtained upon a judgment pronounced upon issues in law, on the same record, see *post*, 1290; *ante*, 831.

Staying proceedings pending rule nisi, &c.

Pending a Rule Nisi, &c.]—As to this, see *post*, *Pt.* 6, *ch.* 1, As to staying proceedings pending an order for particulars, see *post*, 258. If the plaintiff suspect that the defendant is about to leave the country, it may be advisable for him to endeavour to obtain a stipulation introduced into any rule or order staying proceedings for a limited time, entitling him to proceed, under the 1 & 2 *Vict. c.* 110, (if necessary), to arrest the defendant; as it has been decided, that, where a rule or order stays proceedings for a certain time, the plaintiff cannot obtain an order to arrest the defendant under the above statute, until such time has expired (*f*). See as to staying judgment and execution until a second action for the same cause is determined, *ante*, *Vol.* 1, 530.

In actions by outlaws and alien enemies.

In Actions by Outlaws and Alien Enemies.]—The Court have stayed the proceedings after judgment recovered and affirmed on a writ of error, on the defendant bringing the debt and costs into court, the plaintiff having been outlawed in another action; for, if the defendant were to pay the money to the plaintiff, he might be paying that which the Crown would be entitled to have paid over again (*g*). But the Court have refused to stay proceedings upon the ground that the plaintiffs, after verdict, had become alien enemies (*h*).

In other cases. On ground that an action will not lie.

In other Cases, &c.]—In an action on a promissory note, the Court is said in one case to have granted a rule to shew cause why the proceedings should not be stayed upon an affidavit that the note had been obtained without consideration; and that fact not being afterwards contradicted upon shewing cause, the Court is said to have made the rule absolute (*i*). But that case, if correctly stated, seems a first step to the abrogation of trial by jury; and it seems clear that the Court will not stay the proceedings in an action merely on the ground that the action will not lie (*k*). Where a client brought an action against his attorney for negligence, and recovered, the jury finding that the attorney was guilty of gross negligence; the attorney then brought an action for the amount of his bill of costs; the Court refused to stay the proceedings in this latter action (*l*). Where an ejectment was brought to

(*e*) *Alison* v. *Furnival*, 3 Dowl. 202; 1 C., M., & R. 277, *S. C.*

(*f*) *Bell* v. *Stanley*, 6 M. & W. 396; 8 Dowl. 344, *S. C.*

(*g*) *Grant* v. *Bryant*, 6 M. & Sel. 347.

(*h*) *Vanbrymen* v. *Wilson*, 9 East, 391.

But see *De Lemoville* v. *Phillips*, 2 N. R. 97.

(*i*) Tidd. 530.

(*k*) See *Sherwood* v. *Benson*, 4 Taunt. 631; *Smith* v. *Curtis*, 2 Dowl. 223, *ante*, 1296.

(*l*) *Smith* v. *Rolt*, 2 Dowl. 62.

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recover property in the possession of the Crown, the Court, at the instance of the Crown, stayed the proceedings (*m*).

On set-off of mutual claims.

Where a prisoner, in execution for 200*l.*, sued his plaintiff for 11*l.*, and held him to bail, the Court of Common Pleas stayed the proceedings, upon the latter acknowledging satisfaction to the extent of the 11*l.*, and 5*l.*, to answer costs on the judgment for 200*l.* which he had obtained against the former (*n*). So, if an action be commenced for a matter which had been set off and allowed in a former action between the same parties, the Court, it seems, would stay the proceedings (*o*).

On transfer of bill of exchange pending the action.

Where the plaintiff, in an action on a bill of exchange, deposited the bill as a security with another person after action brought, giving him at the same time notice of the action, the Court held, that this was no ground for staying proceedings; but intimated, that, if the person with whom the bill was deposited had brought a second action upon it, they would interfere to stay that action (*p*).

Where there are adverse claims, &c.

As to staying proceedings in the case of adverse claims, see the next Chapter. Where a separate commission was sued out against A., and a joint commission was afterwards sued out against him and B., and the assignees under the first commission obtained a verdict in an action against C., the Court, at the instance of the defendant, ordered proceedings to be stayed on payment of the amount into court, to abide the event of a petition to the chancellor to supersede the first commission (*q*).

Proceedings for publication by order of Parliament.

As to staying proceedings against persons for publication of papers printed by order of Parliament, see 3 & 4 *Vict. c.* 9; and *Stockdale* v. *Hansard*, 11 Ad. & E. 297.

Where audita querela.

The Court will, in general, stay proceedings on motion of a party, where he is entitled to relief upon an *audita querela* (*s*).

Where attorney uncertificated.

As to staying the proceedings where the plaintiff's attorney is uncertificated, see *Vol.* 1, 56.

What a breach of a rule staying proceedings.

What a Breach of a Rule staying Proceedings.]—Any proceeding, even a motion to enlarge another rule in the cause, is a breach of a rule staying proceedings (*t*). So is taking out a rule to discontinue (*u*); or obtaining an order to arrest the defendant under the 1 & 2 *Vict. c.* 110, or issuing a *capias* on such an order (*x*).

(*m*) *Doe Lagh* v. *Roe*, 8 M. & W. 579. It would seem, that no affidavit is necessary in support of such an application, but that it is sufficient if it is made by the Attorney-General appearing on behalf of the Crown.

(*n*) *Peacock* v. *Jeffray*, 1 Taunt. 426. And see Vol. 1, 444.

(*o*) See *Laing* v. *Chatham*, 1 Camp. 252; and Vol. 1, 332. See as to this being a good defence to the action by way of estoppel, *Eastmure* v. *Laces*, 5 Bing. N. C. 444; *ante*, Vol. 1, 444.

(*p*) *Marsh* v. *Newell*, 1 Taunt. 109. And see *Colombies* v. *Slim*, 2 Chit. Rep. 637.

(*q*) *Hodgkinson* v. *Travers*, 2 D. & R. 409; 1 B. & C. 257, S. C. See *Grant* v. *Bryant*, 6 M. & Sel. 347, where a stay of proceedings was ordered after judgment recovered on bringing the money into court, plaintiff having been outlawed in another action.

(*s*) See *ante*, Vol. 1, 474. And see *Outcherlony* v. *Gibson*, 6 Scott, N. R., 577.

(*t*) *Wyatt* v. *Prebbell*, 5 Dowl. 268.

(*u*) *Murray* v. *Silver*, 14 Law J., N. S., 236, C. P.

(*x*) *Ball* v. *Stanley*, 6 M. & W. 396; 8 Dowl. 344, S. C.

CHAPTER X.

INTERPLEADER.

SECT. 1. *Relief of Persons in general against adverse Claims,* 1211 *to* 1219.

2. *Relief of Sheriffs and other Officers against adverse Claims,* 1219 *to* 1230.

SECT. 1.

Relief of Persons in general against adverse Claims.

Stat. 1 & 2 W. 4, c. 58, s. 1.

Statute.]—The 1 & 2 *W.* 4, *c.* 58, *s.* 1, reciting, that "it often happens that a person sued at law for the recovery of money or goods wherein he has no interest, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claims but by a *suit in equity* against the plaintiff and such third party, usually called a bill of interpleader, which is attended with expense and delay;" for remedy thereof enacts, "that, upon application made by or on behalf of any *defendant* sued in any of his Majesty's courts of law at Westminster, or in the Court of Common Pleas of the county palatine of Lancaster, or in the Court of Pleas of the county palatine of Durham, in any action of *assumpsit*, debt, detinue, or trover, such application being made after declaration, and before plea, by affidavit or otherwise, shewing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed or supposed to belong to some third party who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into court or to pay or dispose of the subject-matter of the action, in such manner as the Court or any judge thereof may order or direct, it shall be lawful for the Court, or any judge thereof, to make rules and orders, calling upon such third party to appear and to state the nature and particulars of his claim, and maintain or relinquish his claim, and, upon such rule or order, to hear the allegations as well of such third party as of the plaintiff, and in the meantime to stay the proceedings in such action, and finally to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more *feigned issue or issues*, and also to direct which of the parties shall be plaintiff or defendant on such trial, or with the *consent* of the *plaintiff* and such third party, their counsel or attornies, to *dispose of the merits of their claims, and determine the same in a summary manner*, and to make such *other*

Defendant in action may obtain an interpleader in case of adverse claims.

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rules and orders therein, as to *costs* and *all other matters*, as may appear to be just and reasonable."

Judgment and decision final.

By sect. 2, "the judgment in any such action or issue as may be directed by the Court or judge, and the decision of the Court or judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them."

Claim of party not appearing, barred.

By sect. 3, "if such *third party shall not appear* upon such rule or order to maintain or relinquish his claim, being duly served therewith, or shall *neglect or refuse to comply with any rule or order* to be made after appearance, it shall be lawful for the Court or judge to declare such third party, and all persons claiming by, from, or under him, to be *for ever barred from prosecuting his claim against the original defendant*, his executors or administrators, (saving, nevertheless, the right or claim of such *third party* against the *plaintiff*), and thereupon to make such order between such defendant and the plaintiff, as to *costs* and other matters, as may appear just and reasonable."

Order of judge may be rescinded, &c.

By sect. 4, "no order shall be made in pursuance of this act by a single judge of the Court of Pleas of the said county palatine of Durham, who shall not also be a judge of one of the said courts at Westminster; and that every *order* to be made in pursuance of this act by a *single judge*, not sitting in open court, shall be liable to be *rescinded or altered by the Court*, in like manner as other orders made by a single judge."

Judge may refer matter to Court.

By sect. 5, "if, upon application to a *judge* in the first instance, or in any later stage of the proceedings, he shall think the matter more fit for the decision of the *Court*, it shall be lawful for him to refer the matter to the Court; and thereupon the Court shall and may hear and dispose of the same in the same manner as if the proceeding had originally commenced by rule of court, instead of the order of a judge."

Proceedings may be entered of record, &c.

By sect. 7, "all rules, orders, matters, and decisions to be made and done in pursuance of this act, (except only the affidavits to be filed), may, together with the declaration in the cause, (if any), *be entered of record*, with a note in the margin expressing the true date (*a*) of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by any such rule or order; and every such rule or order *so entered* shall have the *force and effect* of a *judgment*, (except only as to becoming a charge on any lands, tenements, or hereditaments) (*b*), and in case any *costs* shall not be paid within fifteen days after notice of the taxation and amount thereof given to the party ordered to pay the same, his agent or attorney, *execution may* issue for the same by *fieri facias* or *capias ad satisfaciendum*, adapted to the case, together *with* the costs of such entry, and of the execution, if by *fieri facias* (*c*); and such writ and writs may bear *teste on the day of issuing the same*, whether in term or vacation (*d*); and the *sheriff or other officer* executing any such writ

(*a*) See *Lambirth* v. *Barrington*, 4 Dowl. 126; 2 Bing. N. C. 149, *S. C.*

(*b*) *Semble*, it would be a charge since 1 & 2 Vict. c. 110, s. 18. See *post*, Pt. 6, ch. 1.

(*c*) See stat. 1 & 2 Vict. c. 110, s. 18: *post*, 1218, and Pt. 6, ch. 1.

(*d*) See also stat. 3 & 4 W. 4, c. 67, s. 2.

shall be entitled to the same *fees*, and no more, as upon any similar writ grounded upon a judgment of the Court."

To what actions it applies.

What Actions and Cases within the Act.]—This act is confined to the actions therein mentioned, *viz.* of *assumpsit*, debt, detinue, and trover; and, therefore, where the declaration contained a count in *case* as well as trover, the Court would not interfere (*e*).

Cases within the act.

Where actions were commenced against an acceptor of a bill by two parties, each of whom claimed to be the lawful owner of it, the case was held within the act, and an issue was ordered between the two plaintiffs, to try whether one of them was lawfully entitled to recover on the bill (*f*). And where the assignee of a bankrupt factor sued for goods sold by the bankrupt to defendant, and a third party claimed the proceeds, as having been the consignor of the goods, it was held, that the defendant was entitled to the benefit of an interpleader rule (*g*). In a joint action of trover against two defendants, one of them who claims no title to the goods is entitled to the benefit of the act (*h*). And where goods consigned to A., and warehoused at the London Docks, were claimed by B.; and the Dock Company having required an indemnity of A., the original consignee, before delivering them to him, A. refused, and brought an action of trover, with counts for special damage for the detention: on motion by the company for relief, under the Interpleader Act, B. not appearing upon due notice, the Court held that the claim of B. against the company was barred, but that A. ought not, by reason of that act, to be precluded from recovering for his special damage, if any (*i*).

Cases not within it.

But the act does not apply where the defendant claims any interest in the subject-matter of the suit: nor does it apply to adverse claims set up in respect of a sum of money due upon an express contract between the parties, as a contract for work and labour (*j*), or the like (*k*). And where the plaintiff had obtained a quantity of tea *bonâ fide* from a party who had no right to dispose of it, sold it to the defendant, and the owner of the tea claimed it from the defendant, and brought trover against him; it was held, the defendant was not entitled to relief under the act (*l*). Nor is a contested claim to reward advertised for the apprehension of a felon within the act (*m*). Where a party gave a promissory note for money due by him, which note was deposited with a third person, as trustee for the creditor, and an action was brought upon it by the trustee, relief was refused, though an action by the creditor was anticipated (*n*). So, it was refused when an action had been brought against the holder of a stake deposited with him, to abide the event of an illegal race (*o*).

(*e*) *Lawrence* v. *Matheus*, 5 Dowl. 149; 2 H. & W. 128, *S. C.* Such a count, if inserted merely to evade the act, would not do so.

(*f*) *Regan* v. *Serle*, 9 Dowl. 193.

(*g*) *Johnson* v. *Shaw*, 12 Law J., N. S., 112, C. P. And see *Crellin* v. *Leland*, 6 Jur. 733, a case of deposit with bankers: and *Frost* v. *Haywood*, 2 Dowl., N. S., 801; 12 Law J., N. S., 242. Exch., *S. C.*

(*h*) *Gladstone* v. *White*, 1 Hodges, 366.

(*i*) *Lucas* v. *London Dock Company*, 4 B. & Ad. 378: see *Crawshay* v. *Thornton*, 2 Myl. & Cr. 1.

(*j*) *Turner* v. *The Mayor and Corporation of Kendal*, 2 Dowl. & L. 197; 13 M. & W. 171, *S. C.*

(*k*) *James* v. *Pritchard*, 7 M. & W. 216; 8 Dowl. 890, *S. C.*

(*l*) *Slaney* v. *Sidney*, 15 Law J., N. S., 72, Exch.

(*m*) *Grant* v. *Fry*, 4 Dowl. 135: *Collis* v. *Lee*, 1 Hodges, 304.

(*n*) *Newton* v. *Moody*, 7 Dowl. 582.

(*o*) *Applegarth* v. *Colley*, 2 Dowl., N. S., 223.

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So, it will, in general, be refused, if the defendant has, by his own act given any of the other parties a personal right against himself, independently of the actual property in dispute (*p*). The act applies only to claims to property in its nature distinct and tangible, and not to actions for unliquidated damages (*q*). Trover for title-deeds is not within it (*r*). It seems doubtful whether the Court will grant relief under the act, against a mere equitable claim (*s*). A party may apply for relief under the act, although he claims a lien on the goods against all parties (*t*), if he consent to relinquish the lien. But where a wharfinger, against whom an action of trover was brought, and who retained possession of the goods, the subject of the action, under a claim of lien, applied to the Court that a third party, who claimed in opposition to the plaintiff, should be made defendant in his stead, and pay off his lien; the Court thought the case not within the act, the defendant himself setting up a claim (*u*). A defendant who is sued for the recovery of property in his possession, in which he has no interest, but which is claimed by a third person, cannot apply to be relieved under the act, if he has taken an indemnity from the claimant; for he has thereby identified himself with the claimant (*v*), and the act expressly excludes defendants who collude with the third party. So, if a defendant officiously interposes in the affairs of another, and so has placed himself in a difficulty between adverse claims, the Court will, in its discretion, generally refuse to relieve him (*x*). It would seem, that a foreigner residing abroad cannot be compelled to come in under the act (*y*). It does not extend to cases in which the Crown is a party (*z*).

Where party claims a lien.

When defendant has taken an indemnity or colludes.

Officious interference.

Foreigner residing abroad.

Where the Crown a party.

An action must be brought before the Court will interfere: a mere *threat* of one is not sufficient (*a*). Where the defendant obtained an interpleader rule, upon the suggestion that a third party claimed the amount in his hands for which he was sued, and it afterwards appeared that the defendant had no just expectation that he should be sued by the third party, the Court discharged the rule, with costs (*b*).

Action must be brought, &c.: mere threat not enough.

The statute does not take away the party's remedy by bill of interpleader in equity; but if he has proceeded in equity, the common-law courts will not, in general, interfere (*c*).

Remedy in equity.

The Application and subsequent Proceedings.]—The application, as will be seen from the terms of the act, must be made after declaration in the action, and before plea. It may, in general, be made after an order obtained for time to plead (*d*). The application may be made to the Court, or a judge at

The application.

Time for.

To what court, &c.

(*p*) *Paterin* v. *Campbell*, 12 M. & W. 277; 1 Dowl. & L. 397, *S. C.*: *Crawshay* v. *Thornton*, 2 Myl. & K. 1: et per *Alderson*, B., "In interpleading matters, we follow the rule of equity."

(*q*) *Watter* v. *Nicholson*, 6 Dowl. 517.

(*r*) *Smith* v. *Wheeler*, 1 Gale, 163.

(*s*) *Frost* v. *Haywood*, 12 Law J., N. S., 242: see *Crellin* v. *Lapland*, 6 Jur., Q. B., 733: *post*, 1221.

(*t*) *Cotter* v. *Bank of England*, 2 Dowl. 728; 3 Moo. & Scott, 180, *S. C.*

(*u*) *Braddock* v. *Smith*, 9 Bing. 84; 2 Moo. & Scott, 131, *S. C.*

(*v*) *Tucker* v. *Morris*, 1 Dowl. 639; 1 C. & M. 73, *S. C.*

(*x*) *Belcher* v. *Smith*, 9 Bing. 82; 2 Moo. & Scott, 184, *S. C.*

(*y*) *Paterin* v. *Campbell*, *supra*.

(*z*) *Candy* v. *Maugham*, 1 D. & L. 745; 7 Scott, N. R., 401, *S. C.*

(*a*) *Parker* v. *Linnett*, 2 Dowl. 562.

(*b*) *Harrison* v. *Payne*, 2 Hodges, 107.

(*c*) *Sturgess* v. *Claude*, 1 Dowl. 506: *Arrayne* v. *Lloyd*, 1 Bing. N. C. 720; 1 Scott, 619, *S. C.*

(*d*) *Glynes* v. *Jepson*, cor. *Cresswell*, J., at chambers, 19th November, 1842, after conferring with the other judges.

chambers. If made to the Court, it should be the court in which the action against the applicant is pending. If two actions be brought against him in different courts, an application must be made to each court (*e*). A rule which called on the parties to appear before the court, in order that it might exercise its jurisdiction in the adjustment of their claims, was held sufficient (*f*). If it be intended that the rule *nisi* shall be drawn up as a stay of proceedings, and the case be in the Exchequer or Common Pleas, a previous notice of the motion must be given to the opposite parties (*g*); but such notice is not necessary in the Queen's Bench. The application should be supported by an affidavit by the defendant, or some other party, shewing that he does not claim any interest in the subject-matter of the action, but that the right thereto is claimed, or supposed to belong to a third party, &c., as required by the statute, (*ante*, 1211) (*h*). If the application be made to a judge at chambers, this affidavit is not always required. The affidavit should shew that the plaintiff has declared, and that defendant has not pleaded, but the objection may be waived, or the affidavit amended (*i*). If the claimant does not appear to shew cause against the rule or summons, and the same has been duly served upon him; or, if he appears, and does not persist in his claim, a rule or order (*k*) will be made against him under the 3rd section of the act, barring him from prosecuting his claim against the defendant; and the subject-matter of the dispute will be ordered to be delivered up to the plaintiff, and such other order will be made between the plaintiff and the defendant, as to costs and other matters, as may appear just and reasonable. If the claimant appears, and persists in his claim, a rule or order (*l*) will be made, that he be made defendant in the action pending, instead of the original defendant, or that an issue be tried between the plaintiff and the claimant to decide the right; and that, in the meantime, the subject-matter in dispute be deposited in some safe custody, usually in court. As to costs, see *infra*. With the consent of the plaintiff and the claimant, their counsel or attornies, the Court or judge may dispose of the merits of the claim, and determine the same in a summary manner. If the application be to a judge at chambers, he may refer it to the Court. The order of a judge may be rescinded or altered by the Court, or he himself may afterwards rescind or vary it, if he thinks fit. Where a judge made an order, by consent of all parties, to refer the cause, on certain terms, to a barrister, instead of an issue being directed, the Court refused to grant a rule *nisi* for varying the order, by introducing a fresh term into the reference, in consequence of information which one of the parties (an administratrix) had obtained since the hearing at chambers (*m*). If part of a sum claimed by the parties has been paid to one of them before an adverse claim made, the adverse claimant has a right to have the whole sum he claims paid into court, on

Form of rule nisi.

Stay of proceedings.

Affidavit.

The hearing.

Reference to court.

Rescinding or varying order.

Where defendant has paid part to one of several claimants.

(*e*) *Allen* v. *Gilby*, 3 Dowl. 143.
(*f*) *Frost* v. *Haywood*, *infra*. See form of rule, Chit. Forms, 571.
(*g*) See *Smith* v. *Wheeler*, 3 Dowl. 431.
(*h*) See form, Chit. Forms, 570.
(*i*) *Frost* v. *Haywood*, 2 Dowl., N. S., 801; 12 Law J., N. S., 242. Exch., *S. C.*
(*k*) See form of rule, Chit. Forms, 572.
(*l*) See form, Chit. Forms, 571, 572.
(*m*) *Drake* v. *Brown*, 2 M. & R. 270.

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Adding or substituting a claimant.

the holder's applying for relief under the act (*m*). Where an interpleader rule was obtained, and afterwards a claim was made by a curator, appointed by the Scotch law, to the property of a deceased person, the Court enlarged the rule to enable the defendant to make such claimant a party thereto (*n*). If the plaintiff does not proceed to the trial of the feigned issue, the Court will not permit another person's name to be substituted, without making the plaintiff originally appointed a party to the rule (*o*).

Feigned issue, &c., and proceedings after the order.

Feigned Issue, &c.]—If a feigned issue be directed to be tried between the parties, the plaintiff should frame it, and proceed to the trial of it, as directed in *Vol.* 1, 807. It may be added, that the 8 & 9 *Vict. c.* 109, *s.* 19, as to wagers, is an enabling, and not a compulsory enactment; and, therefore, the feigned issue may still be stated in the form of a wager between the plaintiff and the defendant (*p*). The plaintiff must deliver the feigned issue within the time limited by the order; or if no time be limited, and he neglect to deliver it in a reasonable time, an order may be obtained, or the order amended, limiting the time for its delivery. If not delivered by the plaintiff in the time limited, a rule (*q*) or order may be obtained for delivering over to the claimant the subject-matter in dispute, with costs. See further as to the proceedings in a feigned issue, *Vol.* 1, 808. Another claimant cannot be substituted as a plaintiff in the feigned issue without making him a party to the interpleader order (*r*). Until the judgment in the action, or feigned issue, is obtained, neither of the parties is, in general, secure against future claims by the other for the same matter. Where a feigned issue has been tried, judgment must be actually signed before the successful party will be allowed to take the deposited money or property out of court (*s*). And it seems the judgment must be entered in the manner pointed out by the 7th section (*t*), and according to its true date (*u*). Where an issue was directed, and after verdict, but before judgment, the party who was defendant in the issue died, the Court refused to allow the judgment to be entered, as of a time before the death; they said the 7th section of the act precluded them from so doing (*u*). The application to take out the money must be made in the original action (*v*). The rule for this purpose is *nisi* only, in the first instance (*x*). Where a judge's order has been obtained, ordering the payment of a sum of money out of court to a person claiming under an interpleader rule, the Court will not refuse to enforce the order, though a suit of a creditor against the claimant is pending in Chancery; for the right of the receiver cannot be recognised where no injunction has been served upon the officers of the court (*y*).

Future claims.

Taking money out of court, &c.

Costs in ordinary cases.

Costs.]—If the party making the application acts *bonâ fide*,

(*m*) *Allen* v. *Gilby*, 3 Dowl. 143.
(*n*) *Walker* v. *Kerr*, 12 Law J., N. S., 204, Exch. And see *Kirk* v. *Clarke*, 4 Dowl. 363.
(*o*) *Lydal* v. *Biddle*, 5 Dowl. 244.
(*p*) *Luard* v. *Butcher*, 15 Law J., N. S., C. P., 187, *S. C.*
(*q*) A rule *nisi* only in first instance. (*Stanley* v. *Perry*, 1 H. & W. 669).
(*r*) *Lydal* v. *Biddle*, 5 Dowl. 244.
(*s*) *Cooper* v. *Lead Smelting Company*, 1 Dowl. 728; 2 M. & S. 714, 810; 9 Bing. 634, *S. C.*
(*t*) See *Dickenson* v. *Eyre*, 7 Dowl. 721.
(*u*) *Lamberth* v. *Barrington*, 4 Dowl. 126.
(*v*) *Levi* v. *Coyle*, 2 Dowl., N. S., 932; *Parients* v. *Pennell*, 7 Scott, N. R., 834.
(*x*) *Stanley* v. *Perry*, 1 H. & W. 669.
(*y*) *Smith* v. *Clinch*, 2 Dowl., N. S., 48.

he will, in the first instance, be allowed his costs of the application out of the fund or proceeds of the goods in dispute, and the party ultimately unsuccessful will have to repay them (*z*). And it seems that the failure to proceed of the party in the wrong, does not affect the right of the applicant to receive his costs out of the fund, and the successful party will be left to his remedy by action for the deduction, even though the party in the wrong be insolvent (*a*). Where actions had been brought on a bill of exchange by J. and R., each of whom claimed to be the lawful owner of it, against the acceptor, and the Court had directed an issue to try whether R. was lawfully entitled to recover on the bill, the costs of the issue to abide the order of the Court, and the issue was found against R.: it was held, that J. was entitled to have the amount of the bill (which had been paid into court) untouched, the costs of the issue, of his action on the bill of exchange, and of the application to the Court for the costs, such costs to be paid to him by R.; and that the acceptor, as he had refused an indemnity offered to him by J., was only entitled to his costs in the action brought by R., to be paid by him (*b*). Where the applicant was offered an indemnity, and refused it, the Court would not allow him his costs (*c*). If the claimant does not appear on the interpleader rule or summons, he cannot be ordered to pay the costs of the application (*d*). Nor will the Court, in such a case, order such costs to be paid out of the fund in dispute (*e*). Where the claimant did not appear to maintain his claim, the Court ordered that the plaintiff and defendant respectively should each bear his own costs of the rule, and that the proceedings in the action should be stayed on payment by the defendant of the debt and costs (*f*). Where it is decided that the plaintiff is entitled only to a part of the subject-matter in dispute, it will in general be ordered that each party shall pay his own costs of the cause and issue, and all applications and proceedings connected with the cause or issue (*g*). The successful party is entitled to his costs of applying to take the money out of court, or to sell the property in dispute, or to have it delivered to him by the stakeholder, though he has not previously applied to the opposite party (*h*). And in general the successful party is entitled to the costs of all the steps taken in the cause or issue, and incidental to it (*i*). In general, no costs

(*z*) *Parker* v. *Linnett*, 2 Dowl. 569: *Cotter* v. *Bank of England*, 2 Dowl. 728; 3 Moo. & Sc. 180, *S. C.*: *Duer* v. *Mackintosh*, 2 Dowl. 730; 3 Moo. & Scott, 174, *S. C.*: *Agar* v. *Bleighegn*, 1 T. & G. 160: *Reeves* v. *Barraud*, 7 Scott, 281.

(*a*) *Pitchers* v. *Edney*, 4 Bing. N. C. 721; 6 Scott, 582, *S. C.*

(*b*) *Jones* v. *Regan*. 9 Dowl. 580.

(*c*) *Gladstone* v. *White*, 1 Hodges, 386. And see *Jones* v. *Regan*, 9 Dowl. 580.

(*d*) *Jones* v. *Lewis*, 8 M. & W. 264; 9 Dowl. 652, *S. C.*: *Lambert* v. *Cooper*, 5 Dowl. 547; *Grazebrook* v. *Pickford*, 10 M. & W. 279; 2 Dowl., N. S., 249; 12 Law J., N. S., 171, Exch., *S. C.*, where it was held that an appearance merely to object to the irregularity of the proceedings does not subject a party to costs. *Quære*, whether a fresh application could be made to the Court to order the claimant to pay such costs: see per *Williams*, J., in *Lambert* v. *Cooper*, *supra*. It seems not; see *Murdock* v. *Taylor*, *infra*: *Jones* v. *Lewis*, *supra*.

(*e*) *Lambert* v. *Cooper*, 5 Dowl. 547: *Murdock* v. *Taylor*, 8 Scott, 604; 6 Bing., N. C., 293, *S. C.*

(*f*) *Murdock* v. *Taylor*, *supra*.

(*g*) *Kerr* or *Carr* v. *Edwards*, 8 Scott, 337; 8 Dowl. 29, *S. C.*: *Lewis* v. *Holding*, 3 Scott, N. R., 191; 9 Dowl. 652, *S. C.*: but *Staley* v. *Bedwell*, 2 P & D. 309; 10 Ad. & E. 145, *S. C.*, a case decided by the Court of Q.B. on the 6th section of the act, seems opposed to this.

(*h*) *Meredith* v. *Rogers*, 7 Dowl. 596: *Barnes* v. *Bank of England*, 7 Dowl. 319. And see *Reeves* v. *Barraud*, 7 Scott, 281: *Cusel* v. *Pariente*, 7 M. & Gr. 527.

(*i*) See *Cusel* v. *Pariente*, 7 M. & Gr. 527: *Melville* v. *Smark*, 3 M. & Gr. 57; 5 Scott, N. R., 357, *S. C.*

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in matters arising out of interpleader motions are allowed until the termination of the proceedings (*j*).

Security for costs.

The claimant who is made a defendant under an interpleader rule is substituted for the original defendant for all purposes of the suit, and he stands in the same position as any other defendant, and is consequently entitled to security for costs, as in other cases (*k*).

Costs of interpleader not "expenses of execution."

The costs of an interpleader rule or order are not "expenses of the execution," within the 43 *Geo.* 3, *c.* 46, *s.* 5 (*l*).

Execution for costs under 1 & 2 Vict. c. 110, s. 18.

Execution for Costs.]—The party entitled to the costs is not bound to take out execution for them under the 7th section of the act, (*ante*, 1212), but may sue out execution, under the 1 & 2 *Vict. c.* 110, *s.* 18, upon the rule ordering the payment of them; or, if ordered by a judge's order, may make the order a rule of court, and sue out execution, and this without entering the rule or any proceedings on record (*m*).

Remedy under the 7th section of Interpleader Act.

If he sues out execution under the 7th section of the act, the course to be adopted by him, as pointed out by Mr. Chapman, is as follows (*n*):—*The entry must be upon a judgment-roll, commencing with the declaration in the cause (if any); then follows the rule, order, or decision of the Court or judge on the application. Make out a docket paper* (*o*). *Take the roll to one of the Masters, who will number the roll. He will make the proper entry, and the roll must then be carried into the treasury in the same manner as judgment-rolls are. When costs are given by any rule or order, the party entitled to such costs must obtain from the Master an appointment on the rule to tax such costs; a copy of the rule and appointment must be served the day prior to the taxation of costs on the opposite attorney. After taxation of the costs, notice in writing* (*o*) *must be given of the amount of costs allowed to the party ordered to pay the same, or to his attorney or agent; and if the costs are not paid within fifteen days after such notice, a fieri facias or capias ad satisfaciendum* (*p*) *may be issued for the same, and the party may, in addition to the costs allowed, levy for the costs of the fieri facias, but not for the costs of the ca. sa.* The fifteen days' notice must be given, whether the party, his attorney or agent, attend the taxation of costs or not. The most effectual way of giving notice of the amount of costs allowed on taxation will be, by service of a copy of the rule of court, with the Master's *allocatur* for costs thereon, on the party required to pay the same, his attorney or agent, with an indorsement, stating, that, unless the amount allowed for costs be paid within fifteen days, execution will be issued for the recovery thereof. The notice does not require personal service (*q*). It may be here added, that a judgment, even after verdict on a feigned issue under the Interpleader Act, must be entered up as sect. 7 of that act directs, and a

(*j*) *Hood* v. *Bradbury*, 6 M. & Gr. 981.

(*k*) *Bernasech* v. *Bassett*, 1 Com. Bench, 313. And see *Frost* v. *Heywood*, 2 Dowl., N. S., 801; 12 Law J., N. S., 242, Exch., *S. C.*

(*l*) *Hammond* v. *Narin* or *Nairn*, 1 Dowl., N. S., 351; 9 M. & W. 221, *S. C.* See Vol. 1, 563.

(*m*) *Catti* v. *Bartlett*, 1 Dowl., N. S., 928; 2 M. & W. 340, *S. C.* And see the practice as to issuing execution under the 1 & 2 Vict. c. 110, s. 18, *post*, Pt. 6, ch. 1.

(*n*) Chapman's Pract., ch. II. Addenda, p. 162.

(*o*) See form, Chit. Forms, 113.

(*p*) Id. 573.

(*q*) Chapman's Second Addenda to his Practice, 162 to 166.

judgment signed in the ordinary manner on such issue will be set aside on application to the Court (*r*); and the Court has no power to order rules made under it to be entered up otherwise than as appointed in that section, viz. according to their true date (*s*).

Writ of Error.]—No writ of error lies on a judgment on a feigned issue under the Interpleader Act, and a writ of error upon it may be quashed (*t*). Writ of error.

SECT. 2.

Relief of Sheriffs and other Officers against adverse Claims.

Statutes as to.]—Before the 1 & 2 *W.* 4, *c.* 58, if the property in goods taken under an execution was in dispute, the Court, upon the suggestion of this or any other reasonable cause by the sheriff, would enlarge the time for making the return, until the right were tried, or until one of the parties had given the sheriff a sufficient indemnity (*u*). This, however, was not to be considered a general rule; but the indulgence was granted only in special cases, under particular circumstances; because the sheriff, where the property of the goods is in dispute, might, as he still may, summon an inquest to say whose property they are, before he returns the writ. But, in all cases where the doubt arose from a point of law, and not from mere matter of fact, the Court, upon application, would enlarge the time for making the return: therefore, where the doubt was, whether goods seized under a *fi. fa.* were not covered by an extent afterwards sued out, the Court enlarged the time for making the return to the *fi. fa.*, for the purpose of inducing the plaintiff to go into the Court of Exchequer, and there contest the question of right with the Crown (*x*). The sheriff or officer, if he think fit, notwithstanding the above act, may, as heretofore, apply to the Court to enlarge the time for making his return; and, in cases not within the act, such application would be expedient for his protection (*y*). Relief independently of 1 & 2 W. 4, c. 58.

Now, however, a much more effectual relief is afforded to sheriffs and other officers in such cases by the above act, (sect. 6), of which, after reciting that "difficulties sometimes arise in the execution of process against goods and chattels, issued by or under the authority of the said courts, by reason of claims made to such goods and chattels by assignees of bankrupts and other persons not being the parties against whom such process has issued, whereby sheriffs and other Stat. 1 & 2 W. 4, c. 58, as to.

(*r*) *Dickenson* v. *Eyre*, 7 Dowl. 721.

(*s*) *Lamberth* v. *Barrington*, 4 Dowl. 196; 2 Bing. N. S. 149: 2 Scott, 263, *S. C.*

(*t*) *King* v. *Simmonds*, 14 Law J., N. S., Q. B., 208: *Snook* v. *Mattock*, 5 A. & E. 239.

(*u*) *Wells* v. *Pickman*, 7 T. R. 174: *Shaw* v. *Tunbridge*, 2 W. Bl. 1064, 1181: *Venables* v. *Wilkes*, 4 Moore, 389. And see *King* v. *Bridges*, 7 Taunt. 294; 1 Moore, 43; 1 Bing. 71, *S. C.*: *Bernasconi* v. *Farebrother*, 7 B. & C. 379: *Beavan* v. *Dawson*, 4 M. & P. 357; 6 Bing. 506, *S. C.*; Tidd, 9th ed., 1017: Wats. Sheriff, 195.

(*x*) *Wells* v. *Pickman*, 7 T. R. 174: *Thurston* v. *Thurston*, 1 Taunt. 120.

(*y*) See *Roach* v. *Wright*, 8 M. & W. 157; 1 Dowl., N. S., 56, *S. C.*: per *Parke*, B., *Holmes* v. *Musty*, 4 Ad. & El. 131, 132.

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officers are exposed to the hazard and expense of actions; and it is reasonable to afford relief and protection in such cases to such sheriffs and other officers," enacts, "that when any such claim shall be made to any goods or chattels taken or intended to be taken in execution under any such process, or to the proceeds or value thereof, it shall and may be lawful to and for the court from which such process issued, upon application of such sheriff or other officer made before or after the return of such process, and as well before as after any action brought against such sheriff or other officer, to call before them, by rule of court, as well the party issuing such process as the party making such claim, and thereupon to exercise, for the adjustment of such claims and the relief and protection of the sheriff or other officer, all or any of the powers and authorities hereinbefore contained (which see, *ante*, 1211, 1212), and make such rules and decisions as shall appear to be just, according to the circumstances of the case; and the costs of all such proceedings shall be in the discretion of the court."

Sheriffs may apply to Court for relief.

Or to a judge.

And by the 1 & 2 *Vict. c.* 45, *s.* 2, "it shall be lawful for any judge of the Courts of Queen's Bench, Common Pleas, or Exchequer, with respect to any such process issued out of any of those courts, or for any judge of the said Court of Common Pleas of the county palatine of Lancaster, or Court of Pleas of the county palatine of Durham (being also a judge of one of the said three superior courts), with respect to process issued out of the said courts of Lancaster and Durham, respectively, to exercise such powers and authorities for the relief and protection of the sheriff or other officer, as may by virtue of the said last-mentioned act be exercised by the said several courts respectively, and to make such order therein as shall appear to be just; and the costs (*z*) of such proceeding shall be in the discretion of such judge" (*a*).

When relief will be granted.

In what Cases Relief will be granted.]—Relief will not be granted to the sheriff or officers, unless an actual claim to the property has been made. Giving notice of a fiat in bankruptcy having been issued, is not equivalent to a claim by the assignees (*b*), unless, perhaps, where it appears to have been given by the assignees (*c*). But the usual course in such a case is for the sheriff to take out a summons under the act, and obtain an enlargement of the time for returning the writ, and get the interpleader and summons adjourned until such a period as it is most probable assignees will be appointed under the fiat, and, when appointed, to obtain the interpleader order. The claim to be disposed of by the Court or judge, and over which alone they have jurisdiction, is a claim to goods

Claim must have been made.

Nature of the claim.

(*z*) See *Burgh* v. *Schofield*, 9 M. & W. 478; 2 Dowl., N. S., 261, *S. C.*, *post*, 1226.

(*a*) As to the court reviewing, rescinding, or amending this order of a judge, see *post*, 1225. Previously to this enactment, a judge at chambers had no jurisdiction: (*Shaw* v. *Roberts*, 2 Dowl. 25, &c.: *Beames* v. *Cross*, 4 Dowl. 122: *Hailey* v. *Dioney*, 1 Hodges, 180); unless where a rule *nisi* was granted by the Court to shew cause at chambers. (*Pouellar* v. *Lock*, 4 Nev. & M. 852, &c.). And if process issued out of different courts, directed to the same sheriff, separate application must have been made to the respective courts out of which the process issued. (*Bragg* v. *Hopkins*, 2 Dowl. 151).

(*b*) *Bentley* v. *Hook*, 2 Dowl. 339; 2 C. & M. 426, *S. C.*: *Tarleton* v. *Dunmalose*, 5 Bing. N. C. 110; 6 Scott, 843, *semb.* But see *Barker* v. *Phipson*, 3 Dowl. 590.

(*c*) Per *Bayley*, J., in 2 C. & M. 426.

taken in execution under any process from any of the superior courts at Westminster, or Court of Pleas at Lancaster or Durham, or to the proceeds or value thereof. It is upon such a claim alone that the Court or judge will decide whether there shall be an interpleader or not; and if there really is a question between the parties, which could not be decided by the question, as to whether the goods, or the proceeds or value, did or did not belong to the claimant, it is open to doubt whether the Court or judge have any jurisdiction. If, therefore, some wrongful act has been done by the sheriff, or some injury sustained beyond the mere seizure of the goods, that fact should be represented and substantiated by the claimant, or the execution creditor, before the Court or judge, as a ground for their not interfering; and they might decline to interfere in the application. At all events, if an order be made, and be not rescinded by the Court, it will hold good, and be given effect to, at any time; and, therefore, where a sheriff obtained an order directing the goods to be sold, &c., to abide an issue between the claimant and the execution creditor, and a verdict was found for the claimant, who then brought an action against the sheriff for entering his house and seizing and converting his goods; the Court ordered, that so much of the declaration as charged the defendant with seizing and converting the goods should be struck out (*d*). The claim must, it seems, be of such a nature as may be followed by an action (*e*) at the suit of the party making it (*f*), though an action need not be actually brought before making the application (*g*). The claim must, it would seem, be of a legal right, and not a claim of a merely equitable right (*h*). A claim, therefore, that the claimant is a partner with the defendant in the goods seized, is not within the act, unless the plaintiff disputes the goods being the partnership property (*i*). But in cases of equitable claims, though the Court cannot interfere under the Interpleader Act, they will frequently enlarge the time for returning the writ, unless the plaintiff will indemnify the sheriff (*j*). In general, the defendant himself cannot apply under the act, which applies only to persons "not being the parties against whom the process issues;" so that the act does not apply to the case of a defendant alleging the judgment or execution to be void. But an order was made in a case where an executrix claimed *as such*, goods taken under a *fi. fa.* against her on a judgment for her own debt, A. B., executrix of C. D., being a different person from A. B., *simpliciter* (*k*). And although the act, from its language, may seem to have in view only those cases in which the absolute property is claimed, yet the letter of the act will comprehend cases of lien (*l*). The case may be within the act although the goods seized are in the possession of a stranger, and not of the defendant, against whom the execu-

Claim must be such that it may be followed by an action.

Equitable claim.

In general, the defendant cannot apply.

Where a lien claimed.

Good seized in possession of a stranger.

(*d*) *Abbott* v. *Richards*, 3 Dowl. & L. 467.

(*e*) *Isaac* v. *Spilsbury*, 10 Bing. 3; 3 Moo. & Scott, 341; 2 Dowl. 211. S. C.

(*f*) *Roach* v. *Wright*, 8 M. & W. 157.

(*g*) *Green* v. *Brown*, 3 Dowl. 337.

(*h*) *Sturgess* v. *Claude*, 1 Dowl. 505; *Roach* v. *Wright*, 8 M. & W. 155; 1 Dowl., N. S., 56. And see *Putney* v. *Tring*, 5 M. & W. 425; 7 Dowl. 811, S. C.

(*i*) *Holmes* v. *Mentz*, 4 Ad. & E. 127; 5 Nev. & M. 563; 4 Dowl. 300, S. C

(*j*) See *Roach* v. *Wright*, 8 M. & W. 157: *Holmes* v. *Mentz*, 4 Ad. & El. 131, 132.

(*k*) *Fenwick* v. *Laycock*, 1 Gale & D. 532; 2 Q. B. 108, S. C.

(*l*) *Ford* v. *Baynton*, 1 Dowl. 359.

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Execution abandoned.

tion issued (*m*). A person in actual possession of the goods seized under a *fi. fa.* against the defendant, is still a claimant within the act (*n*). If an execution creditor abandons his process against certain goods seized under a *fi. fa.* in favour of a claimant, and the sheriff still sells them under it, he may still apply to the Court under the act (*o*).

Where two executions, and complaint that goods had been improvidently sold.

Where goods had been taken by the sheriff under a *fi. fa.* and sold by him, another *fi. fa.* having issued in the meantime against the same goods, and where a party claimed title to the property against both the plaintiffs, the defendant, and the sheriff, and complained that the goods had been sold improvidently, and in spite of notice from the owner, the Court made a special order for relief of the sheriff (*p*).

Where proceeds paid over, &c.

But the Court will not relieve the sheriff where he has paid over the proceeds of the execution to the judgment-creditor (*q*); nor where he has handed over any part of the goods to the party claiming them (*r*); nor where the sheriff has paid over the proceeds of the execution to the judgment-creditor, though before he had notice of the claim (*s*), nor even if he be willing to bring a similar amount into court (*t*).

Where no seizure made.

And where the sheriff, finding the goods claimed by a third party, withdrew without making any seizure under the *fi. fa.*, it was held, that, as the sheriff had not possession of the goods, and was therefore incapable of delivering them to either party, he was not entitled to relief (*u*). Nor is he entitled to relief if he has seized goods in execution which were under a distress for rent (*v*); or if he has seized under one *fi. fa.*, and the question is, whether that writ ought to have precedence of another (*x*); or, if he is placed in circumstances which give him an interest on either side, as where the under-sheriff's partner is concerned for some of the parties or the like (*y*).

Where question is which writ is to have priority.

Where sheriff interested.

Where it appeared that the under-sheriff was plaintiff in the action in which the execution had been issued and executed, the Court would not interfere to relieve the sheriff, although the sheriff himself swore, in the usual way, that he did not collude either with the execution creditor or the claimant whom he sought to bring before the Court, for the adjustment of their respective claims on the property seized (*z*).

Where sheriff has brought about the claim.

Nor will relief be granted to the sheriff were he has himself brought about the claim. And where an under-sheriff, who was acting as attorney for certain creditors of the defendant informed them of a *fi. fa.* at the suit of the plaintiff having been placed in his hands to execute, by which means the issuing of a fiat against the defendant was accelerated, and the execution thereby defeated, the Court refused to relieve the sheriff (*a*).

Or guilty of neglect.

If the sheriff has been guilty of neglect, and in

(*m*) *Allen* v. *Gibbon*, 2 Dowl. 292.
(*n*) *Barker* v. *Dynes*, 1 Dowl. 169.
(*o*) *Baynton* v. *Harvey*, 3 Dowl. 344.
(*p*) *Howman* v. *Buck*, 2 B. & Ad. 103.
(*q*) *Anderson* v. *Calloway*, 1 C. & M. 182; 1 Dowl. 636, *S. C.*: *Chalon* v. *Anderson*, 3 Tyr. 327.
(*r*) *Braine* v. *Hunt*, 2 Dowl. 391; 2 C. & M. 418, *S. C.*
(*s*) *Scott* v. *Lewis*, 1 Gale, 204; 4 Dowl. 259; 2 C., M., & R. 289, *S. C.*
(*t*) *Ireland* v. *Bushell*, 5 Dowl. 147; 2 H. & W. 118, *S. C.* See, however, *Anderson* v. *Calloway*, *supra*.
(*u*) *Holton* v. *Cussins*, 6 Dowl. 13[illegible]; M. & W. 145, *S. C.*
(*v*) *Hepthorn* v. *Bush*, 2 Dowl. 641. See *Clark* v. *Lord*, 1d. 227; *Gathin* v. *Wilks*, Dowl. 189.
(*x*) *Day* v. *Waldock*, 1 Dowl. 323. See *Salmon* v. *Jones*, 1d. 369.
(*y*) *Duddin* v. *Long*, 3 Dowl. 139; Bing. N. C. 299; 1 Scott, 281, *S. C.*
(*z*) *Ostler* v. *Bower*, 4 Dowl. 686; H. & W. 653, *S. C.*
(*a*) *Cox* v. *Bubb*, 2 Dowl. & L. 738; Law J., N. S., 95, Q. B., *S. C.*

curred a liability thereby, the Court will not relieve him from it (*b*). CHAP. X.

Application for Relief—Proceedings on Hearing, &c.]—It has been said that the sheriff, before he makes the application, is bound to inquire of the nature of the claims set up by the adverse parties, and to ascertain whether the execution creditor submits to, or intends to contest them; for, if it afterwards appear by the disclaimer of the parties, or otherwise, that they have been brought before the Court or judge without reasonable cause, and that there are, in fact, no conflicting claims, the sheriff will probably be ordered to pay the costs of the parties so disclaiming (*c*). And where a levy was made on the 30th October, and a claim was made on the 1st November, under a bill of sale of that date, the Court discharged the rule, and ordered the sheriff to pay the execution-creditor's costs; observing, that, before the sheriff applied to the court, he ought at least to have looked at the date of the bill of sale (*d*). He need not apply for (*e*), nor is he bound to accept, an indemnity, if offered (*f*). If, however, he accept one, the Court will not relieve him (*g*). Sheriff should inquire as to the claim. Taking indemnity.

The application may be made either to the Court or to a judge at chambers (*h*). If there be two writs issuing out of different courts, the application, if made in court, must be to each court (*i*). Application, to whom made.

The application should be made by the sheriff, in a reasonable time after receiving notice of the adverse claim (*j*). Where the sheriff received notice on the 23rd January, of a claim to goods seized by him under a *fi. fa.*, he was held not entitled to relief under the act, on an application made after Hilary Term (*k*). And in a case, before the 1 & 2 *Vict. c.* 45, *ante*, 1220, where the claim was made in the vacation, the court held that the sheriff should have made the application within the first *four* days of the succeeding term; and since that act, he should apply at chambers within a reasonable time, and should not wait for term; and, in the event of laches in this respect, he will have to pay the costs of both parties, and, perhaps, relief will be altogether refused (*l*). But under special circumstances the court would interfere on a later application (*m*). Must be made promptly.

The application should be supported by an affidavit, stating the seizure of the goods by the sheriff under the execution, that the goods, or the proceeds of the sale, are in his hands, and the notice of the claim by the party who made it (*n*), and such other facts as may assist in inducing the court to grant the ap- Affidavits on.

(*b*) *Brackenbury* v. *Laurie*, 3 Dowl. 180. And see *Lewis* v. *Jones*, 2 M. & W. 203.
(*c*) *Bishop* v. *Hinxman*, 2 Dowl. 166.
(*d*) *R.* v. *Sheriff of Oxfordshire*, 6 Dowl. 136.
(*e*) *Crossley* v. *Ebers*, 1 H. & W. 216: *Wilks* v. *Pepjoy*, 10 Leg. Obs. 12.
(*f*) *Levy* v. *Champneys*, 2 Dowl. 454.
(*g*) See *Cutler* v. *Bower*, 4 Dowl. 605.
(*h*) 1 & 2 Vict. c. 45, s. 2: *ante*, 1220.
(*i*) *Bragg* v. *Hopkins*, 2 Dowl. 151.
(*j*) *Devereux* v. *John*, 1 Dowl. 548: *Cooke* v. *Allen*, 2 Dowl. 11; 1 C. & M. 542, S. C.: *Dixon* v. *Enzell*, 2 Dowl. 621: *Barker* v. *Phipson*, 3 Dowl. 590.
(*k*) *Ridgway* v. *Fisher*, 3 Dowl. 567.
(*l*) *Beale* v. *Overton*, 2 M. & W. 534; 5 Dowl. 599, S. C. And see *Barker* v. *Phipson*, 3 Dowl. 590; 1 H. & W. 191, S. C.: *Sableman* v. *Claringbold*, 2 H. & W. 87; in which latter case, the seizure of the goods was long before the claim was made; and the delay not being satisfactorily accounted for, the Court refused to relieve the sheriff.
(*m*) *Dixon* v. *Enzell*, 2 Dowl. 621: *Skipper* v. *Lane*, 2 Dowl. 781; 4 M. & Scott, 283, S. C.
(*n*) *Northcote* v. *Beauchamp*, 1 M. & Scott, 158.

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plication. No supplemental affidavit will be allowed after the rule *nisi* is obtained, and therefore, if there has been any delay, it should be accounted for in the first affidavit (*o*). The affidavit need not state that the sheriff has made application to the adverse claimant for an indemnity (*p*), nor need it, in the Queen's Bench, deny collusion with him (*q*), though this seems to be otherwise in the Exchequer (*r*). The claimants may appear without taking office copies of the affidavits on which the rule was obtained (*s*). An execution-creditor appearing need not produce an affidavit (*t*). But the claimant must, if he appear to the rule, state the nature of his claim upon an affidavit of the facts (*u*). An affidavit, for shewing cause, may be sworn at any time before cause is shewn (*x*).

Who entitled to appear on rule, &c.

No one has a right to be heard against the rule obtained by the sheriff, unless he is called upon by it, although he is in fact a claimant; and if he is called upon in one character, he cannot appear in another (*y*). Where, however, after the rule *nisi* had been obtained, the defendant became bankrupt, his assignees were admitted as parties to the rule (*z*). And where the rule called upon the official assignees of a bankrupt to shew cause, the creditors' assignees not being then chosen, it was held that the creditors' assignees could afterwards shew cause against the rule, although in form they were no parties to it (*a*).

Proceedings on hearing where the parties appear.

If all the parties appear, the Court or judge will hear their statement and the claims; but they cannot, without consent, try the merits of the case or the rights of the parties, but will direct an issue to try them, or else an action (*b*). In one case, where an action of trespass having been brought against the sheriff, for seizing a horse which had been expressly pointed out to the officer as the defendant's property, by the clerk to the plaintiff's attorney, the Court, upon a motion under the interpleader act, instead of an issue, directed that the action should proceed, the name of the execution-creditor being substituted for that of the sheriff: and they further directed, that the horse should be delivered up to the claimants, they giving security to the satisfaction of the Master for the return of the horse, in the event of their claim turning out to be unfounded (*c*). With the consent of the plaintiff and the claimant, the Court or judge will dispose of the merits of their claims, and determine the same in a summary way (*d*). Where the Court direct a feigned issue or action, they will order the proceedings against the sheriff to be stayed until the trial of it; and in the meantime give such directions respecting the sale of the goods and application of the

(*o*) *Cooke* v. *Allen*, 2 Dowl. 11; 1 C. & M. 542; 3 Tyr. 586, *S. C.*

(*p*) *Crossley* v. *Ebere*, 1 H. & W. 216: *Wills* v. *Poppy*, 10 Leg. Obs. 12. See *Levy* v. *Champneys*, 2 Dowl. 454.

(*q*) *Donniger* v. *Hinxman*, 2 Dowl, 424: *Dobbins* v. *Green*, Id. 309: *Bond* v. *Woodhall*, 4 Dowl. 351.

(*r*) *Cooke* v. *Allen*, Id. 11; 1 C. & M. 542; 3 Tyr. 586, *S. C.*; *Anderson* v. *Calloway*, 1 C. & M. 182; 1 Dowl. 636, *S. C.*

(*s*) *Mason* v. *Rainshaw*, 2 Dowl. 395.

(*t*) *Angus* v. *Wootton*, 3 M. & W. 310.

(*u*) *Powell* v. *Lock*, 1 H. & W. 291; 4 Nev. & M. 852; 3 Ad. & E. 315, *S. C.*

(*x*) *Brame* v. *Hunt*, 2 Dowl. 391.

(*y*) *Clarke* v. *Lord*, 2 Dowl. 55.

(*z*) *Kirk* v. *Clarke*, 4 Dowl. 363.

(*a*) *Ibbotson* v. *Chandler*, 9 Dowl. 220.

(*b*) *Harrison* v. *Wright*, 13 M. & W. 816; 2 Dowl. & L. 626; 14 Law J., N. S., Exch. 196, *S. C.*; *Allen* v. *Gibbons*, 2 Dowl. 292: *Brailsbridge* v. *Adshead*, Id. 39: *Badcock* v. *Beauchamp*, 8 Bing. 86; 1 Moo. & Sc. 158, *S. C.*; *Sleeman* v. *Bank*, 3 B. & Ad. 103.

(*c*) *Brown* v. *Ludhaus*, 6 Scott, N. R., 934. Quære as to the form of the issue, where consequential damage is insisted on by the plaintiff, (*S. C.*) See *Sleeman* v. *Bank*, 3 B. & Ad. 103, where a special order was made.

(*d*) *Ford* v. *Baynton*, 1 Dowl. 357: *Carlewis* v. *Pocock*, 5 Dowl. 381.

proceeds, or value thereof, as shall appear to be just (*e*). In the feigned issue, it seems that the claimant should, in general, be the plaintiff, and the execution- creditor the defendant (*f*).

Where they do not appear.

If the claimant do not, upon the sheriff's rule or summons, duly served upon him, appear and support his claim, or neglect or refuse to comply with any rule or order made after appearance, the Court or judge will bar such claim as against the sheriff, saving, nevertheless, the claimant's right against the execution-creditor (*g*). And if the execution-creditor does not upon such rule appear, his claim will be barred (*h*) in respect of the matters brought in question by the rule or summons, and the rule or order will be, not that the execution-creditor shall be barred of his demand generally, but that the sheriff shall withdraw from possession, and that the execution-creditor take no proceedings against him in respect of the goods claimed (*i*); or, if the sheriff have sold, he will be directed to pay over the produce of the sale to the claimant. Where neither the claimant nor the creditor appear, the sheriff will be allowed to sell so much as would satisfy his poundage and expenses, and then withdraw from possession. If an execution-creditor abandon his process against certain goods seized under a *fi. fa.* in favour of the claimant, the sheriff may still shew, in an action against him, that the goods were the defendant's property (*k*).

Rescinding or amending order.

An order made by a single judge under the 1 & 2 *Vict. c.* 45, may be reviewed by the Court (*l*), unless it is summarily disposed of by consent (*ss*). Where the Court amended an order made by a judge, at the instance of the execution-creditor, they directed him to pay the costs of all the parties who had appeared to oppose the rule *nisi*, with the exception of the sheriff (*z*).

If rule discharged, sheriff has a reasonable time to return writ.

If the rule is discharged or summons dismissed, the sheriff is allowed a reasonable time to return the writ, before an attachment can issue against him (*o*).

Compelling sheriff to re-enter, &c.

Where the sheriff has been allowed to withdraw from possession, he cannot, after he is out of office, be compelled to re-enter, whatever be the upshot of the question between the parties (*p*).

Discharging rule on its becoming useless.

If a rule or order, directing the trial of an issue, become useless, the Court may order it to be discharged (*q*).

Order, if made by consent, binding, though otherwise invalid.

An order, under the interpleader act, will be binding on the parties, like an award, if made by their consent, though the judge had no jurisdiction to make it, and though the consent be not stated on the order (*r*).

Feigned issue, &c.

Feigned Issue, &c.]—The observations made, *ante*, 1216, as to

(*e*) Tidd, New Pract. 560.
(*f*) *Bramridge* v. *Adshead*, 2 Dowl. 59.
(*g*) See *Bowdler* v. *Smith*, 1 Dowl. 417: *Perkins* v. *Burton*, 3 Tyr. 51: 2 Dowl. 103: *Tregood* v. *Morgan*, 3 Tyr. 52 *n*: *Ford* v. *Dillon*, 5 B. & Ad. 865; 2 Nev. & M. 662, *S. C.*
(*h*) *Debia* v. *Cummins*, 7 Ad. & El. 560; 2 Nev. & P. 575, *S. C.* But see *Donniger* v. *Hinxman*, 2 Dowl. 424.
(*i*) *Eveleigh* v. *Salisbury*, 3 Bing. N. C. 226; 5 Dowl. 369, *S. C.*
(*k*) *Boynton* v. *Harvey*, 3 Dowl. 344.
(*l*) *Teggin* v. *Langford*, 10 M. & W. 556; 2 Dowl., N. S., 467; 12 Law J., N. S., 76, Exch., *S. C.*
(*m*) *Shortridge* v. *Young*, 12 M. & W. 5; 1 Dowl. & L. 416; 13 Law J., N. S., 30, Exch., *S. C.*
(*n*) *Tilyard* v. *Cane*, 8 Scott, 511; 6 Bing., N. S., 261, *S. C.*
(*o*) *R.* v. *Sheriff of Hertfordshire*, 2 H. & W. 122; 5 Dowl. 144, *S. C.*
(*p*) *Wilton* v. *Chambers*, 3 Dowl. 12.
(*q*) *Luckin* v. *Simpson*, 8 Scott, 676.
(*r*) *Harrison* v. *Wright*, 13 M. & W. 816; 2 Dowl. & L. 695; 14 Law J., N. S., Exch., 196, *S. C.*

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the feigned issue, and the proceedings thereon, will for the most part be here applicable. In framing the issue, care should be taken, that, by the form of the questions stated, admissions are not made that are not intended. Where a question between the execution-creditor and the assignees of a bankrupt was stated as being, "whether the aforesaid execution was valid against the said fiat;" it was held that the plaintiff could not dispute the bankruptcy (*s*). But where the question was, "whether the plaintiffs were entitled to the goods seized, as against and free from the defendant's execution, and whether they were liable to be seized as against the plaintiffs;" it was held, that the plaintiffs claiming as assignees, under the bankruptcy of a judgment-debtor, were bound to prove the trading petitioning creditor's debt, and the act of bankruptcy, although no notice had been given to dispute them (*t*). At the trial, neither party will be allowed to set up a *jus tertii* to the property in dispute (*u*).

Costs in general.

Costs, Poundage, &c.]—The costs, as will be seen from the 6th section of the act, are in the discretion of the Court or judge before whom the application is made (*v*). In general, no costs on matters arising out of interpleader motions are allowed until the termination of the proceedings (*x*). Where an interpleader summons under the 1 & 2 Vict. c. 45, has been heard by a judge at chambers, the Court has no jurisdiction as to costs (*y*). As to security for costs, *see ante*, 1218.

Costs between the claimant and creditor.

If the adverse claimant does not appear upon the rule or summons, it would seem the Court or judge have no power to order him to pay the costs attending the application (*z*). So, on the other hand, if the adverse claimant does appear on the sheriff's rule, and the judgment-creditor does not, the Court will not, according to some cases, order the latter to pay the adverse claimant's costs; for the judgment-creditor is not bound to appear when there are no goods liable to his execution (*a*). If the claimant refuses to try the issue or action directed to be tried between him and the execution-creditor, and abandons his claim, he will be liable to pay the latter's costs down to the time of the claim being abandoned, and of applying to take out of court the money, if any, paid in by the sheriff (*b*). So, he will be liable to them if he neglect to pay money into court in pursuance of an order for that purpose, and this, perhaps, without a previous application having been made to him (*c*). So, if the execution-creditor, instead of proceeding with the issue or action, abandon his claim to levy upon the goods, the claimant will be entitled to his costs in like manner (*d*). Generally, where the issue or action has

(*s*) *Linnet* v. *Chaffers*, 4 Q. B. 762.
(*t*) *Lott* (or *Scott*) v. *Melville*, 3 M. & G. 40.
(*u*) *Carne* v. *Brice*, 8 Dowl. 694; 7 M. & W. 183, *S. C.*
(*v*) See *Seaward* v. *Williams*, 1 Dowl. 528: *Long* v. *Williams*, 4 Ad. & E. 366: *Lewis* v. *Holding*, 3 Scott, N. R., 191; 2 M. & G. 876; 9 Dowl. 632, *S. C.*: *Kerr* v. *Edwards*, 8 Scott, 337; 8 Dowl. 29, *S. C.*
(*x*) *Hood* v. *Bradbury*, 6 M. & G. 981.
(*y*) *Burgh* v. *Schofield*, 2 Dowl., N. S., 961; 9 M. & W. 478, *S. C.*
(*z*) *Ante*, 1217.
(*a*) See *Glazier* v. *Cooke*, 5 Nev. & M. 680: *Swaine* v. *Spencer*, 9 Dowl. 347. But see *Bryant* v. *Ikay*, 1 Dowl. 428: *Berwick* v. *Thomas*, 5 Dowl. 458.
(*b*) *Wills* v. *Hopkins*, 3 Dowl. 346.
(*c*) *Scales* v. *Sargeson*, 3 Dowl. 707; 4 Dowl. 232.
(*d*) *Dobbs* v. *Humphries*, 1 Bing., N. S., 412; 3 Dowl. 377, *S. C.*

been tried, the costs of it, and of the application and subsequent proceedings, follow the event; and the unsuccessful party is liable for them, as of course (*e*), even though he be the assignee of a bankrupt (*f*), and this even though the issue or action have been ordered by a judge at chambers by consent (*g*). But, where it is eventually decided, that the claimant is entitled only to part of the goods, and that the execution is valid as to the residue, the Court will, it seems, apportion the costs between the parties. And where the plaintiff, under a *fi. fa.* against H., seized some horses, five of which were claimed by T., who, under an issue directed to try his right to the five, or any or either of them, established his right as to two only, it was held, that he was only entitled to the costs of the original application, of the application to have a portion of the money which had arisen from a sale of the horses, and which had been paid into court, paid out to him, and to such portion of the costs of the issue as he had necessarily incurred in the prosecution of his just claim; but that he was not entitled to the costs of the proceedings to obtain costs, inasmuch as his claim was too large, and that the execution-creditor was entitled to such costs of the issue, to be paid by T., as related to the three horses which were found not to have been his property; and it was ordered that the Master be at liberty to deduct one set of the said costs from the other, and to make one allocatur for the balance (*h*).

How obtained.

The party claiming the costs must, in order to obtain them, apply to the Court for a rule *nisi* for them, if the issue or action was directed by the Court, or to a judge at chambers for an order on a summons if the issue or action was directed by a judge (*i*). Before making any application to the Court for these costs, they should be demanded of the opposite party, otherwise the costs of the application would not be allowed, if it were resisted only on the ground of such costs (*j*). But the successful party is entitled to the costs of a rule for taking the money out of court, or for having the property in dispute delivered to him by the stakeholder, though he has not applied for the consent of the other party (*k*). The affidavit in support of an application to the court for costs, where the claimant relinquishes his claim, must be intitled in the names of the parties in the original cause (*l*). The application by a successful party for costs may be made before judgment actually signed; but the rule must be drawn up on condition of its being signed (*m*).

Sheriff's costs attending the application.

The sheriff will not, in general, be allowed his costs of

(*e*) *Bowen* v. *Bramridge*, 2 Dowl. 213: *Armitage* v. *Foster*, 1 H. & W. 208. And see *Staley* v. *Bedwell*, 2 P. & D. 309; 10 Ad. & E. 145, *S. C.*

(*f*) *Melville* v. *Smark*, 3 Scott, N. R., 337; 2 M. & G., 57, *S. C.*

(*g*) *Matthews* v. *Sims*, 4 Dowl. 234.

(*h*) *Lewis* v. *Holding*, 3 Scott, N. R., 191; 2 M. & G. 875: 9 Dowl. 652, *S. C.*; and see *ante*, 1217. But see *Staley* v. *Bedwell*, 2 P. & D. 309; 10 Ad. & E. 145, *S. C.*

(*i*) *Burgh* v. *Schofield*, 2 Dowl., N. S., 961: 9 M. & W. 478, *S. C.*

(*j*) *Bowen* v. *Bramridge*, 2 Dowl. 213. See *Scales* v. *Sargeson*, 3 Dowl. 707.

(*k*) *Meredith* v. *Rogers*, 7 Dowl. 598: *Barnes* v. *Bank of England*, 7 Dowl. 319.

(*l*) *Elliott* v. *Sparrow*, 1 H. & W. 370. And see *Levi* v. *Ayle*, 2 Dowl., N. S., 932.

(*m*) *Bland* v. *Delano*, 6 Dowl. 293.

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making and attending the application, for the relief and indemnity given to him by it is sufficiently beneficial (*n*); nor will he be allowed them, though the claimant does not appear (*o*). But, he might be allowed them, if the claimant does appear, if he could shew that his conduct was vexatious (*p*). Also, he will in general be allowed the costs of any application made to open the rule or order already made, where such second application is made by the claimant or execution-creditor, and the sheriff is no way in fault (*q*); but not so if the fresh application can be considered but as a prolongation of the original one (*r*).

Costs, when payable by the sheriff.

The court or judge, when they discharge the sheriff's rule or summons, frequently, upon doing so, order him to pay the costs (*s*); and they will invariably do so, if the sheriff do not appear to support it, or if he did not, before making the application, make some inquiries into the nature of the adverse claim (*t*); or has clearly unnecessarily brought a party before the Court or judge. And where the Court had ordered the sheriff to pay the rent, upon the landlord giving security, and also to pay his costs, it was holden, that the sheriff was liable to pay the expense of the security (*u*). If the sheriff has been ruled to return the writ, and an attachment obtained for not returning it, the court will only make the sheriff's rule absolute on payment by him of the costs of the attachment (*x*).

Sheriff's poundage, and expenses of execution, &c. Where the parties appear.

The sheriff's claim to poundage, fees, and expenses of the execution, depends in general upon the legality of the seizure; and if the parties appear, and an interpleader rule or order is made, he will be ordered to pay into court the proceeds of the goods, without allowing him to deduct such poundage, fees, &c., his claim for them being reserved for the future determination of the Court. His right to them will then depend upon the event of the issue, or action, ordered (*y*). If decided in favour of the execution-creditor, he will get them, otherwise not. If the parties come to an arrangement, and do not try the feigned issue or action ordered, still the sheriff will not be entitled to them, unless, perhaps, it could be shewn that the execution-creditor had realised his debt, or part of it, by such arrangement; in which case, perhaps, he would be ordered to pay poundage, &c., or some part of it, in proportion to the amount realised. And, it seems, he would be entitled, on such arrangement, to expenses incurred by him in respect

(*n*) See *per Curiam* in *Boucher* v. *Smith*, 1 Dowl. 418: *Field* v. *Cope*, 1 Dowl. 567; 2 C. & J. 480; 2 Tyr. 458, S. C.: *Morland* v. *Chitty*, 1 Dowl. 520: *Seaward* v. *Williams*, 1 Dowl. 598: *Bryant* v. *Ikay*, Id. 430: per *Parke*, B., in *Scales* v. *Sargeson*, 4 Dowl. 232.

(*o*) *Jones* v. *Lewis*, 8 M. & W. 264; 9 Dowl. 552, S. C.: *Thompson* (or *Crum*) v. *Sheldon*, 1 Scott, 697: *Lambert* v. *Cooper*, 5 Dowl. 547. And see *Philby* v. *Ikay*, 2 Dowl. 222: *Lewis* v. *Ikay*, Id. 338.

(*p*) *Cox* v. *Fenn*, 7 Dowl. 50.

(*q*) *Bryant* v. *Ikay*, 1 Dowl. 436.

(*r*) See *Tillard* v. *Cave*, 6 Bing., N. S., 251; 8 Scott, 511, S. C.

(*s*) See *Anderson* v. *Calloway*, 1 C. & M. 182; 1 Dowl. 636, S. C.; *Re Sheriff of Oxfordshire*, 6 Dowl. 136.

(*t*) *Bishop* v. *Hinxman*, 2 Dowl. 166.

(*u*) *Clarke* v. *Lord*, 2 Dowl. 227.

(*x*) *Almore* v. *Adeane*, 3 Dowl. 406.

(*y*) See *Barker* v. *Dynes*, 1 Dowl. 169; 2 C. & J. 480; 2 C. & M. 480; 2 Tyr. 458, S. C.: *Morland* v. *Chitty*, 1 Dowl. 520. In a case before 1 Vict. c. 45, giving a judge at chambers jurisdiction in adverse claims under an execution, the Court refused the sheriff his costs incurred by keeping possession in consequence of a party refusing to consent to a judge at chambers making an order in the case, no authority for that purpose being given by the act, and the party having a right to refuse such consent. (*Clarke* v. *Chetwode*, 4 Dowl. 635).

of keeping possession of the goods, or otherwise, *after* the interpleader rule or order was made; and these expenses must, it would seem, be paid by the party who gives up his claim to the goods or proceeds (*s*). Also, the sheriff will be allowed the costs of keeping possession, after making the application, where it is for the benefit of both parties, and not merely in furtherance of his duty (*a*). And in general, if the sheriff have kept possession, or sold the goods (*b*), or done any other act by order of the Court or judge, he will be allowed the costs of so doing (*c*). It may be here observed, that if cattle be taken in execution, the plaintiff is not, as of course, entitled to the costs of keeping them; and if he be ordered to deliver them up on payment of "possession money" only, he cannot make any charge, or detain them, for their keep (*d*). Where there had been great delay on the part of the sheriff in applying to the Court, in consequence of negotiations between the parties, and the execution-creditor afterwards abandoned his claim, the court ordered each party to pay his own costs (*e*). In general, however, the Court or judge may give effect to an interpleader rule or order, at any time (*f*). If neither the execution-creditor nor the claimant appears after service of the interpleader rule or summons, the Court or judge will order so much of the goods to be sold as will satisfy the sheriff's poundage and expenses, &c., and the rest to be abandoned (*g*).

Where parties do appear on the summons.

Execution for Costs.]—As to this, see *ante*, 1218.

Execution for costs.

Writ of Error.]—As to this, see *ante*, 1219.

Writ of error.

(*s*) See *Dabbs* v. *Humphries*, 3 Dowl. 377; 1 Hodges, 4; 1 Bing., N. S., 412; 1 Scott, 295, *S. C.*: *Scales* v. *Sargeson*, 4 Dowl. 231. And see *Armitage* v. *Foster*, 1 H. & W. 208.

(*a*) *Underdon* v. *Burgess*, 4 Dowl. 104.

(*b*) *Brown* v. *Dellane*, 6 Dowl. 293: *Dabbs* v. *Humphries*, *supra*.

(*c*) See the cases *supra*, and *West* v. *Rotherham*, 2 Bing., N. S., 527.

(*d*) *Gaskell* v. *Sefton*, 3 Dowl. & L. 267; 15 Law J., N. S., 107, Exch., *S. C.*

(*e*) *Dixon* v. *Enstell*, 2 Dowl. 631. And see Tidd, New Pract., 981.

(*f*) See per Pollock, C. B., in *Abbott* v. *Richards*, 3 Dowl. & L. 488.

(*g*) *Eveleigh* v. *Salisbury*, 3 Bing., N. S., 228; 5 Dowl. 369, *S. C.*

CHAPTER XI.

SECURITY FOR COSTS.

PART V.

In what cases.

In what Cases.]—It is entirely in the discretion of the court or judge, whether they will compel the plaintiff to give security for costs, and stay the proceedings in the mean time until it be given; and they may exercise such discretionary power at any time (*a*).

Where plaintiff resides abroad.

If the plaintiff, whether suing in an individual or in a representative (*b*) capacity, and whether for his own benefit or that of another (*c*), permanently reside abroad (*d*), or even in Ireland (*e*), or Scotland (*f*), or elsewhere out of the jurisdiction of the court, the court or a judge will stay the proceedings in the action until he give security for costs to the satisfaction of one of the Masters. And they will do so although the defendant has no defence on the merits (*g*). So, where a plaintiff in error resides abroad, he may be in like manner compelled to find security for costs; and, in default thereof, the defendant in error will be allowed to proceed on his judgment (*h*). Where there are several plaintiffs, however, if any one of them reside here, this security will not in general be ordered to be given (*i*), and this although that one be a bankrupt (*k*). But it would be so in an action by husband and wife for a personal injury to the wife, if the husband be resident abroad, although the wife be resident here (*l*). The absence abroad must be of a permanent kind; and where the absence is of a mere temporary kind, as in the case of a seaman, or a foreigner serving on board an English vessel (*m*), or on board a foreign vessel constantly sailing to and from this country (*n*), he will not be compelled to give this security (*o*). As to what is a temporary absence, it perhaps may be taken

Temporary absence not enough.

(*a*) *Fletcher* v. *Law*, 5 N. & M. 351; 1 Ad. & E. 651; 1 H. & W. 430, *S.C.*: *M'Culloch* v. *Robinson*, 2 New Rep. 353.

(*b*) *Chevalier* v. *Finnis*, 1 B. & B. 277; 3 Moore, 602, *S. C.*: *Chamberlain* v. *Chamberlain*, 1 Dowl. 366.

(*c*) *Youde* v. *Youde*, 3 Ad. & E. 311.

(*d*) *Pray* v. *Edie*, 1 T. R. 267: *Lloyd* v. *Davies*, 1 Tyr. 533; 1 Price, N. R. 11, *S. C.*: *Baker* v. *Hargreaves*, 6 T. R. 897: *De Marreffe* v. *Jackson*, 13 Price, 603.

(*e*) *Fitzgerald* v. *Whitmore*, 1 T. R. 362: *Limerick and Waterford Railway Company* v. *Fraser*, 1 Moo. & P. 23; 4 Bing. 304, *S. C.*: *Lewis* v. *Owens*, 5 B. & Ald. 265: *Maloney* v. *Smith*, M'Clel. & Y. 213.

(*f*) *Baxter* v. *Morgan*, 6 Taunt. 379. And see Id. 20: *Naylor* v. *Joseph*, 10 Moore, 522: *M'Clean* v. *Austin*, 1 Tidd, 9th ed., 579.

(*g*) *Edinburgh and Leith Railway Company* v. *Dawson*, 7 Dowl. 573.

(*h*) *Lewis* v. *Owens*, 5 B. & Ald. 265.

(*i*) *Orr* v. *Bowles*, 1 Hodges, 23, C. P.: *Anon.*, 7 Taunt. 307: *Anon.*, 2 C. & J. 88; 1 Dowl. 300, *S. C.*: *Doe Bawden* v. *Roe*, 1 Hodges, 315. But an Irish Company have been compelled to give security for costs, though many of the members resided in England. (*Limerick and Waterford Railway Company* v. *Fraser*, 4 Bing. 304).

(*k*) *M'Connell* v. *Johnstone*, 1 East, 421.

(*l*) *Hanmer* v. *Mangles*, 12 M. & W. 313; 1 Dowl. & L. 395, *S. C.*

(*m*) *Henshen* v. *Garvey*, 2 H. Bl. 383: *Ford* v. *Boucher*, 1 Hodges, 58.

(*n*) *Nelson* v. *Ogle*, 2 Taunt. 253.

(*o*) See *Kaulen* v. *Plane*, 1 Moo. & P. 30: *Jacobs* v. *Stevenson*, 1 B. & P. 96: *Anon.*, 2 Chit. 152: *Cole* v. *Beale*, 7 Moore, 613: *Taylor* v. *Fraser*, 2 Dowl. 622: *Beaustead* v. *Scott*, 2 Dowl. 622: *Frodsham* v. *Myers*, 4 Dowl. 280: *La Normana* v. *Prince of Capua*, 6 Jur. 64. A distinction has been made, where the absence is temporary, between a residence abroad when the action is commenced, and going abroad afterwards and while it is pending: in the

as a rule that it will not be such where the plaintiff would be absent beyond the time, when judgment could in the ordinary course of proceeding be obtained against him; there has not, however, been any decision to this effect (*p*). A foreigner in this country, though his permanent residence be abroad, yet if his visit here be more than of a merely temporary nature, will not be compelled to give this security (*q*). And where he was a foreigner, but was in the habit of residing four months in every year here, and was a man of property, the court refused to compel him to give it (*r*). Nor will this security be required to be given on the ground of plaintiff's absence abroad, when such absence is not voluntary, and the plaintiff is an Englishman; as in the case of naval and military officers, and other persons engaged abroad in the public service (*s*). Therefore they would not require it where the plaintiff was a commissioner of the Ionian Islands, filling his office out of this country (*t*); nor where the plaintiff was an English officer serving in South America (*u*); nor where he held the offices of port-captain and harbour-master in the island of Barbadoes (*x*), nor where he was a private in the East India Company's service in India (*y*). And in such cases, it does not matter that the plaintiff is a foreigner. If the plaintiff be domiciled abroad, it is no answer to the application to say, that he is at present in this country, and was so when the action was commenced, if his visit be but a temporary one (*z*). On the other hand, though the plaintiff be domiciled abroad, the application will not be granted on an affidavit that he intends to leave this country; the defendant must wait till he has left it (*a*). It is no answer to the application that the plaintiff is in the possession of money, or Exchequer bills, or other floating capital, in this country, sufficient to answer for the costs; but it seems it would be so if he be in possession of chattels real, or other property, of a fixed and permanent nature, unless, indeed, he be a foreigner (*b*). A peer, whose person is privileged from arrest (*c*), or a foreign ambassador, or his servant, will not be compelled to give security for costs (*d*); although ambassadors and their suites, by a fiction of the *jus gentium*, are considered as still resident in the state from which they have been sent, and are not amenable to process in the country in which they actually reside. In two recent cases,

Though plaintiff a foreigner.

Nor is an involuntary absence.

Residence at time of application.

Possession of property where an answer to application.

Peers, ambassadors, &c.

Foreign potentates.

former case, *Pattesson*, J., has considered that the plaintiff ought to find security, but not in the latter. See *Wells* v. *Barton*, 2 Dowl. 160. But this distinction is not recognised in the Common Pleas: see *Ford* v. *Boucher*, 1 Hodg. 59.

(*p*) An absence of eighteen months would not, perhaps, be temporary: see *Foss* v. *Wagner*, 2 Dowl. 499.

(*q*) *Perrier* v. *Castor*, 1 H. Bla. 106: *Anon.*, 8 Taunt. 737: *Ciragno* v. *Hassan*, 6 Id. 20: *Anon.*, 3 Moore, 78: *Dowling* v. *Harman*, 6 M. & W. 131; 8 Dowl. 165.

(*r*) *Durrell* v. *Matthesson*, 8 Taunt. 711.

(*s*) *Willis* v. *Garbutt*, 1 Y. & J. 511: *Durrell* v. *Matthesson*, 8 Taunt. 711: *Ciragno* v. *Hassan*, 6 Id. 20: *Dowling* v. *Harman*, 6 M. & W. 131; 8 Dowl. 165. See, however, *Olive* v. *Johnson*, *infra*.

(*t*) *Lord Nugent* v. *Harcourt*, 2 Dowl. 578.

(*u*) *O'Lawler* v. *Macdonald*, 3 Moore, 77; 8 Taunt. 736, *S. C.*

(*x*) *Evering* v. *Chiffenden*, 7 Dowl. 536.

(*y*) *Garwood* v. *Bradburn*, 9 Dowl. 1031.

(*z*) *Olive* v. *Johnson*, 5 B. & Ald. 906; 1 D. & R. 560, *S. C.*: *Naylor* v. *Joseph*, 10 Moore, 522: *Anon.*, 2 Chit. Rep. 152: *Anon.*, 8 Taunt. 737. And see *Gurney* v. *Kay*, 3 Dowl. 559: *Dowling* v. *Harman*, 8 Dowl. 165; 6 M. & W. 131, *S. C.*: *St. Leger* v. *Di Nuovo*, 2 Scott, N. R., 587.

(*a*) *Ciragno* v. *Hassan*, 6 Taunt. 20: *Willing* v. *Garbutt*, 1 Y. & J. 511.

(*b*) See *Limerick Railway Company* v. *Fraser*, 4 Bing. 394: *Edinburgh Railway Company* v. *Dawson*, 7 Dowl. 573.

(*c*) *Ferrars* (*Earl*) v. *Robins*, 2 Dowl. 636. And see *Lord Nugent* v. *Harcourt*, 2 Dowl. 578. But see *Lord Aldborough* v. *Burton*, 9 Leg. Obs. 171, 26th July, 1834, before the Master of the Rolls.

(*d*) *Duke de Montellano* v. *Christin*, 5 M. & Sel. 503.

PART V.

foreign potentates have been compelled to give such security, in causes arising out of commercial transactions (*e*); and, in general, the rank of the plaintiff will afford no answer to the application. Where the defendant has possessed himself of all the plaintiff's property, so as to divest him of all power to give security for costs, the Court will not require it (*f*).

Plaintiff's poverty by defendant's acts.

Where defendant resides abroad.

Where the defendant is *quasi* a plaintiff, as in replevin, and he resides abroad, he may be compelled to find security for costs (*g*). So, in ejectment, where the party, being abroad, seeks to come in and defend as landlord (*h*); and so, perhaps, in a feigned issue under the Interpleader Act (*i*). But, in other actions, the defendant will not be compelled to give such security; and where both plaintiff and defendant were residing abroad, the Court compelled the former to give security, but not the latter (*j*).

Where plaintiff a bankrupt, insolvent, or pauper.

The plaintiff will not be compelled to give security for costs merely because he is a pauper, or bankrupt, or insolvent, and this even in a *qui tam* action (*k*). Nor will such security be compelled, though he become bankrupt or take the benefit of the Insolvent Act after action brought; and though his assignees be entitled to the subject-matter of the action, if they decline the benefit of the action (*l*); and the onus of shewing that they claim the benefit of it lies, it seems, on the defendant (*m*), though this is not free from doubt (*n*). The defendant's course in such a case, where the assignees do not make such claim, is to plead the plaintiff's bankruptcy or insolvency (*o*). Clearly the security will not be compelled where the bankrupt or insolvent is suing on his own behalf, for his own benefit, as for a cause of action which did not vest in his assignees (*p*), or, for after-acquired property (*q*); or where the action is to try the validity of the fiat against him (*r*), or the like (*s*). But if the plaintiff become bankrupt (*t*), or take the

Where he sues

(*e*) *The Emperor of Brazil* v. *Robinson*, 5 Dowl. 522; 1 Nev. & P. 817, *S. C.*; *Otho, King of Greece*, v. *Wright*, 6 Dowl. 12.

(*f*) *M'Cullock* v. *Robinson*, 2 New Rep. 382. And see *Roper* v. *Phillips*, 3 M. & R. 84; *Bristowe* v. *Needham*, 2 Dowl. 656.

(*g*) *Selby* v. *Crutchley*, 1 B. & B. 505; 4 Moore, 260, *S. C.* In *Hiskett* v. *Biddle*, 1 Hodges, 119; 3 Dowl. 634, *S. C.*; the Court refused to compel the defendant in replevin to give security for costs, on the ground of his poverty.

(*h*) *Doe* v. *Jameson*, 4 M. & R. 870.

(*i*) See *Bonascek* v. *Bassett*, 1 Com. B. 310.

(*j*) *Baxter* v. *Morgan*, 6 Taunt. 379. And see *Ford* v. *Stock*, 1 Dowl., N. S., 763, where defendant gave notice of trial by proviso.

(*k*) *Rose* v. *Jaques*, 3 M. & W. 135: *Armitage* v. *Grafton*, 10 Jur. 377, B. C.: *Mylet* v. *Hawkins*, 5 Dowl. 647: *Golding* v. *Barlow*, Cowp. 24: *Field* v. *Carron*, 2 H. Bl. 27: *Gregory* v. *Elgin*, 2 C. & M. 336; 4 Tyr. 235; 2 Dowl. 259, *S. C.*; in which latter case the plaintiff had brought nearly 100 actions against publicans for penalties under the 25 Geo. 2, c. 16.

(*l*) See *Snow* v. *Townsend*, 6 Taunt. 123: *Beckham* v. *Knight*, 6 Dowl. 227; 4 Bing., N. S., 74, *S. C.*: *Doe* v. *Blick*, 5 Scott, 714: *Webb* v. *Ward*, 7 T. R. 296: *Mason* v. *Polhill*, 2 Dowl. 61; 1 C. & M. 690; 3 Tyr. 505, *S. C.*

(*m*) *Reynolds* v. *Holden*, Q.B., Bail Court, M. T. 1837, 1 Jurist, 945; where *Coleridge*, J., refused to compel the assignees to give security for costs where the defendant had not applied to them before the motion, to know whether or not they intended to continue the action or repudiate it. And see *Wilkinshaw* v. *Marshall*, 4 Tyr. 993.

(*n*) See *Denton* v. *Williams*, 6 Dowl. 123: *Taylor* v. *Montague*, 2 M. & W. 315; and see *Doyle* v. *Anderson*, 2 Dowl. 596; where no assignee had been appointed.

(*o*) See *Beckham* v. *Knight*, 6 Dowl. 227; 4 Bing., N. S., 74, *S. C.*

(*p*) *Andrews* v. *Morris*, 7 Dowl. 712.

(*q*) *Cohen* v. *Ball*, 1 Tidd, 9th ed., 560.

(*r*) *M'Cullock* v. *Robinson*, 2 N. R. 382. See *Kennett* v. *Duff*, 2 Smith, 523: *Roper* v. *Phillips*, 3 M. & R. 84.

(*s*) *Wray* v. *Brown*, 6 Bing., N. S., 271; 8 Scott, 557, *S. C.*; *M'Connell* v. *Johnstone*, 1 East, 431: *Minchin* v. *Hart*, 1 Chit. Rep. 215: *M'Cullock* v. *Robinson*, 2 New Rep. 382: *Anon.*, 2 Taunt. 61: *Chaperchy* v. *Calmer*, 2 C. & J. 631: *Beckam* v. *Knight*, 4 Bing., N. S., 74.

(*t*) *Webb* v. *Ward*, 7 T. R. 296: *Mason* v. *Polhill*, 1 C. & M. 690. In *Doyle* v. *Anderson*, 2 Dowl. 596, the Court ordered the security, though the assignees were

for benefit of his assignees.

benefit of the Insolvent Act (*u*), after action brought, and the cause of action vests in his assignees, and they, or the bankrupt for them, continue the action for the benefit of the estate, the Court will compel him to give security for costs; the defendant undertaking not to plead the bankruptcy or insolvency as a defence (*x*). If the plaintiff sue *in formâ pauperis*, in such a case he should be dispaupered before the defendant makes the application for security (*y*). So, the Court or judge will require security for costs to be given by a plaintiff in insolvent circumstances, who sues not for his own benefit, but for that of creditors, to whom he has assigned his property in trust for the benefit of the body of his creditors (*z*). But not so in a case where he has merely assigned the debt sought to be recovered, or part of his property, and the action is for the benefit of the assignees (*a*). It may, perhaps, be taken as a general rule, that where another person is, in fact, proceeding with an action in the name of the party on the record, and that party is in a state of pauperism and insolvency, the Court will, by staying the proceedings, compel him, for whose benefit the action is proceeding, to come in and give security for costs (*b*). And the same if the action be brought at the instigation of a third party to try a right in which such third party is interested (*c*). If an action brought by a tenant is really and substantially the action of the landlord, the Court will order the latter to give security for costs (*d*). Where trespass was brought against parish officers for a distress for poor's rates, the court stayed proceedings in the cause until security for costs was given by the landlord of the plaintiff, who was also his attorney, and who had instigated him to refuse payment of the rates (*e*). But in a subsequent case a somewhat similar motion was refused; it not being clearly made out by the affidavits that the action was the action of the third party, and not that of the plaintiff on the record (*f*). In trespass for mesne profits in the name of John Doe, security for costs will be ordered (*g*). It may here be added, that, except in ejectment, or where he is an officer of the court, the only mode of compelling a stranger to the record to pay costs is by an application to the Court to *stay proceedings* until security for costs be given; for the Court will not, except in those cases, order a stranger to the record to pay the costs of an action, although he be substantially a party to it (*h*).

Where plaintiff sues for benefit, or at instigation, of third parties.

not appointed. But see *Snow* v. *Townsend*, 6 Taunt. 123.

(*u*) *Hesford* v. *M'Knight*, 4 D. & R. 81; 2 B. & C. 579, *S. C.* And see *Clapcarthy* v. *Collier*, 2 C. & J. 631.

(*x*) *Manley* v. *Mayne*, 3 M. & R. 361: *Alexander* v. *Townley*, 5 Scott, N. R., 483: 4 M. & G. 772, *S. C.* Where such an undertaking was not given, and defendant pleaded the bankruptcy, the Court refused to set aside the plea, but rescinded the rule for the security. (*Minchin* v. *Hart*, 1 Chit. Rep. 215).

(*y*) *Mylett* v. *Hacker*, 5 Dowl. 647.

(*z*) *Perkins* v. *Adcock*, 15 Law J., N. S., 7, Exch.: *Hearsay* v. *Pechell*, 7 Dowl. 437.

(*a*) *Morgan* v. *Bowne*, 7 Moore, 344: *Day* v. *Smith*, 1 Dowl. 460: *Wray* v. *Brown*, 8 Scott, 557; 6 Bing. N. C. 271. 8 Dowl. 279, *S. C.*

(*b*) Per *Coleridge*, J., in *Ambrose* v. *Morris*, 7 Dowl. 719: *Elliott* v. *Kendrick*, 12 Ad. & E. 597; 9 Dowl. 195; 4 P. & D. 306, *S. C.* See *Solomon* v. *Lesk*, 9 Dowl. 361.

(*c*) See per *Tindal*, C. J., in *Hearsay* v. *Pechell*, 7 Dowl. 437; 7 Scott, 477. And see *Tenant* v. *Brown*, 5 B. & C. 206.

(*d*) *Ball* v. *Ross*, 1 Scott, N. R., 217; 1 M. & G. 445, *S. C.*

(*e*) *Tenant* v. *Brown*, 5 B. & C. 206.

(*f*) *Hearsay* v. *Pechell*, 7 Dowl. 437; 5 Bing., N. C., 466, *S. C.*

(*g*) *Pike* v. *Carbin*, Say. 78.

(*h*) *Hayward* v. *Gifford*, 6 Dowl. 699. And see *ante*, 956.

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Lunacy or infancy of plaintiff.

Lunacy of the plaintiff is no ground for requiring security for costs (*i*). As to security for costs in an action by an infant, *see ante*, 1090.

Conviction of plaintiff for felony, &c.

Where a plaintiff was convicted of felony, and under sentence of transportation, after issue joined; and the attorney continued the action, he was ordered to give security for costs (*k*). And where, after arresting the defendant, the plaintiff absconded to avoid a charge of bigamy, he was ordered to give this security (*l*).

Claimant under interpleader rule.

A claimant, who is substituted for the defendant under an interpleader rule, is entitled to call upon a plaintiff, resident abroad, for security for costs (*m*).

Issue out of Chancery.

Where the action is brought by order of the Court of Chancery, the Court in which it is brought will not, it seems, in any case, entertain an application for security for costs, but the defendant should apply to the Court of Chancery (*n*).

In ejectment.

As to security for costs in an ejectment, see *ante*, 946, 943.

Application for, when to be made.

Application for, when to be made, and how, and subsequent Proceedings.]—It cannot be made until the defendant has appeared (*o*), unless in the case of several defendants, and then one may make it after he has appeared, though the rest have not so (*p*). In all cases, the defendant must make the application promptly, after he knows of the plaintiff being abroad, or of the other grounds upon which the application is founded; and before the rule of *H. T.*, 2 *W.* 4, *r.* 98, if he took any step in the action with such knowledge, as obtaining an order for time to plead, or pleading, or the like, the Court always dismissed the application (*q*). But now, by that rule, "an application to compel the plaintiff to give security for costs must, in ordinary cases, be made before issue joined:" and, since this rule, promptness is defined to mean "*before issue joined*" (*r*); and the defendant does not in general waive his right to have the security by taking any step in the cause, as by obtaining an order for time to plead, or pleading or the like, with knowledge of the ground for it, provided he apply before issue joined (*s*). And he may apply even after an undertaking, before issue joined, to take short notice of trial generally, or such notice as the plaintiff can give, or notice for a specific day (*t*), but not so if such undertaking was given after issue joined (*u*). And, generally, if the defendant make the application after issue joined, he must do so promptly, and within a reasonable time, after being first apprised of the ground for making

(*i*) *Steel* v. *Allen*, 2 B. & P. 437.
(*k*) *Harvey* v. *Jacob*, 1 B. & Ald. 159.
(*l*) *Rogers* v. *Bangor*, 4 Dowl. 411. But see *Lloyd* v. *Davis*, 1 Tyr. 533.
(*m*) *Benazech* v. *Bennett*, 1 C. B. 313.
(*n*) See *Otto* v. *Johnson*, 5 B. & Ald. 908.
(*o*) *De la Pruvre* v. *Duc de Biron*, 4 T. R. 697.
(*p*) See *Carr* v. *Shaw*, 4 T. R. 496.
(*q*) *Duncan* v. *Stint*, 5 B. & Ald. 702; 1 D. & R. 348, *S. C.*; *Brown* v. *Wright*, 1 Dowl. 95: *Wainwright* v. *Bland*, 2 C., M., & R. 740; 1 Gale, 333; 1 T. & G. 37, *S. C.*
(*r*) *West* v. *Cook*, 1 Com. B. 313: per *Tindal*, C. J.
(*s*) See *Fletcher* v. *Lee*, 5 Nev. & M. 361; 3 Ad. & E. 551; 1 H. & W. 430, *S. C.*; *Fry* v. *Wills*, 3 Dowl. 6: *Edinburgh Railway Company* v. *Dawson*, 7 Dowl. 573: *Dowling* v. *Harman*, 6 M. & W. 131; 8 Dowl. 165, *S. C.*; *Otto* v. *Wright*, 6 Dowl. 12.
(*t*) *Edinburgh and Leith Railway Company* v. *Dawson*, 7 Dowl. 573: *Dowling* v. *Harman*, *supra*; *West* v. *Cook*, 1 C. B. 312; 2 Dowl. & L. 834, *S. C.*
(*u*) *De Montaliano* v. *Garcias*, 1 Bing. 67, per *Puttesson*, J.: *Edinburgh and Leith Railway Company* v. *Dawson*, 7 Dowl. 573: *Muller* v. *Garmon*, 3 Taunt. 273: *Steel* v. *Lacy*, Id. (*n*).

it; and, if he delays making it in a reasonable time, the application will be dismissed (*x*). Where all the costs, as far as a demurrer was concerned, had been incurred, and the plaintiff then went to reside abroad, the Court thought the justice of the case would be met by letting the demurrer be argued, and, if judgment were given for the plaintiff, staying the proceedings until security was given for costs (*y*).

The application may be made to the Court or a judge; usually it is made to the latter, except in term time, and then, unless the case be an ordinary one, it is made to the Court. The rule *nisi*, if to be with a stay of proceedings, will not be granted on the last day of the term. In the Common Pleas (*z*) and Exchequer (*a*), if the rule be intended to stay the plaintiff's proceedings, as it usually is, a previous notice of the motion must be given; and, in the Exchequer, it is, it seems, a two days' notice (*b*); but this notice is not required by the Queen's Bench (*c*). In the Queen's Bench (*d*) and Exchequer (*e*), in order to have the rule *nisi* drawn up with a stay of proceedings, a previous demand (*f*) should be made of the plaintiff, or his attorney or agent, for the security, a reasonable time before moving. But this would be the only consequence in these courts of not making such demand, viz. that the proceedings might go on pending the rule (*g*). In the Common Pleas, such demand must, it seems, be made, and a refusal, or that which is equivalent to it, obtained, before making the motion, or the rule would be refused, unless the defendant would take it without a stay of proceedings, and simply as a rule requiring security for costs (*h*). A notice of motion would not be equivalent to such demand (*i*). In general it is best in all cases, if there be time, to make this demand before applying to the Court or a judge for the security. If the defendant grounds the application upon the fact of the plaintiff being resident abroad, and he cannot otherwise ascertain the fact, so as to make a positive affidavit of it, his course is to take out a summons, and obtain an order to be furnished with the plaintiff's residence, as pointed out in *Vol.* 1, 78, 79.

The affidavit in support of the application need not state in what stage the proceedings are: if the application be too late, it is for the plaintiff to shew it in the affidavit, in shewing cause (*k*). It seems that an affidavit, stating that the plaintiff resides out of the jurisdiction of the court, as the deponent is

The application.

Notice of motion.

Demand of security.

Application for plaintiff's residence.

Affidavit in support of.

(*x*) *Anon.*, 2 Chit. Rep. 151. See *Young* v. *Rishworth*, 8 Ad. & E. 479, n.: *Doe* v. *Broad*, 1 Dowl., N. S., 857: *Wainwright* v. *Bland*, 2 C., M., & R., 740; 4 Dowl. 547, *S. C.*

(*y*) *Kemble* v. *Mills*, 1 Scott, N. R., 402; 1 M. & G. 565, *S. C.*

(*z*) See *Ralfe* v. *Brown*, 1 Hodges, 27.

(*a*) See *Hannah* v. *Wyman*, 3 Dowl. 675.

(*b*) Id. See form, Chit. Forms, 583.

(*c*) *Stratton* v. *Ragan*, 2 Dowl. 563.

(*d*) *Baillie* v. *De Bernales*, 1 B. & Ald. 331: *Hancock* v. *Smith*, 2 Chit. 150.

(*e*) *Jones* v. *Jones*, 2 C. & J. 207; 1 Dowl. 313, *S. C.*: *Fountain* v. *Steele*, 5 Dowl. 331, Exch.

(*f*) *Huntley* v. *Bulwer*, 6 Dowl. 633; 6 Scott, 947, *S. C.* And see form, Chit. Forms, 582.

(*g*) See *King of Greece* v. *Wright*, 6 Dowl. 12: *Fountain* v. *Steele*, *supra*. Before which cases, without such demand, plaintiff was held entitled to the costs of the application: see *Fletcher* v. *Lew*, 3 Ad. & E. 561, *supra*: *Baillie* v. *De Bernales*, 1 B. & A. 331.

(*h*) See *Adams* v. *Brown*, 1 Dowl. 273: *Huntley* v. *Bulwer*, 6 Dowl. 633; 6 Scott, 947, *S. C.* Formerly, a demand and refusal before moving was necessary in all cases. See *Buse* v. *Clive*, 3 M. & Selw. 283.

(*i*) *Huntley* v. *Bulwer*, *supra*.

(*k*) *Cole* v. *Beardy*, 5 Dowl. 161: *Jones* v. *Jones*, 10 Law J., 77; 2 C. & J. 207, *S. C.* See the former case of *Lanzalotti* v. *Powell*, 1 Marsh. 376, *contra*.

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informed and believes, is insufficient (*l*). A statement, that the plaintiff is residing abroad, is *primâ facie* a sufficient statement that he is not abroad for a mere temporary purpose (*m*). The affidavit need not swear to merits (*n*).

Time for giving, and consequence of not giving it.

The Court will not appoint any fixed time within which the security for costs shall be given by the plaintiff (*o*); nor will they allow the defendant to sign a judgment of *non pros*, if not given within a fixed time (*p*). The rule (with the exception where it is obtained against a plaintiff in error (*q*)), does no more than stay the proceedings until the security be given; and if the defendant determines on having the action proceeded with, he must force plaintiff on in the usual way, and thereby abandon the security. The plaintiff, if he wishes to proceed, should give the required security. If the parties cannot agree upon the form or sufficiency of the security, the plaintiff should procure an appointment from one of the masters, and serve a copy of it on the defendant's attorney or

Amount and sufficiency of.

agent one day before the day appointed. The amount and sufficiency of the security is to be decided by the Master, and the Court will not interfere with his decision unless a case of manifest and gross error be made out (*r*). It has been held, that the security must be given for retrospective, as well as prospective costs (*s*); but, in a later case, *Patteson*, J., denied this (*t*). Where the assignee of a debt brought an action in the name of the assignor, who was resident abroad, it was considered that the assignee's written undertaking for securing the costs was not sufficient (*u*). The security should be a bond or instrument under seal (*x*).

Fresh security.

If, after the security is given, one or both of the sureties become bankrupt or insolvent, that will afford no ground for the opposite party insisting on fresh security (*y*).

Discharge of security.

Where the plaintiff had an unsatisfied judgment against the defendant for a large sum, the Court discharged a rule for security for costs, upon the plaintiff undertaking that the costs in the event of the defendant obtaining a verdict should be set off against the former judgment (*z*). It seems doubtful whether, if a plaintiff return to England after he has been compelled to give security for costs on account of his residence abroad, the Court will order the security to be cancelled; at all events, they will not do so, unless the plaintiff himself swear that he intends to reside in this country (*a*).

Time for pleading after security given.

As to the time for pleading after the security is given, and when judgment may be signed for want of a plea, see *ante*, *Vol.* 1, 211.

(*l*) *Joynes* v. *Collinson*, 2 Dowl. & L. 449: *Sandess* v. *Hohler*, 6 Dowl. 274, *sed quære*: and see *Dowling* v. *Harman*, 6 M. & W. 131, per *Alderson*, B. See form of affidavit, Chit. Forms, 582.

(*m*) *Hammer* v. *Mangles*, 12 M. & W. 313.

(*n*) *Ante*, 1230.

(*o*) *Broughton* v. *Jeremy*, 1 H. & W. 525.

(*p*) *Kelly* v. *Brown*, 5 Dowl. 264.

(*q*) *Lewis* v. *Owens*, 1 B. & Ald. 265.

(*r*) *French* v. *Maule*, 4 Scott, N. R., 719; 4 M. & G. 107, S. C. See *Kent* v. *Poole*, 7 Dowl. 572.

(*s*) *Harvey* v. *Jacob*, 1 B. & Ald. 150: *Mason* v. *Polhill*, 2 Dowl. 61.

(*t*) *Oxenden* v. *Cooper*, 4 Dowl. 574. But *Harvey* v. *Jacob* was not cited.

(*u*) *Youde* v. *Youde*, 3 Ad. & E. 311.

(*x*) See form, Chit. Forms, 583.

(*y*) *Jones* v. *Jacobs*, 2 Dowl. 61.

(*z*) *Bristowe* v. *Needham*, 5 Scott, N. R., 799; 2 Dowl., N. S., 658; 4 M. & G. 966, S. C.

(*a*) See *Bednall* v. *Haley*, 7 Dowl. 19; 4 M. & W. 535: *Thrasor* v. *Rusk*, 2 Dowl., N. S., 51.

CHAPTER XII.

OYER OF DEEDS, &c.

What, and in what Cases.]—In all cases where a deed, &c., is pleaded with a *profert*, and such profert is necessary (*a*), the opposite party may have oyer of it, and may then set it forth in his plea, or other pleading, if he will. Oyer may be had on profert made, although the party making it might have alleged an excuse for not doing so (*b*), and in that case the party making the profert will have to amend by stating the excuse (*c*). Unless there has been a *profert*, however, oyer cannot be prayed; and therefore, if a deed be pleaded without *profert*, or a proper excuse for the want of it (*d*), the other party may demur specially (*e*) for the want of it, and should do so if it be essential to his plea, &c., that the deed should be set forth. Oyer is generally craved, where it is essentially necessary that the deed, &c., pleaded should be set forth, before the party craving oyer can plead. It is usually craved of bonds and other specialties, letters of administration (*f*), and letters testamentary (*g*). It cannot be craved of a deed operating under the Statute of Uses (*h*), nor of a feoffment (*i*), nor of private acts of Parliament (*k*), nor of letters patent enrolled in Chancery, though pleaded with a profert, nor of a record (*l*). If, however, a record of the same court be pleaded, we have seen, (*ante*, 838) that the opposite party may demand a note in writing of the term and number of the roll on which such matter of record is entered or filed, or the plea will not be received. It cannot be craved of mesne process (*m*). It may be added that the Court cannot dispense with or modify the right to oyer (*n*).

What, and in what cases.

The term "oyer" does not, it would seem, import *inspection* of the deed; consequently, in cases where the party is desirous of such inspection, and entitled to it, he must take out a summons, or apply to the Court to obtain it, as mentioned in the next chapter. In one case in debt on bond with a *profert*, the Court refused to make a rule on the plaintiff to allow an

Oyer does not include inspection.

(*a*) *Morris's case*, 2 Salk. 497; 2 Ld. Raym. 969, *S.C.*; Steph. Pl. 69; 1 Saund., 6th ed., 9 b. But see *Cook* v. *Remington*, 6 Mod. 237. It seems that the demand of oyer is a kind of plea. (*Anon.*, 3 Salk. 119). As to when a profert is necessary, see the case of *Bain* v. *Cooper*, 8 M. & W. 752, and cases there collected; and 1 Saund., 6th ed., 8 b.

(*b*) *Foresby* (or *Thorsby*) v. *Sparrow*, 2 Str. 1186; 1 Wils. 16, *S. C.*; *Totty* v. *Nesbitt*, 3 T. R. 153.

(*c*) *Totty* v. *Nesbitt*, *supra*.

(*d*) As to what is a sufficient excuse, see *Wymark's case*, 5 Coke, 75 b: *Wallis* v. *Harrison*, 4 M. & W. 539; 1 Saund. 9 a.

(*e*) He cannot demur generally: 4 Anne, c. 16, s. 1.

(*f*) *Gerrard* v. *Early*, 2 Wils. 413.

(*g*) *Daly* v. *Mahon*, 4 Bing., N. S., 235; 3 Scott, 299, *S. C.*

(*h*) *Denman* v. *Bull*, 9 Moore, 563; 3 Bing. 499, *S. C.* See *R.* v. *Jones*, 1 Jones, Rep. Exch. Ir. 635; 1 Saund., 6th ed., 9. n.

(*i*) See *Read* v. *Brockman*, 3 T. R. 151.

(*k*) *Jeffery* v. *White*, 2 Doug. 477.

(*l*) *Rex* v. *Amery*, 1 T. R. 149.

(*m*) *Anon.*, Tidd. 126. It cannot be craved of an original writ. (R. T., 19 G. 3: *Boats* v. *Edwards*, 1 Doug. 227).

(*n*) *Archbishop of Canterbury* v. *Tubb*, 3 Bing., N. C., 789; 5 Dowl. 627, *S. C.*

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inspection of it, on the ground that defendant suspected it to be forged (*o*); but they granted it in another (*p*).

Defendant not bound to plead without it.

The party craving oyer is not bound to plead without it in cases where it is properly demandable (*q*).

Demand of, when not demandable.

If it be craved where it is not demandable, the other party may treat the demand of oyer as a nullity, and sign judgment when the time for pleading has expired; but if, instead of doing so, he grant the oyer, the party who craved it may consider and treat the whole instrument as part of the other's plea (*r*).

At what time demandable.

At what Time demandable.]—Before the introduction of the new practice, since the Uniformity of Process Act, oyer could not be demanded after the term in or of which the deed, &c., was pleaded (*s*), but it is conceived that this rule is now inapplicable. It cannot be demanded after a plea in abatement (*t*); but it may be before the time for pleading, or the time limited by a judge's order for pleading, has expired (*u*); unless the order expressly except the right to demand oyer (*x*); and the right is not waived by pleading, unless the plea be to the deed or other instrument. If made afterwards, it may be treated as a nullity (*y*). Under circumstances, the Court have granted oyer, though sought for after the usual time allowed for it; and on an amendment it is frequently ordered that the defendant may have oyer of the instrument.

Demand, how made.

Demand, how made.]—Oyer, though upon the pleadings it seems, and is supposed to be, granted by the Court, is in fact demanded and granted by the attornies (*z*). *The demand is made by a note in writing, correctly intitled in the court and cause* (*a*), *and signed and directed as notices, &c., usually are. It should be served upon the opposite attorney or agent* (*b*). If a copy of the instrument is wanted as well as oyer, the demand should be of oyer and copy. If the instrument consists of two distinct and complete parts, as a bond with a condition, the oyer should be craved of both (*c*), but it is sufficient to crave oyer of one only, if no use is sought to be made of the other (*d*).

When granted.

When, and how granted.]—The demand of oyer, when pro-

(*o*) *Chetwind* v. *Marnell*, 1 B. & P. 271.

(*p*) *Anon.*, cited 8 Moore, 588.

(*q*) *Sorsby* v. *Sparrow*, 2 Str. 1186; 1 Wils. 16, *S. C.*: *Daley* v. *Mahon*, 6 Dowl. 395; 4 Bing. N. C. 335, *S. C.* See *Archbishop of Canterbury* v. *Tubb*, 3 Bing. N. C. 789; 5 Dowl. 699, *S. C.*

(*r*) *Jeffery* v. *White*, 2 Doug. 476: *Longuill* v. *Hundred of Isleworth*, 6 Mod. 27: *Cook* (*Lady*) v. *Remington*, Id. 237; 1 Saund. 317, n. (9). See 3 T. R. 153, n.

(*s*) *Roberts* v. *Arthur*, 2 Salk. 497; 5 Com. Dig. 132, 133: *Mayor of London* v. *Gorrey*, 2 Lev. 142. See the reason in *Wymark's case*, 5 Co. 74. b.

(*t*) *Longuill* v. *Hundred of Isleworth*, 6 Mod. 28; 2 Salk. 498, *S. C.*

(*u*) *Goodricke* v. *Turley*, 4 Dowl. 431; 2 C., M., & R. 694; 1 T. & Gr. 149, *S. C.*: *Rex* v. *Amery*, 1 T. R. 150: *Gerrard* v. *Early*, 2 Wils. 413: *Duke of Leeds* v. *Vevers*, Barnes, 268: *Farrance* v. *Brignall*, Id. 241: *Barber* v. *Satchwell*, Id. 326: *Hartley* v. *Varley*, Id. 329; Tidd, 9th ed., 566; Selkon, 200.

(*x*) *Goodricke* v. *Turley*, *supra*.

(*y*) *Barber* v. *Satchwell*, Barnes, 326. And see *Sparkes* v. *Simpson*, 2 B. & P. 379.

(*z*) *Anon.*, 3 Salk. 119: *Longuill* v. *The Hundred of Isleworth*, 6 Mod. 28; 2 Salk. 498, *S. C.*

(*a*) *Poole* v. *Coates*, 3 Scott, 768.

(*b*) Tidd, 9th ed. 637. See form of demand, Chit. Forms, 585.

(*c*) *Cooke* v. *Remington*, 6 Mod. 237.

(*d*) Lib. Pl. 209, pl. 220.

perly made, stays all proceedings of the party bound to grant oyer till he has granted it. The plaintiff is not bound to grant oyer within any limited time after it has been demanded (*e*). But it is generally his interest to grant it without delay; for the defendant is entitled to as many pleading days after the oyer has been given, as he had yet unexpired at the time of demanding it. But, if the plaintiff demand oyer, the defendant must grant it within two days exclusive of that on which it is demanded, Sunday, or any other holiday, not being reckoned if it be the last of the two (*g*), otherwise the plaintiff may sign judgment as for want of a plea (*h*).

How granted.

The demand of over, in the days of oral pleading, was complied with by reading the instrument aloud in open court, and which was generally done by the clerk of the court when the oyer was of a record of the court, or by the pleader when the oyer was of a deed or other instrument not such record. *The demand is now complied with by exhibiting, and, if required,* (*as is usually the case*), *by making out a copy of the instrument,* (*including the attestation and names of the witnesses by whom it was attested* (*i*)), *and taking and delivering it to the opposite attorney or agent* (*k*), *who must pay for it at the rate of 4d. per sheet* (*l*).

In general.

As already observed, (*ante*, 1237), the term *oyer* does not import *inspection*. As the instrument of which oyer is given is supposed to be *read*, it seems unnecessary to make out a copy of a *plan* annexed to it (*m*). An indorsement made on a deed at the time of its execution being part of the deed, there can be no complete oyer of the deed without that indorsement (*n*); but this is otherwise in the case of an indorsement made after the execution, and this although it may alter the effect of the deed (*o*). Where the plaintiff is an executor, and oyer is craved of the letters testamentary, of which profert is made, the will, as well as the letters testamentary, must be set out (*p*). Where, in an action on an administration bond by a creditor of the deceased in the name of the archbishop, the defendant craved over of the bond of which profert was made, but the archbishop's officer, who had the custody of the bond, refused to attend at the office of the defendant's attorney with it, for the purpose of oyer: it was held, that, furnishing an office copy of the bond to the defendant's attorney, or producing it to him at the registrar's office in Doctors' Commons, was not sufficient oyer, and the proceedings were stayed until the bond should be produced in the usual course (*q*). The Court will not dispense with the oyer by substituting a copy of the original or otherwise (*r*).

When in hands of third party.

If the deed or instrument of which profert is made is in the hands of a third party, the court may in some cases, under special circumstances, compel him to give oyer of and produce

(*e*) *Webber* v. *Austin*, 8 T. R. 356.
(*f*) *Page* v. *Divine*, 2 T. R. 40, *ante*, Vol. 1, 130.
(*h*) *Anon.*, 6 Mod. 122.
(*i*) *Longmore* v. *Rogers*, Willes, 286. And see *Cook* v. *Remington*, 6 Mod. 237; 2 Salk. 498, *S. C.*
(*k*) *Page* v. *Divine*, 2 T. R. 40.
(*l*) R. T., 5 & 6 G. 2.
(*m*) *Semb. Newton* v. *Wilmot*, 8 M. & W. 730.
(*n*) *Cook* v. *Remington*, 6 Mod. 237; 1 Saund. 9 d., 6th ed.
(*o*) *Smith* v. *Goldsworthy*, 1 Dowl., N. S., 288.
(*p*) *Daley* v. *Mahon*, 6 Dowl. 395; 4 Bing., N. S., 235; 5 Scott, 606, *S. C.*
(*q*) *Archbishop of Canterbury* v. *Tubb*, 3 Bing., N. C., 789; 5 Dowl. 627, *S. C.*
(*r*) *Archbishop of Canterbury* v. *Tubb*, *supra*.

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it, if necessary, at the trial (*s*). If in the possession of a court, as in the case of an administration bond, perhaps the Court of Queen's Bench may grant a mandamus to compel the production (*t*).

Refusal of oyer.

Refusal of Oyer.]—To refuse oyer when it ought to be granted is error (*u*). In order to bring error, the party insisting upon oyer must enter his prayer upon record; and this being in the nature of a plea, the other party may either counterplead, or demur to it, and the Court will thereupon give judgment (*x*); upon which judgment the writ of error may be brought. He has no right to have it entered of record unless it was made in time; and, if out of time, he has no right to call on the other side to counterplead (*y*). When oyer is demanded of a defendant, he must, as we have seen, (*ante*, 1239), grant it in two days, exclusive of that on which it is demanded, Sunday, or any other holiday, not being reckoned if it be the last of the two, otherwise the plaintiff may sign judgment as for want of a plea.

Proceedings after oyer granted.

Proceedings after Oyer granted.]—After oyer is granted, it is optional with the party whether he set it forth in his plea or not (*z*). If, however, the defendant, after having oyer of a deed, does not set forth the whole of it, or if he mis-recite it, the plaintiff may either sign judgment as for want of a plea (*a*), or he may pray that the deed be inrolled, and thereupon have it truly inrolled, and demur (*b*). And it would seem, a similar course, *mutatis mutandis*, might be adopted in the case of a demand of oyer by defendant. But this in both cases must be understood as extending to cases only where the whole of the deed relates to the matter of action; for if it contain other matters besides those which are to be performed by the party craving oyer, it seems to be unnecessary to set out the irrelevant matter,—it is sufficient for him to set out *verbatim* the whole of the matters which relate to him (*c*); otherwise, in some cases, the record might run to an immoderate length (*d*). It seems unnecessary to set out on oyer a plan referred to in the deed (*e*). Where the deed is set forth on the pleading after oyer demanded, the effect is, as if it had been set forth in the first instance by the opposite party, and the tenor of the deed, as it appears upon oyer, is consequently considered as forming a part of the last precedent pleading (*f*). Therefore, if the deed, when so set forth by the plea, be found

(*s*) *Wells* v. *Earl of Montgomery*, 2 Str. 1198; 2 Sellon, 262.

(*t*) *Archbishop of Canterbury* v. *Tubb*, 3 Bing. N. C. 769.

(*u*) *Longvill* v. *Hundred of Thistleworth*, 6 Mod. 128: *Sarsby* v. *Sarrow*, 2 Str. 1186; 1 Wils. 16, *S. C.*; 1 Saund. 9, d.

(*x*) *Mayor of London* v. *Gerrey*, 2 Lev. 142: *Longvill* v. *Hundred of Isleworth*, 2 Salk. 496; 2 Ld. Raym. 969, *S. C.*

(*y*) *Goodricke* v. *Turley*, 2 C., M., & R., 694.

(*z*) *Weavers' Company* v. *Forest*, 2 Str. 1241. See *Smith* v. *Jennings*, 9 Dowl. 162, per *Patteson*, J.

(*a*) *Wallace* v. *Duchess of Cumberland*, 4 T. R. 370: *Cole* v. *Hulme*, 3 M. & R. 86, n.

(*b*) Com. Dig., Pleader, P. 1. And see *Wallace* v. *Duchess of Cumberland*, 4 T. R. 370, n.: *Smith* v. *Jennings*, 9 Dowl. 162.

(*c*) *Wallace* v. *Duchess of Cumberland*, 4 T. R. 370: 1 Saund. 317, n. (2). But *quære*, see *Newton* v. *Wilmot*, 8 M. & W. 711.

(*d*) 1 Saund. 317, n. (2). And see 1 Saund. 9, 82: *Cook* v. *Remington*, 6 Mod. 227.

(*e*) *Newton* v. *Wilmot*, 8 M. & W. 711.

(*f*) See *Paine* v. *Emery*, 5 Tyr. 1097: 2 C., M., & R. 304, *S. C.* See *Smith* v. *Jennings*, 9 Dowl. 155: *Ashton* v. *Preston*, 2 M. & Gr. 1.

to contain in itself matter of objection or answer to the plaintiff's case, as stated in the declaration, the defendant's course is to *demur*, as for matter apparent on the face of the declaration (*g*); and it would be improper to make the objection the subject of *plea* (*h*). When the defendant relies on a variance in the statement of the deed in the declaration, he should plead *non est factum* without craving oyer, and setting out the deed in his plea; for by so doing he would be precluded from availing himself of the variance (*i*).

When party who grants oyer may set out the deed.

We have just stated, that it is optional with the party demanding oyer whether he will set it forth in his plea or not; but by *R. H.*, 2 *W.* 4, *r.* 44, "if a defendant, after craving oyer of a deed, omit to insert it at the head of his plea, the plaintiff on making up the issue or demurrer-book may, if he think fit, insert it for him; but the costs of such insertion shall be in the discretion of the taxing-officer" (*k*). If the plaintiff craving oyer of a deed, &c., do not afterwards set it forth in his replication, &c., the defendant, in his rejoinder, &c., may (if he wish to have it set forth) pray that the deed be inrolled, and then set it forth, or at least such parts of it as relate to the matters in dispute (*l*). Where the defendant pleads a deed, and the plaintiff craves oyer, and then, without setting forth the deed on the record, replies *non est factum*, and adds the similiter for the defendant, and delivers the issue with notice of trial, the defendant may return the issue, and pray that the deed may be inrolled; and if plaintiff afterwards proceeds to trial upon the issue as originally delivered, it is irregular, and the Court will set aside the verdict (*m*).

Time to plead or reply after.

As to the defendant's time for pleading after oyer granted, when demanded by him, see *Vol.* 1, *p.* 210. The plaintiff has the same time to reply after oyer has been given, as he had at the time of the demand (*n*).

(*g*) *Jeffrey* v. *White* Doug. 475: *Snell* v. *Snell*, 4 B. & C. 741.

(*h*) Steph. on Pl., 5th ed.

(*i*) 1 Chit. Pl. 449; 1 Saund. 316, 317. But see per *Patteson*, J., in *Smith* v. *Jennings*, 9 Dowl. 155.

(*k*) Such was formerly the practice of the Common Pleas (Barnes, 397); but the practice of the Queen's Bench was different, in which court the defendant might either set forth the oyer in his plea or not, at his election. (*The Weavers' Company* v. *Forrest*, 2 Str. 1241; *Symmonds* v. *Parmenter*, 1 Wms. 97; Tidd, 9th ed., 569).

(*l*) See *Smith* v. *Jennings*, *supra*; Com. Dig., Pleader, P. 1.

(*m*) *Smith* v. *Jennings*, *supra*.

(*n*) R. T., 5 & 6 G. 2.

CHAPTER XIII.

INSPECTION AND COPIES, &c. OF INSTRUMENTS.

Instruments of a Private Nature, 1242.
Compelling Production for the Purpose of Stamping, 1246.
Public Books and Documents in general, 1247.
Rolls of Manor, 1248.
Corporation Books, &c., 1248.
Mode of obtaining Inspection of Public Books, &c., 1250.

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Instruments of a private nature.

In what cases in general.

Inspection of Instruments of a private Nature.]—The Court (*a*) or a judge will frequently, in the exercise of their equitable jurisdiction pending an action, order (*b*) a party in it to grant to the opposite party the inspection and copy of a deed, or other written instrument, in his or his attorney's possession, when it is necessary to see or have a copy of it, for the purpose of framing his pleading, or supporting his action or defence, as the case may be (*c*); and when the party, having the possession of the deed or instrument, can be considered as holding it as the trustee or agent of the opposite party (*d*).

Particular instances where granted.

Therefore, where one part only of an instrument is executed, and it is lodged in the hands of one party for the use of both, he would be considered a trustee for the other party, and the production of it may be compelled for the use of the latter (*e*). But not so where two parts of an instrument are executed, and one of the parties loses his part, or that part has been destroyed (*f*). Nor will the production be compelled, except in cases where the party requiring it is a party to the instrument, or is identical with him, or claims by or through some person who was a party (*g*). It is not, however, necessary that an instrument *inter partes* should have been executed by the opposite party to entitle the applicant to the production (*h*). An

(*a*) *Post*, 1248.
(*b*) *Post*, 1248.
(*c*) *Post*, 1244.
(*d*) *Goodhiff* v. *Fuller*, 14 M. & W. 4: *Hodgson* v. *Warden*, 1 Dowl. & L. 286: per *Vaughan*, B., *Neale* v. *Swind*, 2 C. & J. 279. See *Read* v. *Coleman*, 2 Dowl. 354: *Smith* v. *Winter*, 6 Dowl. 309. Lord *Mansfield* is said to have laid it down as a rule, that, whenever a defendant would be entitled to a discovery, he should have it, without going into equity. (*Barry* v. *Alexander*, Tidd's Prac. 592). This doctrine, however, cannot be supported. *Goodhiff* v. *Fuller*, 14 M. & W. 41; 2 Dowl. & L. 661. See also *Twisell* v. *Allen*, 5 M. & W. 339, per *Abinger*, C. B., and *Alderson*, B.: *Whitter* v. *Cassalet*, 2 T. R. 633: *Hildyard* v. *Smith*, 1 Bing. 451; 8 Moore, 595, *S. C.*
(*e*) *Bailey* v. *Porter*, 1 Taunt. 396: *King* v. *King*, 4 Taunt. 666: *Morrow* v. *Saunders*, 1 B. & B. 318; *Biggs* v. *Kent*, 6 Bing. 614: *Devenge* v. *Bouverie*, 8 Bing. 1: *Read* v. *Coleman*, 2 C. & M. 426: *Doe Morris* v. *Roe*, 1 M. & W. 207: *Doe* v. *Slight*, 1 Dowl. 163: *R.* v. *Mayor of Beverley*, 8 Dowl. 140.
(*f*) *Street* v. *Brown*, 6 Taunt. 302, where one part of a charter-party was lost at sea. And see *Woodcock* v. *Worthington*, 2 Y. & J. 4: *Travis* v. *Collins*, 2 C. & J. 625: *Lord Portmore* v. *Goring*, 4 Bing. 152; 12 Moore, 363, *S. C.*; *Mayor of Arundel* v. *Holmes*, 8 Dowl. 116. But see *Neal* v. *Sutcude*, 2 C. & J. 276.
(*g*) *Smith* v. *Winter*, 3 M. & W. 399: *Lawrence* v. *Hooper*, 5 Bing. 6: *Brown* v. *Rees*, 6 Taunt. 283: *Ratcliffe* v. *Blenkey*, 3 Bing. 152: *Cocks* v. *Nash*, 9 Bing. 723: *Bateman* v. *Phillips*, 4 Taunt. 161.
(*h*) *Morrow* v. *Saunders*, 1 B. & B. 318.

allottee of shares in a projected railway company, who is called upon to pay money in respect of the shares allotted to him, is entitled to inspect the subscribers' agreement and parliamentary contract, these deeds being within the power and control of the other party (*i*). Where the plaintiff (assignee of A., a bankrupt) sued B. in respect of contracts alleged to have been entered into with him on the joint account of A. and B., he was compelled to allow the defendant to look at A.'s books to see what the contracts were (*k*). In an action against a sworn broker, of London, for negligence in making a contract, the Court compelled him to produce his books, to enable the plaintiff to inspect and take a copy of the contract (*l*). So, where private account books of the plaintiff came into the defendant's hands as his agent, the Court held he should have inspection of them, for the defendant held them as trustee for the plaintiff (*m*). Where, under a warrant for felony against a plaintiff, the deed on which the action was brought was taken from him, the Court ordered that a copy of it should be furnished to him to declare upon (*n*). In an action against the marshal for an escape, the Court compelled him or his officer to permit the plaintiff to inspect the writ of *habeas corpus* and return, and the *committitur* indorsed thereon (*o*). On the other hand, where the plaintiff sued for the breach of an agreement to take him into partnership, and it appeared that the draft articles had been settled by the attornies on both sides, but that, the engrossment varying from the draft, the plaintiff had refused to execute it, he was holden not entitled to inspection and copy of the latter, because he was not a party to it, though he was allowed it of the draft (*p*). And where the application was founded on an affidavit by the plaintiff, that the agreement set up by the defendant was, if it bore the plaintiff's name, a forgery, the rule was on the same ground refused (*q*). In an action for breach of promise of marriage, the Court refused the defendant an inspection of letters written by the plaintiff to him, which he alleged contained a release of his promise, and which, after the breaking off of the connexion, the defendant had returned to her, upon an understanding that all the letters of both should be mutually returned, which she had not complied with on her part (*r*). So, in an action to try the title to land, the Court refused a rule to compel the plaintiff, or his landlord, to permit the defendant to inspect or take a copy of one of the landlord's title deeds to the estate, it not appearing that the plaintiff held the deeds as trustee for the defendant (*s*). So, in an action on a bill, the defence being that the defendant was liable only as surety, and that time had been given to the principal, the defendant was held not to be entitled to the inspection of a deed in the plain-

Particular instances when refused.

(*i*) *Steadman* v. *Arden*, 15 Law J., N. S., 110, Exch.

(*k*) *Whitbourne* v. *Pottifer*, 4 M. & Scott, 122.

(*l*) *Brearing* v. *Alwyn*, 7 B. & C. 204. But see *Rowe* v. *Hoarden*, 1 Moo. & P. 334; 4 Bing. 539, *S. C.*

(*m*) *Jones* v. *Palmer*, 4 Dowl. 446.

(*n*) *Harris* v. *Aitrit*, 2 Chit. Rep. 229.

(*o*) *Fox* v. *Jones*, 7 B. & C. 732; M. & R. 570, *S. C.* See *Cooper* v. *Jones*, 2 Moo. & Sc. 202. See *R.* v. *Sheriff of Chester*, 1 Chit. Rep. 476, *post*, 1245, where inspection of a writ in sheriff's hands was refused.

(*p*) *Ratcliffe* v. *Bleasby*, 3 Bing. 148.

(*q*) *Jessel* v. *Millengen*, 1 M. & Scott, 605.

(*r*) *Goodliff* v. *Fuller*, 14 M. & W. 4.

(*s*) *Pickering* v. *Noyes*, 1 B. & C. 262; 2 D. & R. 386, *S. C.* And see *Hildyard* v. *Smith*, 1 Bing. 451; 8 Moore, 586, *S. C.*

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tiff's possession, by which, as it was alleged, time had been given to the principal, to which the defendant was not a party (*t*). So, in an action by a shipowner against the owners of goods on board, for their proportion of a general average loss, the defendant was allowed to inspect and take copies of the statement of the general average loss, but not of the protest, the account of expenses incurred, which constituted the sums sought to be made the subject of general average, and other usual documents, from which the general average loss was drawn up (*u*). In an action for freight and demurrage by shipowners against the charterer, the Court refused the latter an inspection of the logbook kept during the voyage (*x*). Where in trover for a horse and harness the defence was, that they had been sold under a distress for rent against a third party, and it appeared that such party had signed an agreement allowing the defendant to keep in possession after the five days, the plaintiff was refused an inspection or copy of that agreement (*y*). It may be here added, that though the Court refuse the application, if it appear that a bill of discovery is necessary to the defence, they may give the defendant further time to plead, or postpone the trial, to enable him to file such bill (*z*).

Time granted to file a bill of discovery.

In policy causes.

In policy causes against underwriters, where the plaintiff, on the defendant's application, consents to enter into a consolidation rule, terms are generally imposed on the defendant to produce all books and papers material to the point in issue (*a*). But it would seem from what fell from Mr. Justice *Maule*, in a recent case (*b*), that an order for such production could not be made where the defendants have not obtained such consolidation rule, or in a case not against underwriters; and that the power to make it is derived from the defendant having obtained the benefit of the consolidation.

For what purposes inspection granted or not.

We have seen that the inspection, or copy, will in general only be granted when it is necessary to see or have a copy of the instrument for the purposes of framing a pleading, or otherwise, for supporting the action or defence. It has been refused where the object of it was to plead a dilatory plea, such as a plea in abatement for non-joinder (*c*). The Court have also refused to compel the plaintiff to allow an officer of stamps to inspect the instrument, on which he has declared, to see whether it is forged (*d*); or to deposit bills of exchange, on which the action is brought, in the hands of the officer of the court, that they may be inspected, to see if they be forgeries (*e*). But *Tindal*, C. J., in a more recent case, considered that a suggestion by the defendant that the instrument is a forgery, or that it has been altered since it was signed, is sufficient to

(*t*) *Smith* v. *Winter*, 6 Dowl. 366.
(*u*) *Twisell* v. *Allen*, 5 M. & W. 337; 7 Dowl. 496, S. C.
(*x*) *Randle* v. *Beaumont*, 1 Moo. & P. 396; 4 Bing. 537, S. C. And see *Reece* v. *Hewden*, 4 Bing. 539, n.
(*y*) *Lawrence* v. *Hooker*, 5 Bing. 6.
(*z*) *Whitter* v. *Cassiet*, 2 T. R. 633: *Goodtitle* v. *Fuller*, *supra*.
(*a*) Park, Ins., 6th ed., Introduction, xliv.: *Goldsmid* v. *Merryatt*, 1 Camp. 562; and Id. 563, n.
(*b*) *Twisell* v. *Allen*, 5 M. & W. 339.
(*c*) *Beale* v. *Bird*, 2 D. & R. 419.
(*d*) *Chetwind* v. *Marwell*, 1 B. & P. 271.
(*e*) *Hildyard* v. *Smith*, 8 Moore, 586; 1 Bing. 451, S. C.; *Threlfall* v. *Webster*, 7 Moore, 559; 1 Bing. 161, S. C. And so in the case of a deed, of which profert is made: *Chetwind* v. *Marwell*, 1 B. & P. 271. But see *Anon.*, cited in 8 Moore, 586.

warrant an order for inspection and copy (*f*). They have refused to permit the plaintiff to inspect and take a copy of a deed in the hands of the defendant, with a view only to the discussion of a rule for a new trial (*g*). It may be granted to the defendant though the document sought for is not declared upon (*h*). The application will be refused if it be what is termed a mere fishing application, to discover the ability of the opposite party to produce the instrument, or the like; and the reason of making the application should also appear on the affidavit in support of it; though sometimes judges at chambers make orders for inspection without such affidavit (*i*).

Affidavit.

In general, no order can be obtained to compel a third party, a stranger to the action, to produce or give a copy of an instrument or book of a private nature (*k*). But in some cases, as we have seen *ante*, 1239, if profert is made of a deed which is in the hands of a third party, the court may, in some cases, compel him to give oyer of it, and produce it at the trial.

Instrument must be in hands of a party to the suit.

The Courts do not order the production of other than documentary evidence. Therefore, in an action for goods sold and delivered, they would not compel a defendant to allow an inspection of the goods, to enable the plaintiff to give evidence of their identity (*l*), or value (*m*). So, in an action for infringing a patent for making lace, the Court refused to compel the plaintiff to produce a specimen of the patent lace, to enable defendant to prepare his defence (*n*). In an action on a contract for building a chapel, they refused to grant the plaintiff a rule for a view of the premises with his witnesses (*a*).

Inspection only of documents, not of goods, &c.

Where a defendant makes an affidavit identifying a document exhibited to him only, and not filed, he will be compelled to allow the plaintiff to take a copy of that document, although it is sworn to contain a defence to the action (*b*). Where the party himself has, on a former trial in the action, produced and read a document in evidence, the other is entitled to an inspection of it; but not so a document produced, but not read (*c*).

Where document used before in the action.

The application cannot be made before action brought (*d*). If it be not made until after plea, the Court will not order a stay of proceedings (*e*).

Time of making application.

Before making the application, a demand of the copy or inspection required should in general be made, and a refusal obtained (*f*). *The application should, in the first instance, be*

The application, practical proceedings as to.

(*f*) *Weelmar* v. *Devereux*, 1 M. & G. 723; 2 Scott, N. R., 224; 9 Dowl. 672, *S. C.*

(*g*) *Wood* v. *Morewood*, 2 Scott, N. R., 204; 9 Dowl. 44. And see *S. C.*, 3 Scott, N. R., 307; 9 Dowl., 669, *S. C.*; the case of a public document.

(*h*) *Charnock* v. *Lumley*, 5 Scott, 438; *Stedman* v. *Arden*, *ante*, 1243.

(*i*) *Weelmar* v. *Devereux*, *supra*.

(*k*) *Cocks* v. *Nash*, 3 Moo. & Sc. 166; *R.* v. *Worcenham*, 1 Ld. Raym. 705. As to production for stamping, see *post*, 1249.

(*l*) *Bell* v. *Taylor*, 6 D. & R. 388.

(*m*) *Terquand* v. *Guardians of Strand Union*, 8 Dowl. 901.

(*n*) *Croft* v. *Resch*, 1 Hodges, 110.

(*a*) *Newham* v. *Tuite*, 6 Scott, 374.

(*b*) *Tebbutt* v. *Ambler*, 7 Dowl. 674.

(*c*) *Hewitt* v. *Piggott*, 7 Bing. 400; 5 Moo. & P. 252; 1 Dowl. 219, *S. C.* See *Taylor* v. *Osborne*, 4 Taunt. 180.

(*d*) *Ex p. Partridge*, 1 H. & W. 350: *R.* v. *Sheriff of Chester*, 1 Chit. Rep. 476; in which latter case the Court refused to grant an inspection of a writ in the hands of the sheriff, in order to bring an action against him. The proper way of proceeding would be to rule the sheriff to return the writ.

(*e*) *Charnock* v. *Lumley*, 5 Scott, 438.

(*f*) See *The Birmingham, Bristol, and Thames Junction Railway Company* v. *White*, 1 Q. B. 282, where the defendant, in the first instance, applied to a judge on summons, which was attended by the plaintiffs, and the judge referred the question to the Court, and the Court seemed to be of opinion, that, if the inspection had been grantable, the proceedings on summons were equivalent to a demand and refusal.

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made to a judge at chambers, on summons. It should be supported by an affidavit (g), stating and explaining the facts upon which to ground the application, and which will bring it within the rules above noticed (h). It is not, in general, necessary that the affidavit should disclose the nature of the action (*i*). It should, however, it seems, be shewn that an action is pending (*k*), and that the applicant has not a counterpart or copy of the instrument (*l*). If the application be made after plea pleaded, the Court or judge will not order a stay of proceedings (*m*). The applicant will not, if an order be granted, in general be ordered to pay the costs of the application, unless it be unnecessarily made to the Court instead of a judge; or unless he has not before applied to the opposite party for inspection (*n*). He will be ordered to pay the expense of inspection and copy.

How order complied with.

Under an order to produce letters and give copies, it is sufficient to give extracts of such parts of letters as are relevant to the subject, if the party in whose possession they are will make affidavit that the residue of their contents does not relate to the subject (*o*).

Compelling production for the purpose of stamping.

Compelling Production for purpose of Stamping.]—Where an instrument required to be produced in evidence is in the possession of the opposite party, and unstamped, and it is expedient to get it stamped, the course is to apply to a judge, by summons, on an affidavit of its being in the possession of the opposite party, and obtain an order, requiring him to produce it at a time to be named in the order, before the commissioners of stamps at the Stamp Office, to be stamped (*p*). But this order will not be granted unless the applicant be a party to the instrument (*q*), or has some interest in it (*r*), or the production and stamping cannot possibly interfere with, or injuriously affect, the interest and right of any third party (*s*). No doubt an order may be made in cases where an order for the inspection or copy, above noticed, could not; for the application to produce a document for the purpose of being stamped, stands on a very different ground from an application to inspect and take a copy (*t*). Where two parts of an agreement were interchangeably executed between landlord and tenant, in an action upon the agreement by a purchaser of the premises, the Court refused to compel the tenant to produce his part to be stamped, unless such purchaser had applied to the vendor, or used every endeavour, without success, to find him (*u*). If the opposite party declares he has not got it,

(*g*) See *Woolmer* v. *Devereux*, 7 Dowl. 672; 2 M. & Gr. 758; 1 Scott, N. R., 224, *S. C.* See a form, Chit. Forms, 566.

(*h*) See *Rundle* v. *Beaumont*, 1 Moo. & P. 326.

(*i*) *Morrow* v. *Saunders*, 3 Moore, 671; 1 B. & B. 318, *S. C.*

(*k*) See *Ex p. Partridge*, 1 H. & W. 380.

(*l*) *Morrow* v. *Saunders*, *ubi supra*; *Griffin* v. *Smythe*, 8 Dowl. 490.

(*m*) *Charnock* v. *Lumley*, 5 Scott, 438.

(*n*) *Read* v. *Coleman*, 2 Dowl. 354; 2 C. & M. 456, *S. C.*; *King* v. *King*, 4 Taunt. 666: *Blakey* v. *Porter*, 1 Taunt. 386: *Vaughan* v. *Trevenet*, 2 Dowl. 299.

(*o*) *Clifford* v. *Taylor*, 1 Taunt. 167: *Ramsbotham* v. *Cooper*, 2 Chit. Rep. 231.

(*p*) *Cooke* v. *Stocks*, Tidd, 9th ed., 487: *Bateman* v. *Phillips*, 4 Taunt. 157: *Garner* v. *Bagley*, 5 Moore, 71: *Threlfall* v. *Webster*, 1 Bing. 161; 7 Moore, 559, *S. C.*; *Mason* v. *Godbold*, 3 Bing. 293; 11 Moore, 49, *S. C.* See the form of the order, Chit. Forms, 567.

(*q*) *Taylor* v. *Osborne*, 4 Taunt. 189.

(*r*) *Hall* v. *Bainbridge*, 3 Dowl. & L. 92.

(*s*) *Lawrence* v. *Hooker*, 2 M. & P. 9; 5 Bing. 6, *S. C.*

(*t*) *Neale* v. *Swind*, 2 C. & J. 276; 2 Tyr. 318; 1 Dowl. 314, *S. C.*: and per *Wightman*, J., in *Hall* v. *Bainbridge*, 3 Dowl. & L. 92.

(*u*) *Travis* v. *Collins*, 2 C. & J. 625.

and that it is not within his control, then, perhaps, the judge would make an order that he make such declaration on oath; and that in case he afterwards produces it at the trial, that he should produce it duly stamped. In one case, where the defendant had surreptitiously obtained possession of an unstamped instrument executed by himself and the plaintiff, (thereby preventing the plaintiff from affixing a stamp, as he had intended, within twenty-one days after execution), and then swore that he had lost the agreement; the Court of Common Pleas ordered that he should produce a copy in his possession to the plaintiff; and that, if the plaintiff produced that copy stamped at the trial, the defendant should be precluded from producing the original (*x*). The applicant is not generally made to pay the costs of the application, and especially if the opposite party has before refused to produce the instrument for stamping. But he is ordered to pay the expenses of the production and stamping.

Inspection of public books, &c.

Inspection of Public Books and Documents in general.]—Any one may inspect the records of the courts of law; therefore, when a writ is returned and filed, it may be inspected. Where a *habeas* was lodged with the marshal, an inspection was ordered to be given of it, and of the *committitur* indorsed upon it, to the plaintiff's attorney, although the object of the application was to enable the plaintiff to bring an action against the marshal for an escape (*y*). But the Court will not order the inspection of a writ in the hands of the sheriff, to enable a party to bring an action against him (*z*): inspection in such a case may be obtained by ruling the sheriff to return the writ. Any person has a right to inspect the books of the sessions of the peace (*a*). Where the question in a cause did not concern any transaction in the Post-office, the Court refused to grant an inspection of the books of the Post-office (*b*); and the Court refused to allow the Custom-house books to be inspected, the question in the cause not touching any subject-matter contained in such books (*c*). A parishioner has a right to inspect the parish books if he require it for parochial purposes, but not otherwise (*d*). Where the contents of a deed, which was a public document, were set forth in an inquisition *post mortem*, taken in the reign of James the First, which was duly filed at the Rolls Chapel, the Court refused to compel the production of the original deed (*e*). In an action for a malicious prosecution, where it appeared to be necessary, for the maintenance of the action, that the plaintiff should be put in possession of

(*x*) *Bousfield* v. *Godfrey*, 5 Bing. 418; 2 Moo. & P. 771, *S. C.* See *Goodliff* v. *Fuller*, 14 M. & W. 4: and *quære* as to the power of the Court to restrain a party from taking an objection to evidence at *Nisi Prius*, *i. e.* the production of an existing instrument. (See *Travers* v. *Collins*, 2 C. & J. 625: *Attorney-General* v. *Fishmongers' Company*, 4 Myl. & Cr. 1).

(*y*) *Fuo* v. *Jones*, 7 B. & C. 732.

(*z*) *R.* v. *Sheriff of Chester*, 1 Chit. 676.

(*a*) *Herbert* v. *Ashburner*, 1 Wils. 297.

(*b*) *Crew* v. *Blackburn*, 1 Wils. 240: *Crew* v. *Saunders*, Str. 1005.

(*c*) *Benson* v. *Port*, 1 Wils. 240. See *Atherfield* v. *Beard*, 2 T. R. 616, per *Buller*, J.; *R.* v. *Worsenham*, 1 Ld. Raym. 705.

(*d*) *Anon.*, 2 Chit. 296: *May* v. *Gwynne*, 4 B. & A. 301: *R.* v. *Smallpiece*, 2 Chit. 288: *R.* v. *Lee*, 1 Wils. 240: *Newel* v. *Simpkin*, 4 Moo. & P. 394; 6 Bing. 565, *S. C.*; *R.* v. *Great Farrington*, 9 B. & C. 541: *Edwards* v. *Bennett*, 3 Moo. & P. 49; 6 Bing. 230; 3 Y. & J. 456, *S. C.*: *R.* v. *Justices of Buckinghamshire*, 8 B. & C. 375.

(*e*) *Wood* v. *Morewood*, 9 Dowl. 669.

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the contents of the examinations taken before the justices, and of the warrant on which he was apprehended, a rule was granted for their inspection, and that copies might be taken, and the originals produced at the trial (*y*).

Rolls of manor, &c.

Rolls of Manor, &c.]—The rolls of a manor are open to the inspection of the lord and the copyholders, but not of strangers. Even a person who has a *prima facie* title to a copyhold, is entitled to inspect the court rolls, and take copies of them, so far as relates to the copyhold claimed, although at the time no cause be depending respecting it (*z*). Any of the persons interested in copyhold property are entitled to inspect the rolls of the manor, without the others joining in the application (*a*). But a freehold tenant of a manor has no right to inspect them (*b*); at least, not unless some cause be depending relative to the manor, &c., in which his right as tenant may be involved (*c*). And the Court will in no case grant such an inspection to a prosecutor in a criminal proceeding against the lord (*d*). By rule of *H. T.*, 2 *W.* 4, *s.* 102, "an order upon the lord of a manor to allow the usual limited inspection of the court rolls, on the application of a copyhold tenant, may be absolute in the first instance, upon an affidavit that the copyhold tenant has applied for and been refused inspection" (*e*). It seems, however, that this rule applies only to cases where an action is pending; and in other cases the rule is a rule *nisi* only (*f*). The demand to inspect the rolls cannot be made by the agent of a person authorized by warrant of attorney to make the demand on behalf of the tenant, although the agent's authority is in writing, so as to obtain a *mandamus* in case of a refusal (*g*).

Corporation books, &c.

Corporation Books, &c.]—A party interested in entries in corporation books and the books of public companies, relating to things public and general, has a right to inspect them and have copies of them; and if this be refused, the Court upon motion, grounded upon an affidavit shewing that the evidence likely to be contained in these books is directly material in the cause, or otherwise shewing satisfactorily the interest he has in them, will order that he shall be at liberty to inspect them and have copies (*h*). Thus, in a dispute between corporators, an inspection of the corporation documents relating to the matter in dispute, will be granted to either of them (*i*).

(*y*) MSS.: *Rex* v. *Smith*, 1 Str. 126; Barnes, 468. But see *Rx Justices of Bedford*, 1 Chit. Rep. 637.

(*z*) *R.* v. *Lucas*, 10 East, 235. See *Addington* v. *Clode*, 2 W. Bl. 1030; *Falkard* v. *Hemet*, Id. 1061: *Rogers* v. *Jones*, 5 D. & R. 484.

(*a*) *Ex p. Hutt*, 7 Dowl. 690: *Ex p. Barnes*, 2 Dowl., N. S., 20.

(*b*) *Smith* v. *Davies*, 1 Wils. 104.

(*c*) *R.* v. *Shelly*, 3 T. R. 141: *R.* v. *Allgood*, 7 T. R. 746.

(*d*) *R.* v. *Earl of Cadogan*, 5 B. & Ald. 902; 1 D. & R. 559, *S. C.*

(*e*) See *Ex p. Hutt*, 7 Dowl. 690: *Ex p. Barnes*, 2 Dowl., N. S., 20.

(*f*) *Ex p. Best*, 3 Dowl. 38.

(*g*) *Ex p. Hutt*, *supra*.

(*h*) 2 Phil. Ev., 9th ed., 181; 5 Bac. Abr., Ev. (F.); 12 Vin. Ab. 104: 2 T. R. 264; Peake, Ev. 94, 95: *Mayor* v. *Cowper*, 1 B. & Ald. 301: *Mayor of Lynn* v. *Turner*, 1 T. R. 689, and n.: *Attorney-Gen.* v. *Ward*, Id. 616: *Corporation of Barnstaple* v. *Lord Inchiquin*, 3 Id. 303: *R.* v. *Holland*, 4 Id. 691; 1 East, 70, *S. C.*: *Mayor of Southampton* v. *Graves*, 8 Id. 590: *Imperial Gas Company* v. *Clarke*, 4 M. & P. 727; 7 Bing. 95: *R.* v. *Heatmen in Newcastle-upon-Tyne*, 1 Str. 1223. See *Burrell* v. *Nicholson*, 3 Myl. & K. 690.

(*i*) *Mayor of Southampton* v. *Graves*, 7 T. R. 593, per Ld. *Kenyon*, C. J. See *R.* v. *Babb*, 3 T. R. 579.

But the mere circumstance of a party being a member of a corporation will not give him a right to inspect the corporation books, respecting matters of private concern, having no reference to his rights as a burgess (*k*). In an action by a corporation for toll the defendant, if he is a member of the corporation, but not otherwise (*l*), has a right to inspect all charters, &c., in the possession of the corporation relating to such toll (*m*). In an action for the breach of a by-law, the court compelled the corporation to allow the defendant to inspect the by-law in the corporation books, though he was not a member of the corporation (*n*). In an action against the Bank of England for not paying dividends upon certain stock, the Bank admitting that the stock had, up to a certain day, stood in the Bank books in the plaintiff's name, alleged that the plaintiff had, on that day, transferred it. Upon the affidavit of the plaintiff, that she had never signed or authorized any transfer, and that if such alleged transfer existed, it was a forgery, the Court made absolute a rule allowing her to inspect the particular entry in the transfer book, purporting to transfer the stock (*o*). A member of one of the universities may inspect its statutes and archives, if it become requisite in any matter affecting him in his relation of member (*p*). So, a prebendary may have inspection of the charters, &c., of the chapter, in any matter relating to his prebend (*q*). So, a member (but not a stranger) of the College of Physicians may inspect the books of the college (*r*). Where an information was filed against an officer of the East India Company, on charges of delinquency in India, forwarded upon the report of a board of inquiry there, the Court refused to grant the defendant an inspection of that report, saying, that they had no discretionary power to grant it (*s*). In an action against a shareholder of a company for calls, it was held, that the defendant could not claim to inspect the minute books of the company and of the directors' meetings, "especially with respect to the calls" sued upon, for the purpose of framing his plea (*t*). As to the inspection by freemen of the books, &c., in which their freedom is entered, see 3 *G.* 3, *c.* 15; and 32 *G.* 3, *c.* 58, *s.* 4 (*u*). In criminal cases against corporations, the Court will not compel them to grant inspection of their books to the prosecutor (*x*).

(*k*) See *Stevens* v. *Mayor of Berwick*, 4 Dowl. 277.

(*l*) *Mayor of Southampton* v. *Graves*, 8 T. R. 590. See *Hodges* v. *Atkis*, 2 W. Bl. 877; 3 Wils. 396.

(*m*) *Barnstable* v. *Lathby*, 3 T. R. 303: *Mayor of Lynn* v. *Denton*, 1 T. R. 689.

(*n*) *Harrison* v. *Williams*, 3 B. & C. 162; 4 D. & R. 880, *S. C.*

(*o*) *Foster* v. *The Bank of England*, 15 Law J., N. S., Q. B., 212.

(*p*) See *R.* v. *Purnell*, 1 Wils. 239; 1 W. Bl. 37.

(*q*) *Young* v. *Lynch*, 1 W. Bl. 27. See further as to the inspection of charters of a chapter, *Murray* v. *Thornhill*, 1 Wils. 717: *R.* v. *Worcestshire*, 1 Ld. Raym. 705: *Cas* v. *Capping*, Id. 337; 5 Mod. 395, *S. C.*; *Allen* v. *Tup*, 2 W. Bl. 880.

(*r*) *West* v. *College of Physicians*, 1 Wils. 240.

(*s*) *R.* v. *Holland*, 4 T. R. 691. See further as to inspection of reports of East India Company, *Rex* v. *Shelley*, 3 T. R. 141: *R.* v. *Lucas*, 10 East, 235: *R.* v. *Tower*, 5 M. & Sel. 162: *Warriner* v. *Giles*, 2 Str. 954: *Wilson* v. *Rogers*, 1d. 1242: *Reg.* v. *Mead*, 2 Ld. Raym. 927.

(*t*) *Birmingham, Bristol, and Thames Junction Railway Company* v. *White*, 1 Q. B. 282; 4 P. & D. 649, *S. C.* As to the right of an allottee to inspect the subscribers' agreement, &c., see *ante*, 1243.

(*u*) See also *Davies* v. *Humphreys*, 3 M. & S. 223: *Shuldam* v. *Bunnis*, Cowp. 192.

(*x*) *R.* v. *Purnell*, 1 W. Bl. 37; 1 Wils. 239: *R.* v. *Haydon*, 1 W. Bl. 351: *R.* v. *Cornelius and Another*, 2 Str. 1210.

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the contents of the examinations taken before the justices, and of the warrant on which he was apprehended, a rule was granted for their inspection, and that copies might be taken, and the originals produced at the trial (*y*).

Rolls of manor, &c.

Rolls of Manor, &c.]—The rolls of a manor are open to the inspection of the lord and the copyholders, but not of strangers. Even a person who has a *primâ facie* title to a copyhold, is entitled to inspect the court rolls, and take copies of them, so far as relates to the copyhold claimed, although at the time no cause be depending respecting it (*z*). Any of the persons interested in copyhold property are entitled to inspect the rolls of the manor, without the others joining in the application (*a*). But a freehold tenant of a manor has no right to inspect them (*b*); at least, not unless some cause be depending relative to the manor, &c., in which his right as tenant may be involved (*c*). And the Court will in no case grant such an inspection to a prosecutor in a criminal proceeding against the lord (*d*). By rule of *H. T.*, 2 *W.* 4, *s.* 102, "an order upon the lord of a manor to allow the usual limited inspection of the court rolls, on the application of a copyhold tenant, may be absolute in the first instance, upon an affidavit that the copyhold tenant has applied for and been refused inspection" (*e*). It seems, however, that this rule applies only to cases where an action is pending; and in other cases the rule is a rule *nisi* only (*f*). The demand to inspect the rolls cannot be made by the agent of a person authorized by warrant of attorney to make the demand on behalf of the tenant, although the agent's authority is in writing, so as to obtain a *mandamus* in case of a refusal (*g*).

Corporation books, &c.

Corporation Books, &c.]—A party interested in entries in corporation books and the books of public companies, relating to things public and general, has a right to inspect them and have copies of them; and if this be refused, the Court upon motion, grounded upon an affidavit shewing that the evidence likely to be contained in these books is directly material in the cause, or otherwise shewing satisfactorily the interest he has in them, will order that he shall be at liberty to inspect them and have copies (*h*). Thus, in a dispute between corporators, an inspection of the corporation documents relating to the matter in dispute, will be granted to either of them (*i*).

(*y*) MSS.: *Rex* v. *Smith*, 1 Str. 126; Barnes, 468. But see *Rs Justices of Bedford*, 1 Chit. Rep. 627.

(*z*) *R.* v. *Lucas*, 10 East, 235. See *Addington* v. *Clode*, 2 W. Bl. 1030: *Falkard* v. *Hemet*, Id. 1061: *Rogers* v. *Jones*, 5 D. & R. 484.

(*a*) *Ex p. Hutt*, 7 Dowl. 690: *Ex p. Barnes*, 2 Dowl., N. S., 20.

(*b*) *Smith* v. *Davies*, 1 Wils. 104.

(*c*) *R.* v. *Shelly*, 3 T. R. 141: *R.* v. *Allgood*, 7 T. R. 746.

(*d*) *R.* v. *Earl of Cadogan*, 5 B. & Ald. 902; 1 D. & R. 559, *S. C.*

(*e*) See *Ex p. Hutt*, 7 Dowl. 690: *Ex p. Barnes*, 2 Dowl., N. S., 20.

(*f*) *Ex p. Best*, 3 Dowl. 38.

(*g*) *Ex p. Hutt*, *supra*.

(*h*) 2 Phil. Ev., 9th ed., 181; 5 Bac. Abr., Ev. (F.); 12 Vin. Ab. 104: 2 T. R. 234: Peake, Ev. 94, 95: *May* v. *Gwynne*, 4 B. & Ald. 301: *Mayor of Lynn* v. *Denton*, 1 T. R. 689, and n.: *Atherfold* v. *Beard*, 2 Id. 616: *Corporation of Barnstaple* v. *Lathee*, 3 Id. 303: *R.* v. *Holland*, 4 Id. 691; 2 East, 70, *S. C.*: *Mayor of Southampton* v. *Graves*, 8 Id. 590: *Imperial Gas Company* v. *Clarke*, 4 M. & P. 727; 7 Bing. 95: *R.* v. *Hostmen in Newcastle-upon-Tyne*, 2 Str. 1223. See *Burrell* v. *Nicholson*, 1 Myl. & K. 680.

(*i*) *Mayor of Southampton* v. *Graves*, 8 T. R. 592, per Ld. *Kenyon*, C. J. See *R.* v. *Babb*, 3 T. R. 579.

But the mere circumstance of a party being a member of a corporation will not give him a right to inspect the corporation books, respecting matters of private concern, having no reference to his rights as a burgess (*k*). In an action by a corporation for toll the defendant, if he is a member of the corporation, but not otherwise (*l*), has a right to inspect all charters, &c., in the possession of the corporation relating to such toll (*m*). In an action for the breach of a by-law, the court compelled the corporation to allow the defendant to inspect the by-law in the corporation books, though he was not a member of the corporation (*n*). In an action against the Bank of England for not paying dividends upon certain stock, the Bank admitting that the stock had, up to a certain day, stood in the Bank books in the plaintiff's name, alleged that the plaintiff had, on that day, transferred it. Upon the affidavit of the plaintiff, that she had never signed or authorized any transfer, and that if such alleged transfer existed, it was a forgery, the Court made absolute a rule allowing her to inspect the particular entry in the transfer book, purporting to transfer the stock (*o*). A member of one of the universities may inspect its statutes and archives, if it become requisite in any matter affecting him in his relation of member (*p*). So, a prebendary may have inspection of the charters, &c., of the chapter, in any matter relating to his prebend (*q*). So, a member (but not a stranger) of the College of Physicians may inspect the books of the college (*r*). Where an information was filed against an officer of the East India Company, on charges of delinquency in India, forwarded upon the report of a board of inquiry there, the Court refused to grant the defendant an inspection of that report, saying, that they had no discretionary power to grant it (*s*). In an action against a shareholder of a company for calls, it was held, that the defendant could not claim to inspect the minute books of the company and of the directors' meetings, "especially with respect to the calls" sued upon, for the purpose of framing his plea (*t*). As to the inspection by freemen of the books, &c., in which their freedom is entered, see 3 *G.* 3, *c.* 15; and 32 *G.* 3, *c.* 58, *s.* 4 (*u*). In criminal cases against corporations, the Court will not compel them to grant inspection of their books to the prosecutor (*x*).

(*k*) See *Stevens* v. *Mayor of Berwick*, 4 Dowl. 277.

(*l*) *Mayor of Southampton* v. *Graves*, 8 T. R. 590. See *Hodges* v. *Atkis*, 2 W. Bl. 877; 3 Wils. 398.

(*m*) *Barnstable* v. *Lathby*, 3 T. R. 303: *Mayor of Lynn* v. *Denton*, 1 T. R. 689.

(*n*) *Harrison* v. *Williams*, 3 B. & C. 162; 4 D. & R. 830, *S. C.*

(*o*) *Foster* v. *The Bank of England*, 15 Law J., N. S., Q. B., 212.

(*p*) See *R.* v. *Purnell*, 1 Wils. 239; 1 W. Bl. 37.

(*q*) *Young* v. *Lynch*, 1 W. Bl. 27. See further as to the inspection of charters of a chapter, *Murray* v. *Thornhill*, 1 Wils. 717: *R.* v. *Worcesham*, 1 Ld. Raym. 705: *Cas* v. *Copping*, Id. 337; 5 Mod. 395, *S. C.*; *Allen* v. *Tap*, 2 W. Bl. 850.

(*r*) *West* v. *College of Physicians*, 1 Wils. 240.

(*s*) *R.* v. *Holland*, 4 T. R. 691. See further as to inspection of reports of East India Company, *Rex* v. *Shelley*, 3 T. R. 141: *R.* v. *Lucas*, 10 East, 235: *R.* v. *Tower*, 5 M. & Sel. 162: *Warriner* v. *Giles*, 2 Str. 954: *Wilson* v. *Rogers*, Id. 1242: *Reg.* v. *Mead*, 2 Ld. Raym. 927.

(*t*) *Birmingham, Bristol, and Thames Junction Railway Company* v. *White*, 1 Q. B. 282; 4 P. & D. 649, *S. C.* As to the right of an allottee to inspect the subscribers' agreement, &c., see *ante*, 1243.

(*u*) See also *Davies* v. *Humphreys*, 3 M. & S. 323: *Shuldam* v. *Bunnis*, Cowp. 192.

(*x*) *R.* v. *Purnell*, 1 W. Bl. 37; 1 Wils. 239: *R.* v. *Haydon*, 1 W. Bl. 351: *R.* v. *Cornelius and Another*, 2 Str. 1210.

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Mode of obtaining inspection of public books, &c.

Mode of obtaining Inspection of Public Books, &c.]—To obtain this inspection of public books, &c., there must be *a demand to inspect* made on the proper officer, and a refusal. The demand cannot, it seems, be effectually made by the agent of a party authorised by warrant of attorney (*y*). *The rule is obtained on motion grounded on affidavit, stating the circumstances.* In general, the motion cannot be made until issue joined (*z*). Where there is no action pending, the motion is for a *mandamus* (*a*).

(*y*) See *Ex p. Hutt*, 7 Dowl. 690.
(*z*) *Hodges* v. *Atkis*, 2 W. Bl. 877; 3 Wils. 396, *S. C.*
(*a*) See *Rex* v. *Tower*, 4 M. & Sel. 62; *Ex p. Hutt*, 7 Dowl. 690.

CHAPTER XIV.

PARTICULARS OF DEMAND, SET-OFF, OBJECTION TO PATENTS, &c.

THE courts of common law have a general jurisdiction, independently of any statute, to order particulars of demand, or of defence, to be given, in order to prevent the necessity of applying to a court of equity (*a*). This jurisdiction is, in some cases, confirmed by statute. The rules by which the courts are governed in its exercise, the cases in which particulars will be required, their form, and their effect on other proceedings in the cause, may be conveniently discussed under the following heads, viz.:—

1. *Particulars of Demand*, 1251.
2. *Particulars of Set-off.—Payments, Statutes, Objections to Patents*, 1264.

1. *Particulars of Demand.*

In what Cases.]—In cases where the declaration contains *indebitatus* counts, *R. T.*, 1 *W.* 4, *r.* 6, orders, "that with every declaration, if delivered, or with the notice of declaration, if filed, containing counts of *indebitatus assumpsit*, or *debt on simple contract*, the plaintiff shall deliver *full particulars of his demand* under those counts, where such particulars *can be comprised within three folios;* and *where the same cannot be comprised within three folios*, he shall deliver such *a statement of the nature of his claim*, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios." And, to secure the delivery of particulars in all *such* cases, it is further ordered, "that, if any declaration or notice shall be delivered without such particulars, or such statement as aforesaid, and a judge shall afterwards order a delivery of particulars, the plaintiff shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver. And that a copy of the particulars of the demand, and also particulars (if any) of the defendant's set-off, shall be annexed by the plaintiff's attorney to every record at the time it is entered with the judge's marshal." It will be seen, that

In what cases where indebitatus counts.

(*a*) See the observations of *Tindal*, C. J., in *Bubbeis* v. *M'Kenzie*, 4 Bing. N. C. 127. In criminal cases, where the charge is general, the prosecutor may be, and frequently is, ordered to give the defendant the particulars of the acts charged. See 2 Saund. 308 a, n.; Burn's Justice, tit. "*Particulars*;" *R.* v. *Curwood*, 5 N. & M. 369: *R.* v. *Fowler*, 7 Dowl. 665: *R.* v. *Hamilton*, 7 C. & P. 448.

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the rule extends only to particulars of demand under *indebitatus* counts, and that it, therefore, does not extend to counts on bills of exchange, or promissory notes, or other special counts. The rule, it will be seen, is not imperative, and the only consequence of non-compliance with it, is that specified in it, viz. that the plaintiff will not be allowed for his particulars in costs, if afterwards called for and delivered (*b*): the defendant may also obtain an order for the particulars without being put under the usual terms imposed in other cases in such an order. The plaintiff might sign judgment within the usual time, though no particulars were delivered with the declaration (*c*).

Where special counts.

Where the declaration contains *special counts*:—It may be laid down as a general rule, that in all cases where the cause of action is not fully and specifically disclosed in the declaration, and wherever it appears to be necessary for the furtherance of justice that the defendant should have some more specific information, the Court or a judge will make an order upon him to give the defendant the particulars in writing, and that all proceedings be stayed in the meantime. Thus, in debt on bond conditioned for the performance of covenants, or to indemnify, or the like, the defendant may have a particular of the breaches for which he is sued (*d*). So, in covenant, for not repairing, &c., it is the practice to order a particular of the non-repairs, &c. (*e*). So, in an action by vendee against vendor, where it was stated in the declaration that the abstract of title delivered was "insufficient, defective, and objectionable," the Court obliged the plaintiff to give a particular of all objections to the abstract, arising upon matters of fact, but not of objections in point of law (*f*). So, in an action by vendee against the auctioneer to recover back his deposit, because the conditions of the sale had not been complied with, the defendant may have a particular of the matters of fact on which the plaintiff seeks to recover (*g*), though not of objections on points of law (*h*). So, in an action against a clerk by his former master, for enticing away plaintiff's customers, contrary to an agreement, the declaration, naming two of those customers, but also stating that there were divers others, without naming them, *Patteson*, J., on an affidavit that the defendant would be prejudiced in his defence, and might be taken by surprise at the trial, unless the names of the other customers were given, made an order on plaintiff to give their names, and gave defendant time to plead after the delivery of the particulars (*i*). But wherever the particulars of the cause of action are fully specified in the declaration, as in actions on the case,

In actions ex contractu.

(*b*) From one case, it would seem that a judge, upon ordering the particulars to be delivered, may order the plaintiff to pay the costs of the application for the particulars. (*Clement* v. *Weaver*, 4 Scott, N. R., 229, *sed quære*).

(*c*) *Jones* v. *Fowler*, 1 Gale, 256, per *Alderson*, B., 4 Dowl. 232, *S. C.*

(*d*) Tidd, 9th ed., 597.

(*e*) But in an action of covenant by the assignee of a lease for non-payment of rent and non-repair, the Court refused to compel the plaintiff to give particulars, with sums and dates, particulars of the covenants alleged to have been broken having been given. (*Sawter* v. *Hitchcock*, 5 Dowl. 734).

(*f*) *Collett* v. *Thompson*, 3 B. & P. 246.

(*g*) *Squire* v. *Todd*, 1 Camp. 293.

(*h*) *Roberts* v. *Rowlands*, 3 M. & W. 543; 6 Dowl. 553, *S. C.*

(*i*) *Stapleton* v. *Dewey*, Q. B., 8th Dec. 1838, *coram Patteson*, J., at chambers. See 11 Price, Rep. 19. But *quære*, see *Gale* v. *Reed*, 8 East, 80: and *Rattenbick* v. *Hawkes*, 1 M. & W. 573.

special *assumpsits*, or the like, any further particulars would, of course, be unnecessary, and are seldom granted. And accordingly the Court refused to compel a plaintiff, suing for the breach of an agreement, and assigning that he had incurred certain expenses, to furnish particulars of such special damage (*k*). So, in an action on a bill, where the declaration contains but one count on it, an order for particulars would not be granted unless under special circumstances (*l*); though, perhaps, if the plaintiff in such a case volunteered to give, and gave particulars, and they were inexplicit, the Court might order him to deliver further and better particulars (*m*). In an action for the breach of warranty of a horse, the Court refused an order for particulars of the unsoundness complained of (*n*).

In actions ex delicto.

In actions of trespass, trover, or case, it is generally the practice to refuse particulars of demand, which in most cases are comprised in the declaration. But, under circumstances, a judge will, even in these actions, compel a delivery of particulars, if there be an affidavit, clearly shewing that the defendant does not know for what the plaintiff is proceeding (*o*), and other special circumstances shewing that it is necessary the defendant should have some more specific information, than is disclosed by the declaration (*p*). Thus, in an action against the sheriff or keeper of the Queen's Prison, for an escape, the plaintiff may be compelled to give a particular of the time and place of the escape (*q*). In an indictment for a nuisance against members of a gas company, for throwing poisonous matter into the Thames, and sinking barges, and making erections in the river, the Court ordered the prosecutor to give particulars of the nuisance intended to be proved; and *Littledale*, J., observed, that in the case of an action, there could be no doubt upon the propriety of the plaintiff's being called upon to give such particulars (*r*). And in an indictment for a permanent nuisance by throwing mud into the river Thames, *Coleridge*, J., ordered the prosecutor to give particulars of the acts of nuisance, but not of the dates (*s*). On the other hand, in an action against an attorney for negligence in transacting the assignment of a leasehold belonging to the plaintiff, *per quod* the plaintiff had to pay damages to the assignee, the Court of Common Pleas refused to compel a delivery of a particular of the plaintiff's demand, there being no ambiguity as to the cause of action, or the transaction in respect of which the action was brought (*t*). And the Court have refused to

(*k*) *Rettallick* v. *Hawkes*, 1 M. & W. 373. And see *Stannard* v. *Ullithorne*, 3 Bing., N. S., 326.

(*l*) *Brooks* v. *Farlar*, 3 Bing., N. C., 291; 5 Dowl. 361, *S. C.*

(*m*) *Dawes* v. *Anstruther*, 5 Dowl. 736; 2 M. & W. 817, *S. C.*

(*n*) *Pybis* v. *Stephen*, 6 M. & W. 813; 8 Dowl. 771, *S. C.*

(*o*) *Snelling* v. *Channels*, 5 Dowl. 80.

(*p*) *Horlock* v. *Liddiard*, 10 M. & W. 677; 2 Dowl., N. S., 277, *S. C.*

(*q*) *Webster* v. *Jones*, 7 D. & R. 774; *Davis* v. *Chapman*, 1 Nev. & P. 699; 6 A. & E. 767, *S. C.*

(*r*) *Rex* v. *Curwood*, 5 Nev. & M. 369. In an action for malicious prosecution, alleging, as special damage, that divers persons, named in the declaration, had left off dealing with the plaintiff, *Coltman*, J., on summons, ordered the plaintiff to give the addresses of the persons named within a week, or that, in default thereof, the names of those whose address was not given should be struck out of the declaration. *Fell* v. *Rosting*, 6 April, 1839, at chambers. But *quære* this, especially as to the addresses; for it is not reasonable to expect a tradesmen must know the name and address of every customer he has. And see *Rettallick* v. *Hawkes*, 1 M. & W. 573; and *Stannard* v. *Ullithorne*, *infra*.

(*s*) *R.* v. *Flower*, 7 Dowl. 665.

(*t*) *Stannard* v. *Ullithorne*, 3 Bing., N. C., 326; 3 Scott, 771; 5 Dowl. 370, *S. C.*

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grant particulars in an action of trespass, on the mere affidavit of the defendant that he had read the declaration, and that, from the general and vague form thereof, he was unable to ascertain the grievances on which the plaintiff intended to rely, but held, that some special ground ought to be shewn as a reason for granting such a rule (*u*). As to when particulars will be granted in an ejectment, see *ante*, 945.

At what time obtained.

At what Time, and how obtained—on what Terms, &c.]—By *R. H.*, 2 *W.* 4, *r.* 47, "A summons for particulars and order thereon may be obtained by a defendant before appearance, and may be made, if the judge thinks fit, without the production of any affidavit (*x*), or after declaration and before plea pleaded." It is, indeed, discretionary with the judge to make an order at any time before the trial (*y*). But in general it will be refused after plea pleaded, unless under special circumstances.

How obtained.

We have already seen, that, in declarations containing *indebitatus* counts in *assumpsit*, or debt on simple contract, the plaintiff should deliver the particulars under those counts at the time of filing or delivering the declaration. Should he neglect to do so, under such a declaration, and in other cases where you are entitled to the particulars, the mode of obtaining them is, *by taking out a judge's summons for that purpose, and obtaining an order thereon. If either party be dissatisfied with the judge's decision, he may of course apply to the Court. The order generally is, that the plaintiff's attorney or agent shall deliver to the defendant's attorney or agent the particulars required, and that in the meantime all further proceedings in the cause be stayed* (*z*).

Terms imposed.

But sometimes the judge will not stay the proceedings. The term of "pleading issuably" and taking short notice of trial, if necessary, will in general be imposed on the defendant by the order; unless expressly waived in writing by the plaintiff's attorney (*R. H.*, 59 *G.* 3); or unless the justice of the case requires a dispensation with such terms, as, if the defendant be desirous of pleading in abatement a non-joinder of a party, which is not regarded as other dilatory pleas are; or, unless, as it seems, in cases where the application for particulars has been rendered necessary by the neglect of plaintiff to deliver them with his declaration, in pursuance of the *R. T.*, 1 *W.* 4, *r.* 6. Sometimes the judge will impose other terms on the defendant. Even although the defendant may have had a particular delivered to him before action, still the judge may make plaintiff re-deliver it as a particular of demand in the action, though in such a case the defendant is usually ordered in any event to pay the costs of such particular, if required in detail, and, if necessary, to take short notice of trial (*a*).

Consequences of not giving particulars.

The consequences of not giving particulars of demand where

(*u*) *Horlock* v. *Lallard*, 10 M. & W. 677; 2 Dowl., N. S., 277, *S. C.*

(*x*) 1 Chit. Rep. 734; and R. T., 2 G. 4, C. P.; 6 Moore, 211. Before the rule of H. T., 2 W. 4, r. 47, it was necessary in the Exchequer to have an affidavit that the defendant never had had any particulars, or had mislaid them, or was not sufficiently acquainted to the demand so as safely to proceed to trial. (2 C. & J. 253, n.: Tidd's New Pract. 302. See form of summons, Chit. Forms, 589).

(*y*) See Imp. K. B. 239.

(*z*) See form, Chit. Forms, 589.

(*a*) See *James* v. *Child*, 2 C. & J. 292; 2 Tyr. 312; 1 Dowl. 310, *S. C.*

the declaration contains *indebitatus* counts, have been already considered (*ante*, 1252). As regards the not giving particulars, in obedience to the usual order for them, the only consequence is, that when the order has been drawn up and served, it operates, if so expressed in it (otherwise not (*b*)), as a stay of proceedings from the time of such service till the particulars have been delivered (*c*). Under the usual order, the defendant cannot sign judgment of *nonpros*, though the plaintiff neglect or refuse the delivery of the particulars; neither will the Court or judge give him liberty to sign such judgment (*d*); and this, although the order direct the particulars to be delivered in a specified time (*e*). And the Court of Exchequer refused a rule to compel the plaintiff to deliver particulars in pursuance of a judge's order, and *Alderson*, B., said, "If the plaintiff does not choose to obey the order, by delivering further and better particulars, he cannot proceed with his cause, and is kept at arm's-length, as it were, until he thinks proper to do so: but he cannot be compelled in this manner to comply with the order" (*f*). Nor is the plaintiff's neglect to deliver a particulars, a ground for discharging the defendant out of custody (*g*). And where (before the 1 & 2 *Vict. c.* 110) an order for particulars was obtained in an action commenced by summons, and the plaintiff, instead of delivering particulars, arrested the defendant in a new action for the same cause, *Taunton*, J., held that the arrest was regular (*h*). The defendant's course in these cases, if he will force the plaintiff to proceed in the action, is, to get rid of the order for particulars; and in order to get rid of it, it is not sufficient for him merely to give notice to that effect, he must have the order actually disposed of, by getting it rescinded (*i*).

Form of particulars.

Form of.]—The particulars of demand, if delivered at the time of filing or delivering a declaration under the common *indebitatus* counts in *assumpsit*, or debt on simple contract, should be a *full particular* of the claim under those counts; and, if possible, should be comprised *within three folios;* but, if the full particulars cannot be comprised within three folios, then the plaintiff should deliver *such a statement of the nature of his claim*, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios (*k*), otherwise the plaintiff would not be allowed the costs of the excess of the three folios.

They must be explicit.

The particulars must be explicit, and should in general specify items, dates, and amounts, otherwise the plaintiff may be ordered to give a further and better particular. The object of the particulars is to control the generality of the declaration; and a defendant is entitled to such particulars as will give him that information which a reasonable man should require respecting the matters against which he is called upon

(*b*) *Doe Roberts* v. *Roe*, 13 M. & W. 691.
(*c*) *St. Hanlaire* v. *Byam*, 4 B. & C. 270; *Gibeer* v. *Westmore*, 5 B. & C. 769; 8 D. & R. 607, S. C.; *Wilson* v. *Hunt*, 1 Chit. Rep. 647.
(*d*) *Burgess* v. *Swayne*, 7 B. & C. 485; *Somers* v. *King*, 7 D. & R. 125.
(*e*) *Sutton* v. *Clarke*, 8 Bing. 165; 1 M. & Scott, 271; 1 Dowl. 269, S. C. See *Dumday* v. *Hughes*, 2 Scott, 377.
(*f*) *Cane* v. *Spinks*, 7 Dowl. 27. And see *Kirby* v. *Snowden*, 4 Dowl. 191.
(*g*) *Gratt* v. *Wilks*, 5 Dowl. 715.
(*h*) *Anon.*, 1 Dowl. 59.
(*i*) *Wickens* v. *Cox*, 6 Dowl. 693; 4 M. & W. 67, S. C. See *Harden* v. *Harbourn*, 7 Dowl. 546.
(*k*) *Ante*, 1251.

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to defend himself (*l*). In an action by an engineer against a railway company for surveying their line, &c., and for money paid, a general particular for surveying the country between certain places, including travelling charges and assistance, is sufficient, without specifying the number of fields surveyed, or how much of the charge is for the engineer's skill, time, and labour, and how much for travelling expenses, and expenses; but the particulars should specify the sums paid to the defendant's use (*m*). Where the acceptor of two bills for 250*l.* each, was arrested upon a *capias* indorsed thus: "Bail, by affidavit, for 250*l.* and upwards," "The plaintiff claims 266*l.*, with interest thereon, from the 30th of December to the day of payment, for debt, and 3*l.* 10*s.* for costs, &c.:" the declaration was upon two bills, and the particulars stated that the action was brought to recover 500*l.*: it was held that the defendant was entitled to better particulars (*n*). Where, in an action for an escape, the plaintiff, being ordered to give a particular as to time, &c., alleged in the particulars the escape as having taken place between the 13th May and the 1st November, the Court ordered a better particular (*o*). In covenant by the assignee of lessor against the lessee for not repairing, the particulars merely stated the covenants alleged to have been broken,—the Court, distinguishing between an ejectment for a forfeiture and an action of covenant, considered that, as the defendant had been in possession from a period anterior to the assignment, he must know better than the plaintiff what the breaches were, and therefore refused a better particulars (*p*). Where the action is for a balance of account, the particulars should state what the balance is (*q*). A particular as general as the declaration would probably be deemed a contempt of the order, and might subject the attorney to costs (*r*). But the particulars need only be certain to a common intent (*s*). There is no objection, when an account has been already delivered, to refer to it generally in the particulars, without restating the items of it; but this may impose on the plaintiff the proof at the trial of such delivery (*t*). Less particularity is required in a particular, delivered in pursuance of the rule of *T. T.*, 1 *W.* 4, *r.* 6, where a full particular cannot be comprised in three folios (*u*).

Need not state credit side of account.

It was formerly held, that, if money has been paid on account, the particulars should specify it, and state the balance which the plaintiff seeks to recover (*x*), and that stating the debtor side of the account only, would be considered a contempt, for which the attorney might be ordered to pay the costs of both parties (*y*); but these decisions have been over-

(*l*) Per cur., in *Rennie* v. *Beresford*, 15 Law J., N. S., 78; 15 M. & W. 78; 3 Dowl. & L. 464, S. C.

(*m*) Id.

(*n*) *Davies* v. *Anstruther*, 3 Dowl. 736; 2 M. & W. 817, S. C.

(*o*) *Webster* v. *Jones*, 7 D. & R. 774. And see *Davies* v. *Chapman*, 6 Ad. & E. 767.

(*p*) *Sowter* v. *Hitchcock*, 5 Dowl. 738.

(*q*) *Mitchell* v. *Wright*, 1 Esp. 279.

(*r*) See *Brown* v. *Watts*, 1 Taunt. 353.

(*s*) *Lines* v. *Rees*, 1 Jurist, 503. See *Archbutt* v. *Pennell*, 1 Dowl. & L. 318: *Burnett* v. *Bouch*, 9 C. & P. 620: *Rennie* v. *Beresford*, *supra*: *Higgins* v. *Bate*, 15 Law J., N. S., Exch., 77; 3 Dowl. & L. 470, S. C.

(*t*) *Hatchett* v. *Marshal*, Peake, 172; 1 Wightw. 78. See *James* v. *Child*, 2 C. & J. 252; 2 Tyr. 312; 1 Dowl. 310, S. C.

(*u*) See the forms, Chit. Forms, 588, 590.

(*x*) *Mitchell* v. *Wright*, 1 Esp. 280. See *Miller* v. *Johnson*, 2 Esp. 602.

(*y*) *Addington* v. *Appleton*, 2 Camp. 410.

ruled, and the Court will not, in general, compel the plaintiff to give any part of the credit side of the account (*z*). Though it may be advisable for him in most cases to do so in the case of payment on account, in order to save the expense of a plea of payment (*a*). If the plaintiff do give the defendant the credit side of the account, or credit for payments, the Court will not compel the plaintiff to give a statement of the items of the credit side, or payment, for which such credit has been given (*b*). Credit cannot be given in the particulars for a set-off, so as to prevent the defendant pleading it, as it is impossible to tell whether the defendant will plead one or not (*c*).

Should be intitled in the cause.

The particulars should be intitled in the Court and cause, and signed by the plaintiff's attorney, and be delivered to the defendant's attorney or agent. If delivered under an order it is not unusual, and perhaps it ought, to express that it is so, in order, that, on the face of them, it may appear plaintiff is bound by them.

Amendment of.

Amendment of.—Order for better Particulars.]—If the particulars delivered be incorrect, the plaintiff cannot cure the defect by delivering a fresh particulars, or otherwise, without a judge's order, or by consent (*d*); but he may generally obtain a judge's order to amend them on payment of costs, and such other terms as the justice of the case requires (*e*). Where the plaintiff's attorney, by mistake, gave credit to the defendant in the particulars for a sum of money, the Court allowed the plaintiff to amend them by striking out the credit so given (*f*). An amendment has been allowed after the cause had been referred, and an award made in the reference had been set aside (*g*). So, an amendment has been allowed pending a reference, there being no objection raised by the defendant that he would not have consented to the reference had the amended particulars been delivered before the submission (*h*). The Courts have also allowed an amendment after verdict, and granted a new trial on payment of costs, where the particular has been holden defective by reason of being in form inapplicable to the proper count (*i*). When the plaintiff, by amending his particulars, makes them inconsistent with the declaration, and insensible, the Court will not set aside a verdict obtained by him, unless the defendant was misled by the alteration, *or* had no opportunity of amending his pleadings (*j*).

Better particulars.

If the particulars be not sufficiently explicit, the other party may obtain an order for a further and *better particulars* (*k*). By a rule in the Queen's Bench no summons

(*z*) *Penprase* v. *Crease*, 4 Dowl. 711; 1 M. & W. 36, *S. C.*; *Randall* v. *Ilsey*, 4 Dowl. 682; per *Patteson*, J., in *Smith* v. *Eldridge*, 4 Ad. & E. 64; 5 Nev. & M. 408, *S. C.*; *Beechy* v. *Hanmer*, 9 Jur. 640, B. C.

(*a*) *Post*, 1258, 1259.

(*b*) *Myatt* v. *Green*, 13 M. & W. 377; and per *Alderson*, J., in *Penprase* v. *Crease*, 1 M. & W. 36.

(*c*) *Kilner* v. *Bailey*, 5 M. & W. 362; 7 Dowl. 802, *S. C.*, per *Alderson*, B. See *Morris* v. *Jones*, 1 Q. B. 397: *Rowland* v. *Blakesley*, Id. 403.

(*d*) *Brown* v. *Watts*, 1 Taunt. 353.

(*e*) See *Staples* v. *Holdsworth*, 6 Dowl. 714; 6 Scott, 606; 4 Bing., N. S., 717, *S. C.*; *Collins* v. *Aaron*, 4 Bing., N. S., 233.

(*f*) *Preston* v. *Whitaheart*, 5 Dowl. 720.

(*g*) *Jones* v. *Corry*, 8 Scott, 575; 6 Bing., N. S., 247, *S. C.*

(*h*) *Blunt* v. *Cook*, 5 Scott, N. R., 233; 2 Dowl., N. S., 89, *S. C.*

(*i*) *Holland* v. *Hopkins*, 2 B. & P. 243: *Brockon* v. *Smith*, 1 Ad. & E. 488.

(*j*) *Simons* v. *Wood*, 13 Law J., N. S., 49, Q. B.

(*k*) Tidd, 589, 599. See instances, *Hurst* v. *Waikie*, 1 Camp. 69, n.: *Millwood* v. *Waller*, 2 Taunt. 224: *Brown* v. *Hodgson*, 4 Taunt. 189: *Hunter* v. *Welsh*, 1 Stark. 224: *Dawes* v. *Anstruther*, 5 Dowl. 738.

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for further particulars shall be granted, unless the last previous order for particulars be first drawn up, and such order produced at the time of applying for such summons (*l*).

Stay of proceedings, and time for pleading after.

Stay of Proceedings and Time for Pleading after.]—The summons, which is usually drawn up with a stay of proceedings, operates as such stay from the time it is attendable until it is disposed of. As to the time for pleading or taking the next step, if the summons be discharged, *see post, Part* 6, *Chaps.* 1 *and* 2. As to the time for pleading after an order made, and particulars delivered, *see Vol.* 1, 210.

Time for pleading.

Annexing particulars to the record.

Annexing Particulars to the Record.]—At the time of entering the *nisi prius* record with the judge's marshal, the plaintiff's attorney should annex to it a copy of the particulars of the demand, and of the defendant's set-off (if any) (*m*). This will save the necessity of the opposite party proving the order for the delivery of the particulars, in cases where he may be desirous of confining the party delivering the particulars to the proof of the items contained therein (*n*). But, if the plaintiff annex to the record particulars varying from those delivered to the defendant, and the defendant is prepared at the trial to prove the delivery of the particulars to him, the defendant may nonsuit the plaintiff, if he is unable to give in evidence any cause of action included in the particulars delivered; or if not prepared with proof of the delivery of the particulars, the defendant will be entitled to a new trial, and the plaintiff's attorney might be made to pay the costs of the former trial (*o*). Where the particulars annexed to the record were for 4*l.* 19*s.* on an account stated, and the undersheriff refused to receive evidence of money lent, and nonsuited the plaintiff; the nonsuit was set aside, it appearing in the particulars delivered with the declaration that there was a claim for money lent (*p*).

Effect of particulars on the pleadings and evidence.

Effect of Particulars on the Pleadings and Evidence.]—The particulars are not to be considered as incorporated in the declaration (*q*). Nor do they form any part of, nor can they have the effect of a pleading, except in the case of a payment when credited in them, as presently mentioned (*r*). Nor can they be looked at with a view to construe the pleadings (*s*). The plaintiff may apply them to any count of the declaration to which they are applicable (*t*).

Payments specifically admitted in, need not be pleaded.

Before the *R. T.*, 1 *Vict.*, (1838), it was ruled, that an admission in a particular of demand of money received would not avail defendant in an action of debt, without a plea of payment, though it might be otherwise in an action of *assumpsit* (*u*).

(*l*) R. H., 59 G. 3, Q. B.

(*m*) T. T., 1 W. 4, r. 6, *ante*, 1251; and Vol. 1, 354.

(*n*) *Macarthy* v. *Smith*, 8 Bing. 146; 1 M. & Scott, 227; 1 Dowl. 253. *S. C.*

(*o*) *Morgan* v. *Harris*, 1 Dowl. 570; 2 C. & J. 461, *S. C.*

(*p*) *Ripper* v. *Walton*, 1 Dowl., N. S., 344.

(*q*) *Booth* v. *Howard*, 5 Dowl. 438: *Ferguson* v. *Mahon*, 9 Ad. & E. 945; 1 P. & D. 194. And see *Kingham* (or *Hingha.*) v. *Robins*, 5 M. & W. 94; 7 Dowl. 352, *S. C.*

(*r*) See *Staples* v. *Heidenreth*, 4 Bing., N. S., 717.

(*s*) *Kilner* v. *Bailey*, 5 M. & W. 382, per *Abinger*, C. B.: *Dumpster* v. *Purnell*, 4 Scott, N. R., 30; 3 M. & Gr. 375, S. C.

(*t*) *Russell* v. *Bell*, 10 M. & W. 340.

(*u*) *Ernest* v. *Browne*, 3 Bing., N. C., 674: *Coates* v. *Stevens*, 2 C., M., & R. 118. See *Jacobs* v. *Shirley*, 2 Bing. 98.

This point, however, was not free from doubt (*x*); and it is now settled otherwise by the above rule, which orders, "that in any case, in which the plaintiff (in order to avoid the expense of a plea of payment) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, it shall not be necessary for the defendant to plead the payment of such sum or sums of money. But this rule is not to apply to causes where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums" (*y*). And by the same rule it is ordered, that "payment shall not, in any case, be allowed to be given in evidence, in reduction of damages, but shall be pleaded in bar." This rule applies to payments made after action brought, as well as to those made before (*z*). Though the particulars refer to particulars delivered before action, in which credit is given for payments, still, if the particulars in the action do not give such payments, the case is not within the above rule, and the defendant should plead such payments (*a*). If, notwithstanding the rule, and plaintiff giving credit in the particulars for payments, the defendant pleads a plea of payment, the plea will be taken to be pleaded only to the balance claimed by the particulars (*b*). The giving credit for a payment in the particulars, in pursuance of this rule, is the same in effect as if the payment were pleaded; but, it cannot be taken as an admission as against the defendant, with respect to any of the items in the entire account (*c*). Where a plaintiff admits a payment generally, as thus—"Cr. by bills, 1500*l.*"—this is to be taken as a payment admitted to have been made to the plaintiff by the defendant (*d*). The plaintiff may explain the admission of the payment of a certain sum, by shewing that it was applicable to an item, which, otherwise, he could not recover (*e*). He must prove a debt due to him from the defendant, to a larger amount than the sum admitted by the particulars to have been paid, to enable him to recover (*f*). Where, in debt for goods sold and delivered, the particulars claimed a balance of 29*l.* for goods sold and delivered, after allowing credit for 920*l.* "paid at various times:" at the trial, plaintiff proved and claimed for 949*l.*, and admitted that part of this sum was for 84*l.* the price of a tea urn, which defendant had returned, and plaintiff had taken back; it was held, that plaintiff might shew that the 84*l.* was also a part of the 920*l.*, allowed as money paid, and might, therefore, recover the balance between 949*l.* and 920*l.* (*g*) Where the particulars give defendant credit for a bill indorsed by defendant to plaintiff, but also debit defendant to the amount

(*x*) *Kenyon* v. *Wakes*, 2 M. & W. 764: *Nicholl* v. *Williams*, Id. 758: *Rymer* v. *Cook*, M. & M. 86. n.

(*y*) *Morris* v. *Jones*, 1 Q. B. 397; 1 G. & D. 13; 10 Law J., N. S., 165, Q. B., *S. C.*: *Bosley* v. *Moore*, 8 Dowl. 375.

(*z*) *Eastwick* v. *Harman*, 6 M. & W. 13; 8 Dowl. 369, *S. C.* See *Kennington* v. *Aiken*, 2 Dowl., N. S., 658: *Alexander* v. *Porter*, 1 Dowl., N. S., 832.

(*a*) *Hart* v. *Middleton*, 2 C. & K. 9.

(*b*) *Eastwick* v. *Harman*, *supra*.

(*c*) *Gostling* v. *Herring*, 2 Law J., N. S., 32, C. P. And see *Kenyon* v. *Wagee*, 2 M. & W. 764, shewing that the particulars are evidence for defendant of the payments credited in them.

(*d*) *Smethurst* v. *Taylor*, 12 M. & W. 545.

(*e*) *Smethurst* v. *Taylor*, *supra*, per *Abinger*, C. B.

(*f*) *Smethurst* v. *Taylor*, *supra*; *Rowland* v. *Blakeley*, 1 Q. B. 403.

(*g*) *Lamb* v. *Micklethwaite*, 1 Q. B. 400; 1 G. & D. 136; 9 Dowl. 531, *S. C.*

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of the bill for its dishonour, it is as if the particulars had not mentioned the bill at all: therefore, in such a case, the defendant, in an action for goods sold and delivered, cannot shew, under *non assumpsit*, that the plaintiff, after taking and presenting the bill, failed to give notice of dishonour (*h*). The above rule of *R. T.*, 1 *Vict.*, does not apply to a set off (*i*). If, notwithstanding, the plaintiff admits a set-off in his particulars, he is not concluded by it (*k*). If defendant use such particulars as evidence in support of a plea of set-off, the plaintiff is entitled to have the whole account submitted to the jury, as evidence of the total amount of claims on each side (*k*). In an action for goods sold, &c., the particulars stated the action to be brought "to recover 37*l.*, the balance of an account of 108*l.*," (giving no credit for any specific sums); the defendant pleaded as to 5*l.*, parcel &c., a set-off to that amount—it was properly left to the jury to say, whether the balance claimed meant a sum after giving credit for the 5*l.* set-off (*k*).

Crediting set-off.

At the trial, or execution of a writ of inquiry, the plaintiff will be confined in his proof to the items contained in the particulars delivered (*l*). Thus, in an action for goods sold and delivered, and *non assumpsit* pleaded, the plaintiff will not be allowed to prove a sale of other goods than those mentioned in the particulars; and the plaintiff will not be allowed to go beyond them, in respect of any item wholly omitted; or, in respect of items not properly described in them, and where the misdescription would be calculated to mislead or deceive him. Where the particulars stated the demand to be for goods sold and delivered to the defendant, and not money received to plaintiff's use, the plaintiff was not allowed to give evidence of goods sold *by* the defendant as agent for the plaintiff, so as to recover the proceeds (*m*). But, where the defendant, as plaintiff's agent, had goods from the plaintiff for sale, a particular, containing merely the item, "——tierces of porter, £——," was held applicable to a count for money had and received, as also to any of the counts in the declaration (*n*). And, under a claim "for work and labour under an agreement," the plaintiff may recover for extras (*o*). So, in an action for goods sold and delivered, where the particular was for goods bargained and sold, it was held the plaintiff might recover (*p*). So, disbursements have been held recoverable under an item in the particulars for "cash advanced" (*q*). On the other hand, on a declaration for goods sold, and on an account stated, proof, that the defendant acknowledged, in conversation with a third person, not shewn to be the plaintiff's agent, that he owed the plaintiff 13*l.* 10*s.*, will not support a particular, "To a beast sold and delivered, 13*l.* 10*s.*" (*r*) Where a declaration in *assumpsit* contained three counts, the first on a promissory note for 50*l.*; the second, on another note to the like amount; and the third, for 100*l.* on an account

Proof confined by the particulars.

(*h*) *Green* v. *Smithies*, 1 Q. B. 797; 1 G. & D. 395.

(*i*) *Rowland* v. *Blakeley*, 1 Q. B. 403; 2 G. & D. 734, *S. C.*: *Townson* v. *Jackson*, 2 D. & R. 370.

(*k*) *Townson* v. *Jackson*, 2 Dowl. & L. 369.

(*l*) As to an arbitrator being confined by the particulars, see *post*, Pt. 7.

(*m*) *Holland* v. *Hopkins*, 2 B. & B. 243; 3 Esp. 169, *S. C.*: *Macarty* v. *Smith*, 8 Bing. 145.

(*n*) *Hunter* v. *Welsh*, 1 Stark. 294. And see *Brown* v. *Hodgson*, 4 Taunt. 189.

(*o*) *Lines* v. *Rees*, 1 Jur. 593.

(*p*) *Best* v. *Robinson*, Exch., 30 May, 1846.

(*q*) *Harrison* v. *Wood*, 1 M. & Scott, 535; 8 Bing. 371, *S. C.*

(*r*) *Brecken* v. *Smith*, 1 Ad. & E. 488.

ated; the particulars were, "to recover 50*l.*, being the amount the note in the first count of the declaration mentioned; and o 50*l.*, the amount of the note in the second count men- ned; above are the particulars of the plaintiff's demand for e recovery whereof he will avail himself of the whole or any rt of the declaration;" it was held, that the plaintiff could t recover on the third count, without proving an account ted, with reference to the promissory notes (*s*). So, where e particular was of a promissory note only, and when the te was produced at the trial, it was found to be written on improper stamp, the plaintiff was precluded from resorting recover upon the consideration for it (*t*); but, under such a rticular, after proving the note at the trial, the plaintiff ght recover interest on it (*u*). Where there were three counts three bills, but the particulars stated only that the action s brought to recover the money due on the bill in the first unt, it was held that the plaintiff could not recover on the lls mentioned in the second and third counts (*x*). But where are were two counts, each on a bill, and the particulars stated e action to be, to recover the amount of the bill mentioned the first count, with interest, and that the plaintiffs would ly on the whole or any part of the declaration for the re- very thereof, they were held sufficient to entitle the plaintiff recover on the second count (*y*). So, it seems, the plaintiff ay recover on an account stated, upon the items set forth in e particulars, though the particulars do not expressly refer the account stated (*z*). Where the particular stated various ms of money due by the defendant, but some of which were, fact, owing from the defendant and his partner, and not from e defendant alone, and the defendant pleaded the nonjoinder abatement; the plaintiff was not allowed to give evidence of ose due from the defendant solely, because they were not stinguished from the others in the particulars (*a*). Where e particulars stated the cause of action to be for the amount stakes deposited in the defendant's hands, by the plaintiff d R., and won by the plaintiff of R., the Court held that he uld not recover the amount of his own stake, on proof that had redemanded it from the defendant before it was paid er (*b*). In an action for damaging some goods, and not rede- ering others, the particulars contained articles under each ead, and mentioned one as "not redelivered," which was, in ct, redelivered, but damaged; it was held, that the plaintiff uld not recover in respect of it (*c*). So, under a particular n non-cultivation, the plaintiff cannot go into evidence of ncultivation (*d*).

Mistakes, not misleading, immaterial.

As the object, however, of this strictness is, that the opposite party may know what will be attempted to be proved against

(*p*) *Roberts* v. *Elsworth*, 10 M. & W. 653; 2 Dowl., N. S., 456; 12 Law J., N. S., 15, Exch. See *Hadley* v. *Bambridge*, 2 G. & D. 483; 3 Q. B. 316, S. C.

(*q*) *Wade* v. *Beasley*, 4 Esp. 7: *Brown* v. *Watts*, 1 Taunt. 353.

(*r*) *Blake* v. *Lawrence*, 4 Esp. 147.

(*s*) *Duncan* v. *Hill*, 2 B. & B. 684. But see *Cooper* v. *Amos*, &c., *post*, 1963.

(*t*) *Sley* v. *Fisher*, 2 M. & W. 722.

(*u*) See *Fisher* v. *Wainewright*, 1 M. & W. 497.

(*a*) *Colson* v. *Selby*, 1 Esp. 452; 2 Selton, 339, S. C. But see *Hill* v. *White*, 8 Scott, 949.

(*b*) *Davenport* v. *Davies*, 1 M. & W. 560. And see *Mearing* v. *Hollings*, 15 Law J., N. S., 168, Exch.; 14 M. & W. 711, S. C.

(*c*) *Moss* v. *Smith*, 1 Scott, N. R., 25; 8 Dowl. 537; 1 M. & Gr. 228, S. C.

(*d*) *Doe Winnall* v. *Broad*, 2 Scott, N. R., 685.

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him at the trial, and may prepare his evidence accordingly, a mistake in the particular, either as to dates or other matter, not calculated to deceive or mislead him, will not be deemed material (*e*); and, in general, a liberal construction should be put upon the particulars (*f*). Thus, an error in the date of one of the items in a particular, as, where work and labour was stated to have been performed in another month, was holden to be immaterial, because it could not have misled the defendant (*g*). And, in a more recent case, where the particulars stated goods to have been delivered on the 6th June, 1836, and the plaintiff gave evidence of goods supplied on the 28th May, 1836, it was held that this was not a particular which could have misled the defendant, although he had bought goods of the plaintiff, and paid for them for the sixth months previous to the 28th May, 1836 (*h*). So, where the particular specified a bill for 60*l*., bearing date on a certain day, and the evidence was of a bill for 63*l*., dated on a different day, in the same year and month, *Abbott*, J., held the variance to be immaterial (*i*). So, where a payment made on account of the defendant to A. was stated in the particulars to have been made to B., Lord *Ellenborough* said, he should hold it to be immaterial, unless the defendant would make affidavit that he was misled by the particulars (*k*). So, where the action is for money had and received to the use of the bankrupt, and the particulars for money had and received "to the use of the plaintiffs as assignees" (*l*). So, a particular in which the plaintiffs claim for goods sold as brewers, will not prevent their recovering as spirit-dealers, where the defendant had not been misled (*m*). So, in an action for goods sold, where the particulars were for "chalk," and the proof was for "caulk," the variance was held immaterial, as it was not likely to mislead (*n*). So, where in debt for rent, the plaintiff in his particular described the premises as being in a different parish from that in which they were really situate, the mistake was held immaterial (*o*). So, where in an action for use and occupation, the particulars stated a special contract to pay 40*l*. for six months, for certain premises, *Coleridge*, J., held, that the plaintiff might recover on an implied contract to pay rent for the same premises (*p*). So, in ejectment to recover premises forfeited by non-payment of rent, a variance between the amount of rent proved to be due, and the amount demanded in the particulars, was holden not to be material (*q*). Where the particulars were on an account stated, "as appears by a memorandum under the hand of the defendant of this date," and the memorandum was inadmissible for want of a promissory note stamp, it was held, that the

(*e*) *Lambirth* v. *Raff*, 1 M. & Scott, 897; 8 Bing. 411, *S. C.*; *Harrison* v. *Wood*, 1 M. & Scott, 536; 8 Bing. 371, *S. C.*; *Spencer* v. *Bates*, 1 Gale, 108: *Green* v. *Clarke*, 2 Dowl. 18. See *Ripper* v. *Walton*, 1 Dowl., N. S., 344: *Simons* v. *Wood*, 13 Law J., N. S., 49, Q. B., *ante*, 1257, (where an amendment had been made in the particulars): *Hurcum* v. *Strriker*, *supra*: *Young* v. *Fisher*, 7 Jur. 69, C. P.

(*f*) *Hurcum* v. *Striker*, 2 Dowl., N. S., 524; 10 M. & W. 553, *S. C.*

(*g*) *Millwood* v. *Walter*, 2 Taunt. 224.

(*h*) *Fleming* v. *Crisp*, 5 Dowl. 454.

(*i*) *Dunn* v. *Thomas*, Manning's Index, 240. See *Parsons* v. *Wilson*, 4 Scott, N. R., 1; 3 M. & G. 445, *S. C.*

(*k*) *Day* v. *Bower*, 1 Camp. 69, n. See *Lambirth* v. *Raff*, 1 M. & Scott, 897; 8 Bing. 411, *S. C.*

(*l*) *Tucker* v. *Barrow*, 1 M. & M. 137.

(*m*) *Lambirth* v. *Raff*, 1 Bing. 411; 4 M. & Scott, 897, *S. C.*

(*n*) *Spencer* v. *Bates*, 1 Gale, 102.

(*o*) *Davies* v. *Edwards*, 3 M. & Sel. 380.

(*p*) *Kirkman* v. *Jarvis*, 7 Dowl. 678.

(*q*) *Tenny* v. *Moody*, 10 Moore, 292; 3 Bing. 3, *S. C.*

account stated might be proved by other evidence than the memorandum. It was held, also, that verbal evidence was admissible of an admission of the money being due, and a promise to pay it by instalments, though such admission and promise were made at the time of signing the memorandum, and were embodied in it (*r*).

Omission, when cured by defendant's evidence.

Also, although the plaintiff is confined in his proof to the items contained in his particulars, yet if it appear from the defendant's evidence, that he is entitled to recover for items not included in the particulars, he shall recover for such items (*s*). But where, in an action for lottery tickets sold, the particulars of the defendant's set-off mentioned the sale of the tickets to himself, it was held that this was not sufficient proof of the sale, and that the fact must be proved by other evidence (*t*).

Special counts not affected by.

It seems, also, that where the particulars need not be given as to some counts, the omission in them of those causes of action will not be material. Therefore, the delivery of a particular under the *indebitatus* counts will not prevent the plaintiff from giving evidence on a special count in his declaration, if he has not included that part of his claim in his particulars, as a particular is only necessary to explain the *indebitatus* counts (*u*). And, where the first count was on a bill of exchange for 40*l*., and the second on a bill for 20*l*., and the third for goods sold, and the particulars specified only the 20*l*. bill and the goods—per *Abbott*, C. J., "That is no objection. If the bill is specified in the declaration, it need not be mentioned in the particulars. You must give a particular of goods sold, but you never need give a particular of bills of exchange if they appear in the declaration" (*v*). But where the plaintiff declared upon three bills of exchange; but sought by his particular to recover on the bill set out in the first count only, it was holden that he might give the other two bills in evidence to prove a collateral matter, namely, the partnership of the defendants (*x*); but it was considered that he could not give them in evidence as a substantive cause of action (*x*). Though, according to a more recent case, he might have done so, had the particulars stated that the plaintiff would rely on the whole or any part of the declaration (*y*).

Proof of items omitted from former bill.

The plaintiff may give evidence of a demand contained in the particulars, though he omitted to include it in a bill delivered before action brought (*z*). But this would in most cases operate against him in evidence as to the additional items; and the delivery of a former bill is conclusive evidence against an increase of charge on any of the same items contained in a subsequent bill (*a*).

Particulars, how proved.

No proof of the order for, or delivery of, the particulars of demand or set-off is requisite at the trial, when they have been

(*r*) *Singleton* v. *Barrett*, 2 C. & J. 368.

(*s*) *Hurst* v. *Watkis*, 1 Camp. 68; accord per *Parke*, B., in *Fisher* v. *Wainwright*, 1 M. & W. 486. See *Holland* v. *Hopkins*, 2 B. & P. 243.

(*t*) *Miller* v. *Johnson*, 2 Esp. 602: *Harrington* v. *M'Morris*, 5 Taunt. 229: *sed quære?*

(*u*) *Day* v. *Davies*, 5 C. & P. 340. And see *Cooper* v. *Amos*, 2 C. & P. 267: *Fisher* v. *Wainwright*, 5 Dowl. 102; 1 M. & W. 480, *S. C.*

(*v*) *Cooper* v. *Amos*, 2 C. & P. 267. See per *Taunton*, J., in *Brockon* v. *Smith*, 1 Ad. & E. 490.

(*x*) *Duncan* v. *Hill*, 2 B. & B. 682.

(*y*) *Hay* v. *Fisher*, 2 M. & W. 722.

(*z*) *Short* v. *Edwards*, 1 Esp. 374.

(*a*) See *Loveridge* v. *Botham*, 1 B. & P. 49.

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annexed to the record (*b*); though the particulars are not part of the record (*c*). When not so annexed, in order to prove them at the trial, the judge's order, with the particulars, should be produced, and evidence given of the plaintiff's attorney's or agent's signature to the latter, unless admitted by him (*d*).

2. *Particulars of Set-off—Payments—Statutes—Objections to Patent.*

Particulars of set-off.

Particulars of Set-off.]—Where the defendant pleads *set-off*, the plaintiff may obtain a particular of the set-off, in the same cases as a defendant would be entitled to it, if the matter so set off were declared upon. It is obtained by taking out a judge's summons for that purpose, and getting an order thereon. It is also the practice, where a defendant obtains an order for time to plead, and it is contemplated that the defendant will plead a set-off, for the judge to impose in it the terms of the defendant delivering a particular of set-off at the time of delivering the plea. The order generally requires the particulars to be delivered within a certain time, otherwise that the defendant shall not be allowed to give evidence of them at the trial (*e*). Perhaps the order may be enforced by attachment, or if the particulars of set-off are not delivered in pursuance of the order, the plea of set-off might be struck out, upon application to a judge. Where an order was obtained for the delivery of particulars of set-off within a fortnight, and they were not delivered for five weeks, but after delivery an order was made by consent for the amendment of the declaration, this was holden to be a waiver of the irregularity in the delivery of the particulars (*f*). It is no objection to the use of particulars of set-off, delivered without a judge's order, that they are headed in a different court from that in which the action was brought (*g*). The demand of particulars of set-off, delivered after a plea which was a nullity, has been held to be no waiver of the plaintiff's right to sign judgment (*h*).

Particulars of payments.

Particulars of Payments.]—Where the defendant pleads payment, the plaintiff, according to the decision of the Court of Common Pleas, may obtain particulars of the payments relied on, on an affidavit stating that he cannot safely go to trial without them (*i*). But the Court of Exchequer, in a later case, refused to grant such particulars (*k*), and it is now the practice not to grant them.

Particulars of statute.

Particulars of Statutes.]—Where the defendant pleads not guilty "by statute," the plaintiff, on an affidavit, that he can-

(*b*) *Ante*, 1258.
(*c*) *Ante*, 1258.
(*d*) See Rose. 40; 1 Phil. Evid. 183.
(*e*) See *Lovelock* v. *Cheveley*, Holt, 552. It would seem, from one case, that such an order would not prevent the defendant from giving such evidence: *Payne* v. *Davis*, 9 Jur. 734, B. C., T. T., 1845. See form of order, Chit. Forms, 591.
(*f*) *Wallis* v. *Anderson*, 1 Moo. & M. 291, per Lord *Tenterden*, C. J.
(*g*) *Lewis* v. *Hilton*, 5 Dowl. 267.
(*h*) *Ford* v. *Bernard*, 6 Bing. 534; 4 Moo. & P. 312, *S. C.*
(*i*) *Ireland* v. *Thompson*, 4 Bing., N. C., 716; 6 Scott, 601, *S. C.*
(*k*) *Phipps* v. *Sutcharn*, 8 Dowl. 266.

not discover the statute, under which the defendant sets up a defence, may obtain a judge's order, that the defendant shall point it out in a limited time, or else, that the words "by statute," shall be struck out of the margin of the plea (*l*).

Particulars of objections to patent.

Particulars of Objections to Patent.]—The act for amending the law of patents (*5 & 6 W. 4, c. 83, s. 5*) enacts, "that in any action brought against any person for infringing any letters patent, the defendant on pleading thereto shall give to the plaintiff, and in any *scire facias* to repeal such letters patent, the plaintiff shall file with his declaration, a notice of any objections on which he means to rely at the trial of such action, and no objection shall be allowed to be made in behalf of such defendant or plaintiff respectively at such trial, unless he prove the objections stated in such notice: provided always, that it shall and may be lawful for any judge at chambers, on summons served by such defendant or plaintiff on such plaintiff or defendant, respectively, to shew cause why he should not be allowed to offer other objections whereof notice shall not have been given as aforesaid, to give leave to offer such objections, on such terms as to such judge shall seem fit" (*m*). The notice of objections is to apprise the plaintiff of what he has to meet (*n*). It cannot go beyond the pleas (*o*). An objection, that the patentee was not the first and true inventor, need not shew who the first inventor was, or under what circumstances the invention had been previously used (*p*). If the defendant objects that the patent is not new, he should specify whether he objects to the patent generally, on that ground, or to part only, and if so, to what part (*q*). An objection, that the specification does not sufficiently describe the nature of the invention, and the manner in which it is to be performed, is sufficient (*r*). But, an objection, that the patentee had not caused any specification sufficiently describing the nature of the invention to be enrolled, is not sufficiently precise (*s*). An objection, that the patent was obtained by fraud, should state the species of fraud upon which the defendant intends to rely (*t*). If the notice of objections be not sufficiently specific, the plaintiff's course is to apply to a judge for an order for the delivery of a more specific notice (*u*); but, if he omit to do so, he cannot object to the generality of the notice at the trial: the only question then is, whether the notice is sufficiently large to include the objections relied on by the defendant (*x*). As to the costs, in case of failure of any of these objections, see *post*, *Ch.* 31, *title* "*Costs.*"

Decision on statute.

(*l*) *Cry* v. *Lord Ferrester*, 8 M. & W. 312; 9 Dowl. 770, *S. C.* Three days was the time limited by the order in this case.

(*m*) See *Losh* v. *Hague*, 2 Jur. 657.

(*n*) *Losh* v. *Hague*, Web. Pat. Ca. 203: *Fisher* v. *Dewick*, 6 Scott, 887.

(*o*) *Macnamara* v. *Hulse*, 1 C. & M. 471.

(*p*) *Russell* v. *Ledsam*, 11 M. & W. 647; 1 Dowl. & L. 347, *S. C.*; *Bulnois* v. *Mackenzie*, 4 Bing. N. C. 127; 6 Dowl. 215; 5 Scott, 419, *S. C.*; *Heath* v. *Unwin*, 10 M. & W. 684: *R.* v. *Walton*, 2 Bing. 969: *Bentley* v. *Keighley*, 1 Dowl. & L. 944; 8 Scott, N. R., 372, *S. C.* But see *Jones* v. *Berger*, Webst. Pat. Cas. 544; 5 M. & G. 208; 6 Scott, N. R., 208, *S. C.*

(*q*) *Russell* v. *Ledsam*, *supra*: *Heath* v. *Unwin*, *supra*: *Fisher* v. *Dewick*, 4 Bing., N. C., 127; 5 Scott, 419, *S. C.*

(*r*) *Heath* v. *Unwin*, 10 M. & W. 684: *Leaf* v. *Topham*, 2 Dowl. & L. 863. See *Jones* v. *Berger*, *supra*.

(*s*) *Leaf* v. *Topham*, 2 Dowl. & L. 863.

(*t*) *Russell* v. *Ledsam*, *supra*.

(*u*) *Bulnois* v. *M'Kenzie*, 4 Bing., N. C., 127; 6 Dowl. 215, *S. C.*

(*x*) *Neilson* v. *Harford*, 8 M. & W. 806.

CHAPTER XV.

COMPOUNDING PENAL ACTIONS.

PART V.

In what cases.

IN all actions by common informers for penalties upon any statute, the Court may give the plaintiff leave to compound with the defendant (*a*). Where the crown is concerned, the consent of the attorney-general must be procured (*b*). No composition can be made, unless by the leave of the court in which the suit is pending, under pain of 10*l*., and of being ever afterwards disabled from suing in any popular action (*c*). This leave, however, is not necessary in actions by the party grieved (*d*). It is entirely in the discretion of the Court to grant it or not (*e*). They generally grant it almost as of course, where the crown is concerned, and the consent of the attorney-general obtained; but, in other cases, they frequently refuse it. They have refused to grant it in an action on the 25 *G.* 2, *c.* 36, for keeping a disorderly house, &c. (*f*); also, in an action where part of the penalty was given to the poor (*g*).

Notice to solicitor of Treasury, when necessary.

Formerly, in the Common Pleas, where part of the penalty went to the crown, it was usual to give notice to the solicitor of the Treasury, and the consent of one of the Queen's counsel or serjeants must have been obtained, before the motion could have been granted for leave to compound a penal action (*h*). But, by general rule of all the courts of the *H. T.*, 2 *W.* 4, *r.* 99, "leave to compound a penal action shall not be given in cases where part of the penalty goes to the crown, unless notice shall be given to the proper officer, but in other cases it may" (*i*).

Motion for leave, when to be made.

The motion for leave to compound cannot be made before the defendant has pleaded (*k*). And the Court will seldom allow of it after verdict, unless circumstances be stated to them which entitle the defendant to such an indulgence (*l*), as where he is very poor, &c. (*m*)

The application.

The motion for this purpose *is grounded* on an *affidavit by the plaintiff, or his attorney, stating shortly, for what penalties, and under what statute the action is brought, and the state of the*

(*a*) 18 El. c. 5, ss. 3, 6. See *Rex* v. *Crisp*, 1 B. & Ald. 282: *Williams* v. *Edley*, 6 East, 378: *Howard* v. *Sowerby*, 1 Taunt. 103: *Sheldon* v. *Mumford*, 5 Id. 268: *Whitehead* v. *Wynn*, 5 M. & Sel. 427: *R.* v. *Gibbs*, 3 Dowl. 345.

(*b*) *Howard* v. *Sowerby*: *Sheldon* v. *Mumford*: *R* v. *Gibbs*, *supra*.

(*c*) 18 Eliz. c. 5, s. 2.

(*d*) *Kirkham* v. *Wheely*, 1 Salk. 30.

(*e*) *Maughan* v. *Walker*, 5 T. R. 98: *Hoseell* v. *Morris*, 1 Wils. 79, 130.

(*f*) *Bellis* v. *Beale*, Tidd, 9th ed., 557; 1 Chit. 361, n.: *Wood* v. *Johnson*, 2 W. Bla. 1157.

(*g*) *Hanson* v. *Sprange*, 2 Smith, 195.

(*h*) *Howard* v. *Sowerby*, 1 Taunt. 103: *Sheldon* v. *Mumford*, 5 Taunt. 268: *Rex* v. *Gibbs*, 3 Dowl. 345.

(*i*) See form of notice, Chit. Forms, 593.

(*k*) *R.* v. *Collier*, 2 Dowl. 581. See *R.* v. *Crisp*, 1 B. & Ald. 282.

(*l*) *Crowder* v. *Wagstaff*, 1 B. & P. 18: *Maughan* v. *Walker*, 5 T. R. 98: *Morgan* v. *Lute*, 1 Chit. 361.

(*m*) *Bradshaw* v. *Mottram*, 1 Str. 167.

cause, and the agreement of the parties to apply for leave to compound the action, and the terms of composition (*n*). In cases where the crown is not concerned, the affidavit should also state special circumstances, to induce the court to grant the motion. *In cases where the crown is concerned, besides giving the notice of motion above mentioned to the solicitor of the Treasury, take to him this affidavit, with the declaration and plea, and he will lay them before the Attorney-General for his consent. As soon as the solicitor of the Treasury ascertains whether the Attorney-General consents to or refuses the composition, he generally writes to the plaintiff's attorney informing him of it. The plaintiff's attorney then applies at the Treasury, and if the Attorney-General consents, you have to pay the solicitor* (5*l.* 1*s.* 4*d.*), *who hands to you the papers left, and also a consent brief of the Attorney-General, consenting on the part of the crown to the action being compounded, and for one moiety of the penalty to be paid to the plaintiff, and the other moiety to remain for the crown. The plaintiff's attorney then indorses a brief for counsel to consent on the part of the plaintiff to the action being compounded. A like brief must be signed, indorsed by counsel, to consent on the part of the defendant. The two latter are half-guinea motions, and need not be moved in court. All this may be done in vacation as well as in term* (*o*). *Take the three briefs and affidavit to the Rule Office, and draw up the rule* (*p*), *and serve a copy on defendant's attorney, and make an appointment with him for the defendant to go with you to pay the money to the officer of the respective courts, whose duty it is to receive the money and give a receipt upon the original rule. In the Queen's Bench, the Queen's part of the penalty must be paid to the Master of the Crown Office* (*q*), *and in the other courts to the Masters* (*r*). *The plaintiff's attorney then makes an appointment with his client to attend and receive the moiety, and he must accompany him to identify him.*

Costs.

Where the act gives costs to the prosecutor, he has been allowed to receive a certain sum and costs of suit, which together amounted to more than the sum paid to the crown (*s*). But this has been refused where the sum stipulated for costs was so disproportionate as to prove collusion (*t*). And where the act does not give costs, and the defendant is willing to compound for a certain sum, and to give a further sum for costs, the crown is entitled to half of such further sum, it only being in the nature of an addition to the composition (*u*).

Payment of composition, how enforced.

The rule for the composition must express that the defendant doth hereby undertake to pay the sum for which he has leave to compound (*x*); and, if he do not afterwards pay it, the Court, upon application, will grant an attachment against him (*y*).

(*n*) See form of affidavit, Chit. Forms, 383.

(*o*) The application, it seems, cannot be made to the judge at *Nisi Prius* on the trial of the cause. (*Lee* v. *Carey*, 1 Chit. Rep. 381).

(*p*) See form, Chit. Forms, 394. See R. E., 33 G. 3, Q. B.

(*q*) R. M., 7 G. 3: *Brown* v. *Bailey*, 4 Burr. 1929.

(*r*) See *Wood* v. *Ellis*, 2 W. Bla. 1154.

(*s*) *North* v. *Smart*, 1 B. & P. 51: *Wood* v. *Johnson*, 2 W. Bla. 1157.

(*t*) *Wood* v. *Caslan*, 2 W. Bl. 1157.

(*u*) *Lee* v. *Cass*, 2 Taunt. 213.

(*x*) R. E., 33 G. 3, r. 2.

(*y*) *Rex* v. *Clifton*, 5 T. R. 257.

CHAPTER XVI.

SETTING ASIDE PROCEEDINGS FOR IRREGULARITY.

In what Cases, 1268.
Who may take advantage of, and herein of what is a Nullity, and what an Irregularity, 1270.
In what Time the Application must be made, and when Irregularity waived, 1271.
The Application and Proceedings on, &c., 1274.
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PART V.

In what cases.

In what Cases in General.]—The particular cases in which proceedings are usually set aside for irregularity, have been already noticed in the course of this work; we shall here, however, again notice some of them, and attempt to deduce from them a few general rules.

1. Where a previous necessary proceeding has been omitted.

1. If any necessary proceedings have been omitted by the plaintiff, his next subsequent proceeding may be set aside for irregularity. Thus, if the defendant be arrested upon bailable process, and there have been no affidavit to hold to bail, the arrest will be set aside for irregularity; that is, the defendant will be discharged upon a common appearance; or, if he have given a bail-bond, such bail-bond will be ordered to be delivered up to be cancelled (*a*). So, if plaintiff sign judgment for want of a plea, without having given a rule to plead, or demanded a plea when necessary, the judgment may be set aside (*b*). So, if the plaintiff proceed to trial without having given notice of trial to the defendant, the verdict (if for plaintiff) may be set aside, and a new trial granted (*c*). So, if the plaintiff sign judgment upon a *cognovit* or judge's order, without entering an appearance for the defendant, the judgment may be set aside (*d*). Where a penal statute required an affidavit to be filed before suing out process, and several actions were commenced on an affidavit, including all the defendants in the several actions, instead of a separate affidavit against each, it was held, that the affidavit was defective, that the want of an affidavit was not waived by putting in bail, for that the irregularity rendered the proceedings a nullity, and all the proceedings were set aside (*e*).

2. Where the proceeding is too soon or too late.

2. If any necessary proceeding on the part of the plaintiff be not had within the time limited for it, or be had before the time appointed for it by the practice of the court, it may be set aside

(*a*) See Vol. 1, 697.
(*b*) See Vol. 1, 213, 215.
(*c*) See Vol. 1, 297; Bul. N. P. 327: *Douglas* v. *Ray*, 4 T. R. 552.
(*d*) See Vol. 1, 165.
(*e*) *Goodwin q. t.* v. *Parry*, 4 T. R. 577.

for irregularity. For instance, if the plaintiff enter an appearance for the defendant after the time limited for that purpose, the proceedings may be set aside for irregularity (*f*). And the same, if he declare after the cause is out of court (*g*). So, if judgment be signed for want of a plea before the time for pleading, the rule to plead, and twenty-four hours after demand of a plea, have severally expired, and the defendant has not waived the necessity for them by pleading or otherwise, the judgment may be set aside (*h*). So, if final judgment be signed before the expiration of the time limited for signing it, it may be set aside for irregularity (*i*).

3. Where it is informal, or not done in the manner prescribed by the practice of the court.

3. So, if any necessary proceeding be informal, or not done in the manner prescribed by the practice of the court, it may be set aside for irregularity. Thus, if a judicial writ be tested (*j*) or returnable improperly, or be misdirected (*k*), or if the name of either party be omitted in it (*l*), or if the attorney's name be indorsed on it without his authority (*m*), or if there be a material variance between the first writ and the *alias* (*n*), or if there be any other material defect in it, it may be set aside for irregularity, and the defendant ordered to be discharged, or the goods seized under the writ, or the produce of them ordered to be returned to the defendant, as the case may require. So, if the declaration be at the suit of two plaintiffs, and the writ at the suit of one; or if the writ be against one defendant, and the declaration against two (*o*); or if the declaration be for a cause of action different from that in the writ (*p*), the proceedings may be set aside for irregularity. So, if a pleading be dated on a different day to that on which it was delivered, it is irregular, and may be set aside (*q*).

4. Where it is not warranted by the other proceedings in the case.

4. And, lastly, if any proceedings are had which are not warranted by the particular circumstances of the case, according to the practice of the court, or for which there is no foundation,—as, where an attachment is sued out against the sheriff, or proceedings had against the bail after the defendant has been rendered, and notice of render given to the plaintiff's attorney, or where judgment for want of a plea is signed after plea pleaded; or where the writ of execution is not warranted by the judgment, or the like,—the proceedings may be set aside for irregularity.

Distinction between an irregularity and a nullity.

It may be added, that where the proceeding adopted is that prescribed by the practice of the court, and the error is merely in the manner of taking it, such an error is an irregularity, and may be waived by the laches or subsequent acts of the opposite party; but where, as frequently occurs in cases falling within the first and last of the above rules, the proceeding itself is altogether unwarranted, and different from that which, if any,

(*f*) *Watson* v. *Dore*, 2 M. & W. 386: *Smith* v. *Painter*, 2 T. R. 719. See *Davis* v. *Hughes*, 7 Id. 206: *ante*, Vol. 1, 166.
(*g*) *Wynn* v. *Clarke*, 5 Taunt. 649, Vol. 1, 184.
(*h*) See Vol. 1, 262.
(*i*) See *Doe* v. *Hodges*, 4 D. & R. 363: *ante*, Vol. 1, 458, &c.
(*j*) *Hart* v. *Weston*, 5 Burr. 2636: *ante*, Vol. 1, 148, 549.
(*k*) *Ante*, Vol. 1, 537.
(*l*) *Tomson* v. *Browne*, Andr. 16.
(*m*) *Oppenheim* v. *Harrison*, 1 Burr. 20. See Vol. 1, p. 150, &c.
(*n*) *Corbett* v. *Bates*, 3 T. R. 660.
(*o*) But not *vice versâ*, if the plaintiff drop all further proceedings against the defendant omitted in the declaration. *Ante*, Vol. 1, 192.
(*p*) *Tummon* v. *Ward*, 4 Nev. & M. 876: *ante*, Vol. 1, p. 192.
(*q*) *Ante*, Vol. 1, 193, 294.

PART V.

ought to have been taken, then the proceeding is a nullity, and cannot be waived by any act of the party against whom it has been taken (*s*). Thus, a writ of summons bearing date on a Sunday is a nullity, and cannot be waived (*t*). So is a notice of declaration served on that day (*u*). So is service of a writ on it (*x*). So is an affidavit taken before a person not having competent authority to take it (*y*). So is a plea in abatement without a proper affidavit (*z*). If a plea be intitled in a wrong court, or perhaps in a wrong cause, or have not counsel's signature when it ought, it is a nullity (*a*). A defective notice of trial may be treated as a nullity (*b*). If a judge make an order for an arrest, under the 1 & 2 *Vict. c.* 110, which he is not authorised in making, it seems a writ issued under it is a nullity, and the sheriff is not bound to make any return to it (*c*). On the other hand, a declaration or plea, dated on a day different from that on which it was delivered, cannot be treated as a nullity, though it may be set aside as irregular (*d*). A judgment signed without an appearance entered, is not a nullity (*e*). If the plaintiff enter an appearance for the defendant, in ignorance that the defendant has already appeared, this is an irregularity, and not a nullity (*f*). A writ of execution sued out without a *scire facias*, after a year and a day, is not a nullity, though it may be set aside as irregular, or a writ of error brought for it (*g*). By rule of all the courts of *M. T.*, 3 *W.* 4, *s.* 10 (*h*), "if the plaintiff or his attorney shall omit to insert in, or indorse on, any writ or copy thereof, any of the matters required by stat. 2 *W.* 4, *c.* 39, to be by him inserted therein, such writ or copy thereof shall not on that account be held void, but may be set aside as irregular, upon application to be made to the court out of which the same shall issue, or any judge."

Who may take advantage of.

Who may take Advantage of.]—In general, it is only the opposite party or his representatives, or those claiming under him, that can take advantage of the irregularity, and strangers to the proceedings cannot do so (*i*). A defendant is not, it seems, disqualified by want of interest, by a fiat in bankruptcy having issued against him, and being still in operation, from moving to set aside an execution levied on his goods against good faith, though the debt, warrant, and judgment are unimpeached (*k*). It may be added, that laches in making the application, in general, equally affects the party's representatives as himself (*l*).

(*s*) See *Smith* v. *Sandys*, 5 Nev. & M. 60: *Roberts* v. *Spur*, 3 Dowl. 551: *Hanson* v. *Shackleton*, 4 Dowl. 48.

(*t*) *Hanson* v. *Shackleton*, 4 Dowl. 48; 1 H. & W. 342, *S. C.*

(*u*) *Morgan* v. *Johnson*, 1 H. Bl. 628.

(*x*) *Taylor* v. *Phillips*, 3 East, 155.

(*y*) See *Sharpe* v. *Johnson*, 2 Bing., N.C., 246; 2 Scott, 405; 4 Dowl. 334, *S. C.* And see Vol. 1, 702.

(*z*) *Garratt* v. *Hooper*, 1 Dowl. 28. *Ante*, 819.

(*a*) *Ante*, Vol. 1, 266, 267. And see other instances of pleas being nullities, Id. 264.

(*b*) *Ante*, Vol. 1, 297.

(*c*) Per *Parke*, B., in *Brown* v. *M'Mullan*, 7 M. & W. 196.

(*d*) *Ante*, Vol. 1, 193, 266.

(*e*) *Ante*, Vol. 1, 165.

(*f*) *Maple* v. *Woodgate*, 26 April, 1946, B. C., cor. *Wightman*.

(*g*) *Ante*, 1013.

(*h*) See Vol. 1, 143.

(*i*) See cases, *ante*, 862, as to a warrant of attorney. And see Vol. 1, 162, as to applying to set aside proceedings on the ground of no service of writ.

(*k*) *Ante*, Vol. 1, 567.

(*l*) *Weedon* v. *Garcia*, 2 Dowl., N. S., 68. And see *Routledge* v. *Giles*, 2 C. & J. 163.

In what time the application must be made.

In what Time the Application must be made, and when Irregularity waived.]—By rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 33, "no application to set aside process or proceedings for *irregularity* shall be allowed unless made within a *reasonable time*, nor *if the party applying has taken a fresh step after knowledge of the irregularity*" (*m*). This rule, it seems, applies as well to the case of a prisoner as to other persons (*n*). It applies to the representatives of the party, as well as the party himself (*o*). It applies to the party's own acts only, and not to acts done by the opposite party for him (*p*). Where there is an irregularity in a proceeding had in vacation, and there is time in the course of that vacation to apply to a judge at chambers, the application should be made accordingly, for if, as we shall presently see (*q*), a reasonable time were to elapse by waiting till the term, the Court would refuse the application (*q*).

What a reasonable time.

As to what is a reasonable time within which the application to set aside the process or proceedings should be made, must depend on each particular case. Instances of this time, in each particular case, will be found noticed in the different Chapters throughout the Work. As to the time for taking advantage of an irregularity in the writ of summons, see *Vol.* 1, 159; in a *distringas*, *Vol.* 1, 181; in an appearance, *Vol.* 1, 169; in a declaration, *Vol.* 1, 202; in an issue, *Vol.* 1, 286; in an execution, *Vol.* 1, 566; on a wrongful arrest on *mesne* process, *Vol.* 1, 702; in a notice of bail, *Vol.* 1, 744; on a frivolous demurrer, *ante*, 828; on a defective warrant of attorney, *ante*, 858; on a judgment by default, *ante*, 881, and on a judgment by default in ejectment, *ante*, 935.

Waiver of irregularity by taking fresh step.

If the party complaining of an irregularity take a fresh step in the action after knowledge of it, he cannot apply to set aside the irregular proceeding, or otherwise take advantage of it (*r*). Therefore, by entering an appearance, the defendant waives any irregularity in the process (*s*). Putting in and perfecting bail (*t*), or merely putting in bail (*u*), waives any defect or irregularity in the affidavit to hold to bail. Obtaining time to inquire after bail, is a waiver of an irregularity in the notice of bail (*x*). By taking a declaration out of the office, the defendant waives all objections to the process (*y*), and to the service of it (*z*). So, an irregularity, on the ground of a variance between the notice of the declaration and writ, or any other irre-

(*m*) Before this rule, the Courts of Queen's Bench and Exchequer always refused to set aside proceedings for irregularity, unless the application was made in a reasonable time; but the Court of Common Pleas did not bind the party to any particular time, provided the application was made before a further step was taken in the cause: Tidd, 9th ed., 514; 1 Chit. 14.

(*n*) *Primrose* v. *Baddeley*, 2 Dowl. 350; 2 C. & M. 468; 4 Tyr. 370, *S. C.*: *Fife* v. *Bruce*, 4 Dowl. 329: *Fownes* v. *Stokes*, 4 Dowl. 125: *Greenshield* v. *Pritchard*, 8 M. & W. 148: *R.* v. *Burgess*, 8 Ad. & E. 275: *Warne* v. *Hadden*, 4 Dowl. 960: *Davies* v. *Watkins*, 2 Dowl., N. S., 930: *Claridge* v. *M'Kenzie*, 12 Law J., N. S., 131, C. P.

(*o*) *Weedon* v. *Garcia*, 2 Dowl., N. S., 68.

(*p*) Per *Parke*, B., *Chalkley* v. *Carter*, 4 Dowl. 480: *Davies* v. *Sherlock*, 7 Dowl. 530.

(*q*) *Post*, 1274.

(*r*) See the above rule of H. T., 2 W. 4, r. 33. And see *Cohn* v. *Davis*, 1 H. Bla. 80: *Rogers* v. *Mapleback*, Id. 106: *Browne* v. *Wilmore*, 1 M. & Gr. 276.

(*s*) *Fox* v. *Nuney*, 1 B. & P. 250: *R.* v. *Hare*, 1 Stra. 155: *Steele* v. *Morgan*, 8 D. & R. 480. *Aliter*, if entered by plaintiff: *Davis* v. *Sherlock*, 7 Dowl. 530: *Chalkley* v. *Carter*, 4 Dowl. 480: see *Ledwick* v. *Prangnall*, 1 Moore, 299.

(*t*) *Jones* v. *Price*, 1 East, 81; *Chapman* v. *Snow*, 1 B. & P. 132.

(*u*) *D'Argent* v. *Vivant*, 1 East, 330: *Hodgson* v. *Dorrell*, 3 M. & W. 295.

(*x*) *Foster's Bail*, 2 Dowl. 586.

(*y*) *Caswell* v. *Martin*, 2 Stra. 1072.

(*z*) *Hudson* v. *Nicholson*, 5 M. & W. 437.

PART V.

gularity in the notice which the defendant might have discovered, without taking the declaration out of the office, or an irregularity, on the ground of the declaration having been filed, instead of delivered, will be waived, by taking it out of the office; but not so, where the irregularity is in the declaration, and not in the notice (*a*). By pleading, the defendant waives an irregularity in the declaration (*b*) and rule to plead (*c*); but where a defendant, after having applied to a judge in vacation, within due time and in a proper manner, to set aside the declaration for irregularity, who refused an order, to save a judgment, delivered a plea under protest, it was held he might afterwards apply to the Court in the following term to set aside the proceedings (*d*). An irregularity in, or omitting to give, a rule to plead or demand of plea, is waived by the defendant pleading; and this, although the plea be a nullity upon which the plaintiff signs judgment (*e*). So, it seems, obtaining time to plead would be a waiver of a rule to plead, and obtaining time to declare would be a waiver of a rule to declare (*f*). Where a defendant pleaded to a *scire facias*, pending a rule he had obtained to set it aside for irregularity, the Court held that he waived the irregularity by his plea (*g*). But where, pending a rule to set aside a *sci. fa.*, which did not operate as a stay of proceedings, the defendant appeared to the *sci. fa.*, in order to prevent judgment, it was held to be no waiver (*h*). So, pleading to an action on a bail-bond, after demand and refusal of oyer, in order to prevent judgment being signed, is no waiver of the right to oyer (*i*). Obtaining time to reply (*k*), or an order for a particulars of set-off (*l*), or demurring or replying, is a waiver of an objection to a plea not being an issuable one. But not so the taking of money out of court, on one of several pleas (*m*). Nor will the plaintiff by demanding a particular of set-off, waive the right to sign judgment as for want of a plea, where the plea is a *nullity* (*n*). After joining in demurrer, the plaintiff cannot apply to set it aside as frivolous (*o*). An irregularity in the issue will, it seems, be waived, by the defendant appearing and defending at the trial, even though he protest against the irregularity, and take no part in the proceedings (*p*). It is not waived by attending a summons to shew cause why the action should not be tried before the sheriff, and omitting then to take the objection (*q*). As to how far attending at the trial before the sheriff will waive an irregularity in the proceeding, see *Vol.* 1, 414. An irregularity in a notice of trial or inquiry, or in the time and place of executing it, would be waived in general by

(*a*) See Vol. 1, 203.
(*b*) *Bertrum* v. *Williams*, 4 Bing., N. S., 301.
(*c*) See *Parry* v. *Fisher*, 6 East, 549.
(*d*) *Tory* v. *Stevens*, 6 Dowl. 275. And see *Woodcock* v. *Kilby*, 1 M. & W. 41: *Bellotti* v. *Barolla*, 4 Dowl. 719: *Coaster* v. *Burke*, 5 East, 461.
(*e*) *Semble*, *Parry* v. *Fisher*, 6 East, 549; and such is the practice.
(*f*) *Towers* v. *Powell*, 1 H. Bla. 87. See an instance when otherwise: *Woodcock* v. *Kilby*, *supra*.
(*g*) *Sloman* v. *Gregory*, 1 D. & R. 161.
(*h*) See *per Cur.*, 5 East, 462.
(*i*) *Goodricke* v. *Turley*, 4 Dowl. 431.
(*k*) *Ante*, Vol. 1, 222.
(*l*) *Scott* v. *Watson*, 14 Law J., N. S., 240, C. P.; 1 Com. B. 836, *S. C.*
(*m*) *Verbeet* v. *De Keyser*, 3 Dowl. & L. 392.
(*n*) *Ford* v. *Barnard*, 6 Bing. 534; 4 Moo. & P. 302, *S. C.* See *Garrett* v. *Hooper*, 1 Dowl. 28.
(*o*) *Norton* v. *Mackintosh*, 7 Dowl. 522.
(*p*) *Ante*, Vol. 1, 227.
(*q*) *Middleton* v. *Woods*, 6 M. & W. 136; 8 Dowl. 170, *S. C.*

the defendant attending and defending at the trial or inquiry (*r*). In general, an irregularity in signing the judgment would be waived by attending the taxation of costs (*s*). Suing out a writ of error waives an irregularity in the record (*t*). In general, applying to set aside proceedings on the ground of a certain irregularity, is a waiver of any other irregularity then known to exist (*u*). Various other instances of a waiver of an irregularity, by taking a fresh step in the action, will be found noticed throughout this Work.

Waiver by other means.

An irregularity may be also waived by other means than taking a fresh step in the action. Thus, an undertaking by an attorney to appear or accept service, waives an irregularity in the writ or copy, or service (*x*). Defendants giving a bail-bond by their christian and surnames has been deemed a waiver of an irregularity in the writ, which required the sheriff to take Messrs. C. & D., without mentioning their christian names (*y*). If the plaintiff, at the defendant's request, accept without opposition bail named by the defendant, the latter cannot afterwards move to discharge the bail for a defect in the affidavit (*z*). By the defendant's attorney receiving notice of declaration, and saying "It is all right, I will call and settle the debt and costs," the defendant waives any irregularity in the process (*a*); so he waives it by paying the debt and part of the costs (*b*), or perhaps by admitting the debt after service, and requesting time to pay it (*c*). In general, however, a defendant's asking for time to pay the debt, &c. does not of itself waive an irregularity in the plaintiff's last proceeding (*d*). By accepting the *issue*, and not moving to set it aside or amend it at plaintiff's cost within four days, the defendant admits it to have been properly made up (*e*).

No waiver unless with knowledge of irregularity.

In general, there can be no waiver of an irregularity, unless with a knowledge of the irregularity (*f*). So an irregularity is not waived by agreeing to terms, where the party is under a misapprehension occasioned by the mistake of a judge in point of law (*g*). It rests, however, upon the party complaining of the irregularity to shew that he had no knowledge of it (*h*). And, indeed, it would seem to follow from one case, that, at least where the irregularity is apparent on the face of the proceeding, the applicant is bound to come promptly after he knows of the proceeding, and not merely after he knows of the irregularity itself (*i*).

No waiver where proceeding a nullity.

What has here been said as to the time of making the application to set aside proceedings for irregularity, must be understood only of proceedings which are merely *irregular*; for, if

(*r*) *Ante*, Vol. 1, 297; and *ante*, 895.
(*s*) *Ante*, 982. And see *Archer* v. *Garrard*, 6 Dowl. 132, an action of debt.
(*t*) *Ouchterlony* v. *Gibson*, 12 Law J., N.S., 94, C. P.
(*u*) *Thorpe* v. *Bear*, 2 B. & Ald. 373. And see *Pike* v. *Davis*, 4 Jur. 395.
(*x*) See *Anon.*, 1 Chit. 129: *Hompay* v. *Kenning*, 2 Chit. 236: *Lowes* v. *Clarke*, Id. 240: *Coates* v. *Sandy*, 9 Dowl. 381.
(*y*) *Kingston* v. *Llewellin*, 1 B. & B. 589.
(*z*) *Mammatt* v. *Matthews*, 4 Moo. & Scott, 356; 10 Bing. 506; 2 Dowl. 747, S. C.
(*a*) *Lloyd* v. *Hawkyard*, 1 M. & R. 330.
(*b*) *Monday* v. *Sear*, 11 Price, 122.
(*c*) *Rawes* v. *Knight*, 1 Bing. 132.
(*d*) *Anon.*, 1 Dowl. 23.
(*e*) *Ante*, Vol. 1, 295.
(*f*) Per *Bayley*, J., in *Cox* v. *Tullock*, 2 Dowl. 47.
(*g*) *Whalley* v. *Barnett*, 1 Dowl. 607; 3 Tyr. 239, S. C. And see *Woodcock* v. *Killey*, 1 M. & W. 41; 4 Dowl. 730, S. C.
(*h*) *Anderton* v. *Earl of Stirling* (or *Alexander*), 2 Dowl. 267: *Harbot* v. *Darley*, 4 Dowl. 726.
(*i*) *Esdaile* v. *Davis*, 6 Dowl. 465: *Fawber* v. *French*, 5 N. & M. 656.

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a proceeding be completely *defective* and *void*, or, in other words a *nullity*, the defect is not waived by any delay of the opposite party (*k*). See the instances as to what may be deemed a nullity, *ante*, 1269. And it may be observed, as a general rule, that waiver is doing something after an irregularity committed, where the irregularity might have been corrected before such act done (*l*).

Excuse for not applying in time.

If there be any peculiar circumstances to excuse the lateness of the application, they must be clearly established by the party applying (*m*). And if the application be to the Court, and the excuse be a previous application at chambers, the rule must be drawn up on reading the summons and order, or on affidavit of the fact (*n*). Delay occasioned by changing the attorney has been held insufficient (*o*). So has the illness of a witness, whose affidavit was necessary to support the application, as a commissioner might have been sent for (*p*). We have just seen, *ante*, 1273, in what cases the want of knowledge of the irregularity will be an excuse for having delayed the application.

The application, &c.

The Application, and Proceedings on, &c.]—Proceedings, when irregular, are set aside upon application to the Court in

To the Court or judge.

term time, or to a judge. In ordinary and clear cases, it should be made to the latter, as the Court might refuse the costs of the application. Also, if the irregularity happen in the vacation, the application should be to a judge, in cases where, by delaying it until the term, more than a reasonable time for making it would elapse (*q*); and if the applicant be dissatisfied with the decision of the judge, he may apply to the Court on the first day or early part of the next term, though the judge refuses to give time for that purpose; and steps necessarily taken in the interim will not amount to a waiver of the irregularity (*r*), at least if taken under protest (*s*). In such cases, where the application to the Court is *primâ facie* too late, but the applicant relies upon the fact of a previous similar application having been made to a judge at chambers within the proper time, the rule should be drawn up on reading the summons of the judge, or upon an affidavit of the fact, otherwise it will be discharged with costs (*t*).

Notice of motion.

Previous to moving the Court, a notice of the intended motion should be given to the opposite party, in order to obtain a

(*k*) See *Mortimer* v. *Piggott*, 2 Dowl. 615: *Taylor* v. *Phillips*, 3 East, 156: *Osborne* v. *Taylor*, 1 Chit. Rep. 400: *Anon.*, 2 Id. 237: *Garratt* v. *Hooper*, 1 Dowl. 28: *Roberts* v. *Spurr*, 3 Dowl. 551. See *Moore* v. *Stockwell*, 6 B. & C. 76; 9 D. & R. 194, *S. C.*; *Cocks* v. *Edwards*, 2 Dowl., N. S., 55.

(*l*) *Per Cur.*, *Stevenson* v. *Dancers*, 2 B. & P. 110.

(*m*) See *Anderdon* v. *Alexander*, 2 Dowl. 267: *Herbert* v. *Darley*, 4 Dowl. 726: *Orton* v. *France*, 4 Dowl. 598: *Eckside* v. *Davis*, 6 Dowl. 465.

(*n*) *Sugars* v. *Concannon*, 5 M. & W. 30; 7 Dowl. 391, *S. C.*, nom. *Shugars* v. *Concannon*. See *Goren* v. *Tute*, 7 M. & W. 142.

(*o*) *Golding* v. *Scarborough*, 2 H. & W. 94.

(*p*) *Orton* v. *France*, 4 Dowl. 598.

(*q*) See *Woodcock* v. *Kilby*, 4 Dowl. 730: *Doe Parr* v. *Roe*, 1 Q. B. 700: *Cox* v. *Tollock*, 1 C. & M. 531; 2 Dowl. 47, *S. C.*: *Quilters* v. *Neely*, 9 Dowl. 139. And see *Hinton* v. *Stevens*, 4 Dowl. 283; 1 H. & W. 591, *S.C.*: *Elliston* v. *Roberts*, 2 C. & M. 343: 2 Dowl. 241, *S. C.*: *Anderson* v. *Alexander*, 2 Dowl. 267: *Tyler* v. *Green*, 3 Dowl. 439: even where the time expires on the last day of vacation. (Id.)

(*r*) *Woodcock* v. *Kilby*, 1 M. & W. 41: *Bellotti* v. *Borella*, 4 Dowl. 719.

(*s*) See *Tory* v. *Stevens*, 6 Dowl. 275.

(*t*) *Shugars* v. *Concannon*, 5 M. & W. 30; 7 Dowl. 391. The judge's certifying it in court will not do. (*Goren* v. *Tute*, 7 M. & W. 142).

rule with a stay of proceedings in the Common Pleas (*u*) and Exchequer (*x*), but it seems not so in the Queen's Bench (*y*). In the Exchequer, a two days' notice is requisite for such stay (*z*).

Affidavit for.

The application must be supported by an affidavit, shewing the irregularity complained of (*a*); and if the irregularity be in any process, a copy of such process should be annexed to the affidavit. The affidavits must shew a clear case for relief. Therefore, where the motion was to set aside a judgment on a *cognovit*, which contained an agreement, that if there were any error in the accounts it should be rectified, and the affidavit stated that an error had been discovered, it was held to be defective for not stating what the error was, whether in amount or otherwise (*b*). So, in moving to set aside an interlocutory judgment, it must be distinctly stated, that the judgment has been signed, and it will not suffice to state, that the defendant has been served with a rule to compute (*c*). So, an affidavit to set aside proceedings, on the ground of the defendant not having been served with process, should shew that the party making the application is the defendant in the cause; that the process never came to his knowledge or possession (*d*). The affidavit need not swear to merits (*e*); but where the application is to set aside a judgment, and there be the least doubt as to the irregularity complained of being such, it is advisable it should do so, to prevent a total failure of the application (*f*).

Form of application should go to root of irregularity.

The application should go to the commencement or root of the irregularity complained of, and this should appear in the rule or summons accordingly. Therefore, where the service of the writ was regular, but the writ was irregular, and the application was to set aside the service only, the rule was discharged (*g*). The application should have been to set aside the writ, or the writ and service (*h*). So, where an appearance had been entered by the plaintiff for the defendant, without personal service of the writ, and a declaration has been filed, the defendant should move to set aside the appearance and declaration, and not merely the declaration (*i*). So, where the defendant has been held to bail upon an insufficient affidavit, the application should be to set aside the judge's order, and not the *capias* (*k*).

Should correctly state the irregularity.

The application should also correctly state the proceeding which is complained of. Therefore, where the rule was to set aside the writ, only for irregularity, and there was no irregularity in the writ, but only in the service, the rule was discharged with costs (*l*). Where the irregularity was in the copy of the writ served, and perhaps in the writ itself, it not

(*u*) *Rolfe* v. *Brown*, 1 Hodges, 27.
(*x*) See *Hannah* v. *Wyman*, 3 Dowl. 673: *Smith* v. *Wheeler*, 3 Dowl. 431. See form of notice, &c., Chit. Forms, 595.
(*y*) *Stratton* v. *Regan*, 2 Dowl. 585; overruling *Fortescue* v. *Jones*, 1 Id. 594.
(*z*) See *Hannah* v. *Wyman*, 3 Dowl. 673.
(*a*) See Chit. Forms, 596.
(*b*) *Preedy* v. *Lovell*, 4 Dowl. 671.
(*c*) *Causey* v. *Drayton*, 3 Dowl. 184.
(*d*) *Ante*, Vol. 1, 162. And see *Emerson* v. *Brown*, 8 Scott, N.R., 219: *Stevenson* v. *Thorne*, 13 M. & W. 149; and see other instances, Vol. 1, 160.
(*e*) *Williams* v. *Williams*, 2 C., M., & R. 473: *Claridge* v *M'Kenzie*, 12 Law J., N. S., 131, C. P.
(*f*) *Ante*, 883, 884.
(*g*) *Edwards* v. *Danks*, 4 Dowl. 357: *Hasker* v. *Jarmaine*, 1 C. & M. 408.
(*h*) See further, *ante*, Vol. 1, p. 159; and *Chapman* v. *Becks*, 3 Dowl. & L. 353.
(*i*) *Brooks* v. *Roberts*, 3 Dowl. & L. 13; 1 Com. B. 636, S. C.
(*k*) *Hopkinson* v. *Salembier*, 7 Dowl. 493; 5 M. & W. 423, S. C. See Vol. 1, p. 702.
(*l*) *Huggitt* v. *Parkin*, 1 Bing. 65.

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being in the form given by the statute, and the application was to set aside the copy, it was held to be erroneous: as it did not appear that the copy was not a true one, the motion ought to have been to set aside the service, or the copy or service (*m*), or to have set aside the writ or the service, or the copy and service (*n*). So, where the rule was to set aside a judgment for irregularity, and the real objection was, that it was signed against good faith, the Court discharged the rule, but without costs (*o*). In the Common Pleas there is a rule of *M. T.*, 10 *G.* 4 (*p*), similar to a former one in the Queen's Bench of *T. T.*, 42 *G.* 3 (*q*), "that in future, where a rule to shew cause is obtained for the purpose of setting aside an annuity or annuities, the several objections thereto intended to be insisted upon by the counsel at the time of making such rule absolute, shall be stated in the said rule to shew cause." And the same in a rule *nisi* to set aside an award (*r*). And this rule has been adopted in practice in the Exchequer (*s*). By direction of the judges, every summons to set aside proceedings for irregularity, must specify the irregularity, and the party will not be allowed to go into any matter not specified. The rule or summons will be no stay of proceedings in the meantime, until it is disposed of, unless it specially direct it (*t*). The rule *nisi* or summons should ask for the costs, otherwise the applicant might not get them; on the other hand, if so asked, and the application fail, it will, in general, be discharged with costs (*u*).

Should in some cases state grounds of irregularity.

Should be for a stay of proceedings.

Asking for costs.

The rule.

If the Court be satisfied from the affidavit that the proceedings are irregular, they will grant a rule *nisi*, and afterwards, if sufficient cause be not shewn against it, they will make the rule absolute (*v*). If the rule be discharged, still the party may bring a writ of error, if the irregularity be such that can be made the subject of such a proceeding, by its being apparent on the record, and the Court sometimes, in cases of much doubt, or where the application is not to be favoured, refuse it and leave the party to his writ of error (*w*).

Writ of error.

Terms imposed of bringing no action, &c.

As to the enforcing on the defendant the terms of not bringing an action, on the setting aside of a judgment and execution, see *ante*, 882, and *Vol.* 1, 567.

Costs.

Costs.]—If the rule for setting aside the proceedings for irregularity be made absolute, it is generally with costs, unless some strong grounds be shewn to the Court for ordering it otherwise. But if the rule be *not moved with costs*, and it be made absolute, *no cause being shewn*, it must be made absolute in the terms in which it was moved, *viz.* without costs (*y*): if cause be shewn against a rule so moved, the Court will, on making it absolute or discharging it, do so with or without costs,

(*m*) *Hall* v. *Redlington*, 5 M. & W. 605: *Crow* v. *Field*, 8 Dowl. 231: *Kenny* v. *Bishop*, 9 Id. 57.

(*n*) See *Wills* v. *Dawson*, 2 Dowl., N. S., 465: *Trustove* v. *Whitchurch*, 1 Scott, N. R., 415: 1 M. & Gr. 426, *S. C.*: *Chapman* v. *Becks*, 3 Dowl. & L. 353.

(*o*) *Smith* v. *Clarke*, 2 Dowl. 218.

(*p*) 6 Bing. 347; 3 Moo. & P. 762.

(*q*) 2 East, 569.

(*r*) 6 Bing. 347; R. E., 2 G. 4, Q. B.; 11 Price, 57, Exch.

(*s*) 11 Price, 57.

(*t*) *Post*, 1277; and *post*, Pt. 6, Ch. 1, 2.

(*u*) *Post*, 1276, 1277.

(*v*) See the form, Chit. Forms, 596.

(*w*) See *Walker* v. *Needham*, 1 Dowl., N. S., 220. And see *ante*, 1013: and *ante*, 1145, as to outlawry proceedings.

(*y*) *Per Cur.*, 37 G. 3, K. B.; 1 Tidd, 594: *Rex* v. *Sheriff of Middlesex*, in *Duncombe* v. *Crisp*, 2 Dowl. 5. And see *Jones* v. *Hay*, 1 Scott, N. R., 390.

as in their discretion they may think fit, according as they are of opinion that the motion ought or ought not to have been made, or ought or ought not to have been resisted (*z*). On the other hand, where the rule is moved *with costs*, and it is *discharged*, it will, almost universally, be so with costs (*a*). In the Queen's Bench, by *R. M.*, 37 *G.* 3 (*b*), if the rule be "discharged generally, without any special direction upon the matter of costs, it is understood to be discharged with costs, and the latter rule must be discharged accordingly." There seems to be no similar rule in the Common Pleas or Exchequer; and in these courts, if the rule be discharged, the successful party should apply for costs (*c*). In setting aside a judgment and execution for irregularity, unless a good case for damages be shewn, the rule will not be made absolute with costs, if the defendant will not consent to the terms of bringing no action (*d*). In the case of an order to set aside proceedings, a judge at chambers may give costs (*e*), and his discretionary power is exercised, in general, in the same way as if the case was before the Court. If he refuses to give costs, the successful party must not afterwards apply to the Court for them (*f*).

Remedy, &c. for costs.

As to the mode of enforcing the payment of costs by execution, see *post*, *Pt.* 6, *Ch.* 1; by attachment, see *post*, *Pt.* 8. If the application be by one of several defendants, the costs must be paid to him, and not to any other defendant (*g*). Where an interlocutory judgment was set aside for irregularity, with costs, and the defendant then pleaded, and the plaintiff replied, and a judge thereupon gave the defendant time to rejoin until three days after the costs of the rule were paid, which, of course, had the effect of staying the proceedings in the action, the Court held that the judge had no power to do so (*h*). The costs of an application to set aside a judgment and execution for irregularity, which was granted without costs, cannot be recovered by way of aggravation of damages, in an action of trespass for seizing goods under colour of such judgment and execution (*i*).

Stay of proceedings.

Stay of Proceedings.]—We have seen, *ante*, 1274, as to the necessity for a notice of motion in order to obtain a rule *nisi*, with a stay of proceedings. As to the effect of the rule or summons, in staying the proceedings, until it is disposed of, when it states that all proceedings shall be in the meantime stayed, see *post*, *Pt.* 6, *Ch.* 1, 2; and see *Id.*, as to the time allowed for taking the next step after the rule or summons is disposed of.

Confessing irregularity, &c.

Confessing the Irregularity, &c.]—If the party who has committed the irregularity be satisfied that he has no sufficient cause

(*z*) See *Anon.*, 1 Chit. Rep. 390, n.: *Tilley* v. *Henley*, Id. 136. And see *Hussey* v. *Parkin*, 1 Bing. 65: *Re Morrison*, 9 Dowl. 94.

(*a*) *Tilley* v. *Henley*, 1 Chit. Rep. 136. And see *Huggett* v. *Parkin*, 1 Bing. 65; 7 Moore, 359, *S. C.*: *Edwards* v. *Danks*, 4 Dowl. 357: *Smith* v. *Clarke*, 4 Dowl. 357: Where the rule is discharged for a formal objection to the affidavit, the Court has a discretion as to the costs, and may discharge it without costs. (*Harris* v. *Matthews*, 4 Dowl. 608). And see further as the costs in general, *post*, Pt. 6, Ch. 1.

(*b*) 7 T. R. 82.

(*c*) See *Anon.*, 1 Chit. Rep. 390, n.

(*d*) *Ante*, 883.

(*e*) *Doe Prescott* v. *Koe*, 1 Dowl. 274; 2 Moo. & Scott, 119; 9 Bing. 104, *S. C.* And see *Read* v. *Lee*, 2 B. & Ad. 415; 1 Dowl. 52, *S. C.*: *Spicer* v. *Todd*, 1 Dowl. 306.

(*f*) *Davy* v. *Brown*, 1 Scott, 384.

(*g*) *Shoveler* v. *Stokes*, 2 Dowl. & L. 2.

(*h*) *Wenham* v. *Downes*, 5 N. & M. 244.

(*i*) *Loton* v. *Devereux*, 10 Law J. 103, Q. B.; 3 B. & Ad. 343, *S. C.*: *Pritchet* v. *Boovey*, 1 C. & M. 775.

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to shew against the rule, he may save some expense by serving the opposite party with a notice, acknowledging the defect, desiring him not to proceed to make the rule absolute, and offering to pay the costs already incurred (*k*); or, if he perceive the defect before the other party has moved for a rule to set aside the proceeding, he may prevent all expense by a similar notice (*l*). And where, after service of the rule *nisi* to set aside a declaration irregularly delivered, the plaintiff's attorney offered to pay the costs, which the defendant refused, the Court made the rule absolute, on the terms that the defendant should pay all the costs subsequent to the offer (*m*). We have seen, *ante*, 883, that the plaintiff may waive a judgment signed by him; and where a plaintiff signed an irregular judgment, and, on the defendant taking out a summons to set it aside, he informed the defendant that the judgment was withdrawn, it was held, that the defendant had no right to get an order drawn up for setting aside the judgment, and that, therefore, he was liable to pay the expense of it (*n*). An affidavit in support of a motion to set aside an appearance irregularly entered by a plaintiff after notice that process was abandoned need not deny "that any other process had come to defendant's knowledge" if it denies the *service* of any subsequent writ (*o*).

(*k*) See form of notice, Chit. Forms, 597.

(*l*) See form of notice not to appear to process, Chit. Forms, 597. See Imp. K. B. 494, n.; and the case of an irregular judgment, *ante*, 704.

(*m*) *Briscoe* v. *Beckett*, 4 M. & R. 100. And see *Halton* v. *Stocking*, 2 C. & J. 60; 2 Tyr. 165; 1 Dowl. 296, *S. C.*, where the attorney was made to pay the subsequent costs.

(*n*) *Hargrave* v. *Holden*, 3 Dowl. 176. See *Clarke* v. *Crockford*, Id. 693; *Robinson* v. *Stoddart*, 5 Dowl. 266.

(*o*) *Wintle* v. *Hagg*, 7 Dowl. 623. See *Giles* v. *Hemming*, 6 Dowl. 623.

CHAPTER XVII.

JUDGMENT OF NONPROS.

What.

JUDGMENT of *nonpros* is a final judgment against the plaintiff for costs only, signed by the defendant, whenever the plaintiff, in any stage of the action, neglects to prosecute his suit, or part of it, within the time limited by the practice of the court for that purpose.

For not declaring in ordinary cases.

For not declaring.]—We have already seen (*ante, Vol.* 1, 184) that the plaintiff has the whole of the term next after the appearance is entered, to declare, and this whether it be in term or vacation; and that if the plaintiff do not declare within such time, or within such further time to declare as he may obtain of the Court or a judge, the defendant may, at the expiration of *four days* next after a *written demand* of declaration served upon the plaintiff, his attorney, or agent, as the case may be, sign judgment of *nonpros* (*a*). The demand cannot be made until after the time in which the plaintiff is bound to declare (*b*). If such a demand has been made, and time to declare obtained, the defendant may sign judgment of *nonpros* without a fresh demand (*c*). But judgment of *nonpros* cannot be signed after declaration has been actually delivered or tendered, although the time has expired (*d*). But where the defendant, being in a situation to sign judgment of *nonpros* for not declaring, the plaintiff, with a view to prevent it, obtained a rule to discontinue on payment of costs, but instead of discontinuing, he afterwards delivered a declaration, and the defendant, thereupon, signed judgment of *nonpros*, the Court deeming what had been done by the plaintiff to be a fraud upon the practice of the court, refused to set aside the judgment (*e*). Nor can the defendant sign such judgment, unless he has appeared (*f*); nor can he sign it if the plaintiff

(*a*) This four days' demand is required by the R. T., 1 W. 4, r. 8, by which it is ordered, "That no judgment of *nonpros* shall be signed for want of a declaration, replication, or other subsequent pleading, until four days next after a demand thereof shall have been made, in writing, upon the plaintiff, his attorney, or agent, as the case may be." (See the former practice, Tidd's New Pract. 225). That rule, as far as it related to a demand of replication and subsequent pleadings, is altered by the R. H., 2 W. 4, r. 1, s. 54, *ante*, Vol. 1, 277, which makes a service of a *rule to reply or plead* a subsequent pleading a sufficient *demand* of such replication or subsequent pleading. By R. H., 2 W. 4, r. 1, s. 38, it shall not be necessary for a defendant, in any case, to give a *rule to declare*, except upon removal from inferior courts. (See the form of the judgment, Chit. Forms, 598).

(*b*) *Harris* v. *Duncan*, cor. *Patteson*, J., at chambers, Feb. 1837.

(*c*) *Wells* v. *Hare*, 1 Dowl. 366: *Toulon* v. *Grant*, 5 Dowl. 153.

(*d*) *Gray* v. *Pennell*, 1 Dowl. 120. And see the cases as to a plea, Vol. 1, 263.

(*e*) *Ariel* v. *Barrow*, 8 Bing. 375.

(*f*) *Anon.*, 2 Chit. 37. And see *Bate* v. *Bolton*, 4 Dowl. 160: *Hall* v. *Champneys*, 4 Dowl. 713; 1 Tyr. & G. 496, *S. C.* It would seem the appearance may be entered after the eight days limited by the writ of summons, unless plaintiff has appeared *sec. stat.* in the meantime: *sed quære*. And see Lush, Pr. 336.

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has entered an appearance for him *sec. stat.* (*g*). Nor can a party who has been served with a writ of summons, and afterwards told not to appear to it, afterwards appear and sign judgment of *nonpros* (*h*). Where the defendant, on entering an appearance to the writ of summons, made a mistake in the names of the parties, and notice being given to him of the fact by the plaintiff, he promised to amend, but instead of doing so, entered a new appearance, and then demanded a declaration, and the plaintiff not declaring till the following term, he signed judgment of *nonpros*, the Court held that the defendant had been irregular in not amending the appearance, and set aside the judgment (*i*). Nor can judgment of *nonpros* for not declaring be signed after the expiration of a year from the service of the process, when the action is altogether out of court (*k*). Nor can the defendant sign a judgment of *nonpros* pending an order for a stay of proceedings, until the delivery of a particulars of demand (*l*), or the like.

Where several defendants.

If the action be against *several* defendants, the plaintiff may be *nonprossed* by any one on behalf of all, if all have appeared, and he is in default as to all (*m*), and he has their authority for signing the judgment (*n*); but if all have not appeared, then those, or any one of those, who have appeared, cannot on behalf of all *nonpros* the plaintiff, even in trespass (*o*). It would seem, according to a recent case, that one of several defendants may sign judgment of *nonpros* for want of a declaration as to himself alone (*p*).

In replevin and other cases.

As to a judgment of *nonpros* against the plaintiff for not declaring in replevin, see *ante*, 992. As to such judgment on a removal of a cause from an inferior court in other cases, see *ante*, 1157. As to such judgment after a reversal of an outlawry, see *ante*, 1143.

For not replying, &c.

For not replying, &c.]—If the plaintiff do not reply, surrejoin, surrebut, &c., within the time limited for that purpose after service of the rule, (see *ante*, *Vol.* 1, 276, 277), or specified in an order for further time, the defendant, whether the plaintiff has appeared for him *sec. stat.* or not, may sign judgment of *nonpros*, unless the replication, &c., has been delivered or tendered in the meantime (*q*). And even where

(*g*) The judgment of *nonpros* is founded on the 13 Car. 2, st. 2, c. 2, s. 3: from the wording of which, it would appear, that, to sign judgment of *nonpros* for not declaring, an appearance must have been entered "for the defendant by attorney, in the term wherein the process is returnable." At that time an appearance could not be entered by the plaintiff for the defendant, the 12 Geo. 1, c. 29, being the first statute allowing it.

(*h*) See *Walker* v. *Midland*, 1 Dowl. & L. 159: *Solly* v. *Richardson*, 6 Dowl. 774.

(*i*) *Bate* v. *Bolton*, 2 C., M., & R. 365; 4 Dowl. 100, *S. C.* And see Id.; 1 Tyr. & G. 148; 4 Dowl. 677.

(*k*) See R. H., 2 W. 4, r. 35, Vol. 1, 184, and cases there cited. See also *Cooper* v. *Nias*, 3 B. & Ald. 271; 1 Chit. Rep. 669, *S. C.*

(*l*) See *ante*, 1255; and see there the course to be adopted by the defendant.

(*m*) See *Hamlet* v. *Bingham*, 5 Scott, N. R., 899; 4 M. & Gr. 909, *S. C.*

(*n*) Per *Maule*, J., in 5 Scott, N. R., 893.

(*o*) *Philpott* v. *Muller*, 1 Doug. 169; 3rd ed., n. 56: *Palmer* v. *Fiestal*, 2 Dowl. 807. See *Ironwood* v. *Mawley*, 5 D. & R. 351; 3 B. & C. 553, *S. C.*: *Jones* v. *Gibson*, 5 B. & C. 768; 8 D. & R. 592, *S. C.*: *Murphy* v. *Donlan*, 5 B. & C. 178; 7 D. & R. 618, *S. C.*

(*p*) *Hamlet* v. *Bingham*, 5 Scott, N. R., 899; 4 M. & G. 909. And see *Rae* v. *Cock*, 2 T. R. 257: *Butler* v. *Upton*, Id. 289, n.: See also *Price* v. *Foulkes*, 4 Burr. 2418; 1 Comyns, 74: *Allington* v. *Vavasour*, 2 Salk. 455; from which it appears, that if several defendants are entitled to judgment of *nonpros*, they can sign but one judgment, although they have appeared severally by separate attornies.

(*q*) *Gray* v. *Pennell*, 1 Dowl. 120. If the delivery of replication, &c., be a fraud

the plea concludes to the country, if the plaintiff be ruled to reply, he must, it seems, actually deliver the *similiter* within the time limited by the rule, otherwise the defendant may sign a *nonpros* (*r*). Service of a rule to reply, or to plead any subsequent pleading, is a sufficient demand of a replication or such other subsequent pleading, and therefore a separate demand is not requisite (*s*) If the plea be a *nullity* and not merely *irregular*, it seems that no judgment of *nonpros* could be regularly signed for not replying to it (*t*). As to *nonprossing* the plaintiff in ejectment, see *ante*, 944.

May be signed as to part of the suit.

It may be observed, that a judgment of *nonpros* may be signed to any part of the suit which is not prosecuted. Thus, for instance, if the declaration contain two counts, and the defendant plead *non assumpsit* to the first count, and the Statute of Limitations to the second, and the plaintiff reply to the plea of the Statute of Limitations, but omit adding the *similiter* to the plea of *non assumpsit*, defendant ruling the plaintiff to reply, and waiting four days after it, might sign a judgment of *nonpros* to the first count. But in such, or in any other case where the plaintiff has so replied, &c., so as to leave part only of the defence answered, the defendant could not sign judgment of *nonpros* as to the whole action, but only as to such part of it as remains not prosecuted by the plaintiff. Where the defendant pleaded by mistake the general issue to three instead of four counts, and plaintiff replied, and then defendant amended his plea by extending it to the fourth count, and plantiff not having replied to the amended plea, although ruled so so do, defendant signed judgment of *nonpros* to the whole action—it was held that this was irregular (*u*). And where defendant pleaded payment into court to the whole declaration, and other pleas to all except the sum paid in, and the plaintiff replied to the plea of payment into court only, that he accepted the sum paid in and was satisfied, it was held, that the defendant could not sign judgment of *nonpros* for want of a replication to the other pleas (*x*). But where the payment into court is pleaded only to part, the plaintiff must reply to the other pleas, or the defendant will be entitled to judgment of *nonpros* on the unanswered pleas (*y*). As to a *nonpros* by one of several defendants, see *ante*, 1280.

For not entering the issue.

For not entering the Issue.]—Formerly, if the plaintiff did not bring in the record before the expiration of the rule to enter the issue, the defendant might have signed judgment of *nonpros*; but now there is no occasion to enter the issue, and no rule for that purpose, and, consequently, no judgment can be signed against plaintiff for not entering it (*z*).

on the Court, judgment may be signed, notwithstanding delivery. (*Ariel* v. *Barrow*, 8 Bing. 375, *ante*, 1279).

(*r*) *Hollis* v. *Buckingham*, 3 D. & R. 1. See the forms of judgment for not replying, Chit. Forms, 599.

(*s*) R. H., 2 W. 4, r. 1, s. 54, *ante*, Vol. 1, 277, *ante*, 1279, n. (*a*).

(*t*) *Garratt* v. *Hooper*, 1 Dowl. 28. But see *Gould* v. *Whitehead*, 8 Scott, 340.

(*u*) *Dordesay* v. *Cook*, 4 B. & C. 135.

(*x*) *Coates* v. *Stevens*, 2 C., M., & R. 118; 1 Gale, 75; 3 Dowl. 784, *S. C.*, *ante*, 1187.

(*y*) *Topham* v. *Kidmore*, 5 Dowl. 676. Even where the plea is irregular in form. (*Emmott* v. *Standen*, 3 M. & W. 497; 6 Dowl. 891, *S. C.*)

(*z*) See *Hodges* v. *Diley*, 7 Dowl. 555, *ante*, Vol. 1, 289. *Platt*, B., in *Baker* v. *Jupp*, 3 Dowl. & L. 475, said, "that there could not be a *nonpros* after issue joined."

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In error.

In Error.]—As to when the defendant in error may sign judgment of *nonpros* for not transcribing the record, see *Vol.* 1, 499. As to when the defendant in error may sign judgment of *nonpros* for not assigning error, &c., see *Vol.* 1, 500.

In other cases.

In other Cases.]—On a rule to discontinue after plea pleaded, such rule containing an undertaking by plaintiff to pay the costs, and a consent, that, if they are not paid within four days after taxation, the defendant shall be at liberty to sign judgment of *nonpros;* in such case, if the plaintiff do not pay the costs within that time, defendant may have a judgment of *nonpros* accordingly (*a*). Where the plaintiff's proceedings in a second action are stayed until he have paid the costs of a former action, the Court will not allow the defendant to *nonpros* the second action for non-payment of those costs (*b*). Where the tenant in a writ of right, not being able to discover who the demandant was, obtained a judge's order, directing the attorney to deliver to the tenant's attorney the true name and address of his client, the Court refused to allow the tenant to sign judgment of *nonpros* for disobedience of this order. It seems that the proper course in such a case would be, to make the judge's order a rule of court, and then move for an attachment against the attorney (*c*). The Court will not make an order for a judgment of *nonpros* for not delivering particulars, see *ante,* 1255.

How signed.

How signed.]—*Make an incipitur on a roll of the day of the declaration (or, if no declaration, then of the day judgment is to be signed), and also on a judgment paper. Take them to the proper clerk in the Master's Office, and the Master will sign the judgment. Get him to tax the costs, and he will mark the same upon the judgment paper. After judgment signed and costs taxed, you may proceed to sue out execution.* Also, in error, judgment of *nonpros* is signed as above directed. As to signing it in the case of several defendants, see *ante,* 1280.

In what cases set aside.

In what Cases set aside.]—If the judgment be regular, it is discretionary with the Court or a judge to set it aside, and they will in most cases do so upon an affidavit of merits, or that the plaintiff had at the commencing of the action, and still has, a good cause of action in that suit (*d*), and upon payment of costs, in order to let in a trial of the merits. They have refused to set it aside in an action by a common informer (*e*). Where a regular judgment is set aside on payment of costs, this means the costs of the judgment and of resisting the application to set it aside (*f*).

If the judgment be irregular, it may in all cases set it aside with costs, provided the application be made in due time; and if an action or other proceedings be had upon such a judgment,

(*a*) R. H., 2 W. 4, r. 106. See *post,* 1285.
(*b*) *Doe Sutton* v. *Ridgway,* 5 B. & Ald. 523.
(*c*) *Dumaday* v. *Hughes,* 2 Scott, 377.
(*d*) *Cortesse* v. *Hume,* 2 Dowl. 134.
(*e*) *Bennett* v. *Smith,* 1 Burr. 401.
(*f*) *Christie* v. *Thompson,* 1 Dowl., N. S., 592.

one rule is all that is requisite in order to set aside such proceedings, as well as the judgment (*g*).

Costs and execution, &c.

Costs and Execution, &c.]—The defendant is entitled to costs in all cases (*h*), even in an action by a common informer (*i*), excepting upon a *nonpros* for not transcribing, in error (*k*). We have already seen (*ante*, 944), when the defendant in ejectment is entitled to the costs of a *nonpros*.

For these costs the defendant may either sue out execution by *ca. sa.* or *fieri facias* (*l*), or he may proceed by debt on the judgment, in which he would have a right to his costs, notwithstanding the 43 *G.* 3, *c.* 46, *s.* 4 (*m*). Under the execution the defendant cannot levy more than the sum recovered by the judgment; consequently, the sheriff's poundage or fees, or other expenses of the execution, cannot be levied (*n*).

Proceedings after it.

Proceedings after it.]—After being *nonprossed*, the plaintiff may commence a new action against the defendant, for the same cause; and he may, as in other cases, obtain an order to hold the defendant to bail (*o*).

(*g*) *Barlow* v. *Kaye*, 4 T. R. 638. See *Kibblewhite* v. *Jeffrye*, 1 Chit. 142.

(*h*) See 23 H. 8, c. 15; 8 Eliz. c. 2; 13 Car. 2, st. 2, c. 2; 4 J. 1, c. 4. *Davies* v. *Jones*, 1 T. R. 373. The plaintiff was liable even before the 3 & 4 W. 4, c. 42, s. 31, (*ante*, 1074), although he sued as executor. (*Hawes* v. *Saunders*, 3 Burr. 1586: *Higgs* v. *Warry*, 6 T. R. 654). But he was not so liable before that act (sect. 32), and R. H., 4 W. 4, r. 15, on a judgment of *nonpros* obtained by reason of the plaintiff's having omitted to enter the issue on record after joinder in demurrer to a plea in *abatement*. (*Michlam* v. *Bate*, 8 B. & C. 642; 3 M. & R. 91, *S. C.*)

(*i*) 18 Eliz. c. 5: *Law* v. *Worrall*, 1 Wils. 177.

(*k*) *Salt* v. *Richards*, 7 East, 110. See *College of Physicians* v. *Harrison*, 9 B. & C. 525: *ante*, Vol. 1, 499.

(*l*) *Murray* v. *Wilson*, 1 Wils. 316. See the form, Chit. Forms, 600.

(*m*) *Bennett* v. *Neale*, 14 East, 343.

(*n*) *Baker* v. *Sydee*, 7 Taunt. 180: *Anon.*, 2 Chit. Rep. 353.

(*o*) *Turton* v. *Hayes*, 1 Stra. 439: *Nesbit* v. *Rishton*, 11 Ad. & E. 251. See 1 & 2 Vict. c. 110, s. 3.

CHAPTER XVIII.

DISCONTINUANCE AND RULE TO DISCONTINUE.

PART V.

What, &c.

It is unnecessary, in a work of this nature, to treat particularly of the subject of discontinuance; it is sufficient to know that it never can be the subject of objection *pendente placito* (*a*), and that, after verdict, it is cured by the Statute of Jeofails, 32 *H.* 8, *c.* 30 (*b*).

Continuances.

Continuances.]—Formerly, after declaration, and before issue joined, the proceedings were continued by imparlance; (*see ante*, 802; *Vol.* 1, 209); after issue joined and before verdict, by *vicecomes non misit breve;* after demurrer, and before judgment, by *curia advisari vult;* after issue joined upon *nul tiel* record, by *curia advisari vult*, &c.; after verdict and before judgment, in actions tried at the assizes, and in cases of special verdicts, by *curia advisari vult;* after joinder in error and before judgment, also by *curia advisari vult* (*d*). But now, by rule of all the courts of *H. T.*, 4 *W.* 4, *r.* 2, "no *entry* of continuances by way of *imparlance, curia advisari vult, vicecomes non misit breve*, or *otherwise*, shall be made upon any record or roll whatever, or in the pleadings, except the *jurata ponitur in respectu*, which is to be retained. Provided that such regulation shall not alter or affect any existing rules of practice as to the *times of proceeding* in the cause" (*e*). It has been doubted whether this rule abolishes imparlances in proceedings by *scire facias*, when not a continuation of the suit (*f*), or in actions not commenced by the process prescribed by the Uniformity of Process Act (*g*).

Rule to discontinue.

Rule to discontinue.]—If the plaintiff find that he has misconceived his action, or that for some defect in the pleadings, or other reason, he will not be able to maintain it, he may obtain a rule for leave to discontinue. This indulgence, however, is granted only to plaintiffs; even an avowant in replevin cannot have it (*h*). The obtaining of the rule is deemed a step in the cause (*i*).

When obtained.

This rule may be had at any time, as of course, after the commencement of the action, and before trial or writ of inquiry

(*a*) *Beecher* v. *Shirley*, Cro. Jac. 211.

(*b*) See as to continuances of process, to save a Statute of Limitations, *ante*, 1128. See *Humble* v. *Bland*, 6 T. R. 255: *Wynn* v. *Wynn*, 1 Wils. 40: *Richards* v. *Brown*, 1 Doug. 115.

(*d*) See *Curhuis* v. *Purday*, 1 Salk. 179: *Wilkes* v. *Wood*, 2 Wils. 203. See *Doe Meare* v. *Dolman*, 7 T. R. 618.

(*e*) By the prior rule of H. T., 2 W. 4, r. 105, the entry of continuances after judgment by default, and before execution of writ of inquiry, was rendered unnecessary, which was otherwise in the Queen's Bench before that rule.

(*f*) *Doe Phillips* v. *Roe*, M. 1839; B. C., 3 Jurist, 1076.

(*g*) *Ante*, 994.

(*h*) *Long* v. *Buckeridge*, 1 Str. 112.

(*i*) *Murray* v. *Silver*, 1 Com. B. 638; 3 Dowl. & L. 26, *S. C.*

or demurrer argued and allowed; but not during a rule with a stay of proceedings (*k*). The Court may grant it, as a matter of especial favour, even after a special verdict (*l*); but they will not do so in a hard action (*m*), or to give the plaintiff an opportunity to adduce fresh proof in contradiction to the verdict (*n*). Nor will they ever grant it after a general verdict (*o*), unless after a rule for a new trial has been obtained (*p*). Nor will they grant it after a writ of inquiry executed and returned (*q*), unless with the defendant's consent. The Court have allowed the plaintiff to discontinue upon payment of costs after a demurrer argued and allowed, where there was a mistake in the plaintiff's pleading (*r*); but now the Court, in such a case, frequently gives the party leave to amend upon payment of costs (*s*). It will not be allowed after a peremptory rule for judgment on demurrer (*t*).

Motion and rule for.

Before argument on demurrer, verdict, or execution of a writ of inquiry, *this is a mere side-bar rule, and may be had as a matter of course from the proper clerk at the Master's Office* (*u*). *In other cases it is obtained upon application to the Court, and is but a rule nisi, which you must afterwards proceed to make absolute in the ordinary way.* Formerly, in the Common Pleas, if the rule to discontinue were obtained *after plea* pleaded, the defendant's attorney or agent must have *consented* to a rule in the treasury chamber in term time, or before a judge in vacation, or else there must have been a rule to shew cause: but by rule *H. T.*, 2 *W.* 4, *r.* 106, of all the courts, "to entitle a plaintiff to discontinue after a plea pleaded, it shall not be necessary to obtain the defendant's consent, but the rule shall contain an undertaking (*x*) on the part of the plaintiff to pay the costs, and a consent, that, if they are not paid within *four* days after taxation, defendant shall be at liberty to sign a *non-pros*" (*y*).

In general granted upon payment of costs.

The terms upon which a party is allowed to discontinue are in the discretion of the Court. In general, the payment of costs is imposed (*z*). Where the defendant is a justice of peace, and in some other actions against public officers and others, if the plaintiff discontinue, it must be upon payment of double costs (*a*). But, as we have seen, *ante*, 826, where the defendant pleads *puis darrein continuance*, the plaintiff, if he do not reply, may have a rule to discontinue without payment of costs; and

(*k*) *Murray* v. *Silver*, 1 Com. B. 638; 3 Dowl. & L. 26, *S. C.*

(*l*) *Price* v. *Parker*, 1 Salk. 178.

(*m*) *Boscher* v. *Lawson*, Hardw. 200, 201.

(*n*) *Roe* v. *Gray*, 2 W. Bl. 815.

(*o*) *Price* v. *Parker*, 1 Salk. 178: *Young* v. *Hitchens*, 1 Dav. & M. 599.

(*p*) *Goodenough* v. *Butler* (or *Beetles*), 2 C., M., & R. 240; 3 Dowl. 751, *S. C.* If the rule is silent as to the costs of the trial, the plaintiff, by discontinuing, will not make himself liable to pay them. *Jolliffe* v. *Munday*, 4 M. & W. 502: *Earl of Macclesfield* v. *Bradley*, 7 M. & W. 570; 9 Dowl. 312, *S. C.*, overruling *Sweeting* v. *Hales*, 9 B. & C. 369).

(*q*) *Stephens* v. *Etherick*, Carth. 86; 1 Show. 63, *S. C.*

(*r*) *Rex* v. *Burnis*, 2 Lev. 194: *But* v. *Withens*, Id. 209: *Pugh* v. *Robins*, 1 T. R. 116; 1 Saund. 23, 39. But see *Samson* v. *Rhodes*, 8 Scott, 557. In that case, after judgment for the defendant on demurrer to plaintiff's pleadings, the plaintiff took out a rule to discontinue, which the Court refused to set aside, saying that it was unnecessary to do so, seeing that the defendant was not estopped from availing himself of his judgment on the demurrer.

(*s*) 2 Saund. 73, n. (1): *ante*, 834.

(*t*) *Turner* v. *Turner*, 1 Salk. 179.

(*u*) See the forms, Chit. Forms, 602.

(*x*) See form of rule and undertaking, Chit. Forms, 602.

(*y*) See *Pott* v. *Hirst*, 1 Dowl. & L. 910; 7 Scott, N. R., 800, *S. C.*

(*z*) See 8 Eliz. c. 2, s. 2, Comb. 299.

(*a*) See 5 & 6 Vict. c. 97, s. 2, *post*, Ch. 31,

PART V.

it is the same in some other cases, though rarely so (*b*). Where a plaintiff obtained a verdict which was set aside and a new trial granted, and the plaintiff, instead of proceeding to the new trial, discontinued the action, it was held that he was not liable to the costs of the former trial (*c*). If the defendant become insolvent after the commencement of the action, and the plaintiff take no further steps in it after knowledge of the insolvency, the Court will, it seems, allow him to discontinue without payment of costs (*d*). Sometimes, by consent, the rule to discontinue is drawn up without costs.

Taxation of costs.

As soon as you have obtained the side-bar rule, or rule absolute, *take it to one of the Masters, and get an appointment on it to tax the costs. Serve a copy of the rule and appointment on the defendant's attorney or agent; and attend at the time appointed, and the Master will tax the costs.* If, after judgment for the plaintiff on demurrer, to one of several pleas, he discontinue the action, and the defendant does not insist upon his writ of error, the costs of the demurrer and the costs of the discontinuance may be ascertained by one taxation, and an *allocatur* made out for the balance (*e*). If the defendant insists upon his writ of error, the costs of the discontinuance and demurrer must be taxed separately (*f*). Upon the question as to what costs will be allowed, it has been decided that the defendant is not entitled, under any circumstances, to the costs of the draft or copies of the briefs, where the plaintiff discontinues without having given notice of trial (*g*).

Consequence of not paying costs.

Where plaintiff has leave to discontinue upon payment of costs, they should be paid forthwith; for, until paid, the action is not discontinued or stayed, and the plaintiff may be compelled to proceed therein as usual (*h*). And where the plaintiff, instead of paying costs, went on and obtained a verdict, *Parke*, J., refused to set aside the verdict, and order a discontinuance to be entered (*i*). And where the plaintiff served a rule to discontinue with an appointment to tax costs, and on the following day the defendant obtained a rule absolute for judgment, as in case of a nonsuit—the judgment was held regular (*k*). But if the rule be obtained *after plea* pleaded, and contain, as it should do, the plaintiff's consent, that if they are not paid within four days after taxation, the defendant shall be at liberty *to sign judgment of nonpros* (*l*), then if they

repealing provisions giving double costs. And see as to actions against officers of excise and customs, and other officers, *ante*, 1117. See *Devenish* v. *Martins*, 2 Stra. 974: *ante*, 1117.

(*b*) See *Ames* v. *Ragg*, 2 Dowl. 35, where defendant had been guilty of fraudulent conduct. (*Pennegen* v. *Chanter*, 6 Scott, 300).

(*c*) *Gray* v. *Cox*, 2 Dowl. 220. And see *Earl of Macclesfield* v. *Bradley*, 7 M. & W. 570; 9 Dowl. 312, *S. C.*: *Patterson* v. *Powell*, 2 Dowl. 738.

(*d*) See *Ford* v. *Stock*, 1 Dowl., N. S., 763.

(*e*) *Mayor of Macclesfield* v. *Gee*, 13 M. & W. 470; 2 Dowl. & L. 418, *S. C.* It would seem, that, in such a case, the plaintiff is entitled to the costs of the demurrer. (*S. C.*)

(*f*) *Mayor of Macclesfield* v. *Gee*, *supra*.

(*g*) *Doe Postlethwaite* v. *Neale*, 2 M. & W. 732; 6 Dowl. 166, *S. C.*

(*h*) *Boston* v. *Jupp*, 15 M. & W. 149: *Molling* v. *Buckholts*, 3 M. & Sel. 153: *Whitmore* v. *Williams*, 6 T. R. 765. See *White* v. *Gomperts*, 5 B. & Ald. 905; 1 D. & R. 556, *S. C.* Before the statutory rule of H. T., 4 W. 4, s. 3, Vol. 1, 466, when the judgment of discontinuance was entered, it related back to the day when the original rule to discontinue was taken out; and it was considered that from that day the action was discontinued: see *Brandt* v. *Peacock*, 1 B. & C. 649; 3 D. & R. 2, *S. C.*

(*i*) *Edgington* v. *Proudman*, 1 Dowl. 152.

(*k*) *Baker* v. *Jupp*, 3 Dowl. & L. 474; 15 M. & W. 149, *S. C.*, nom. *Boston* v. *Jupp*; *semb.*, overruling *Cooper* v. *Holloway*, 1 Hodges, 76.

(*l*) See form of entry on roll, Chit. Forms, 602.

be not so paid, the defendant may sign such judgment as of course (*m*). The plaintiff is not, it seems, liable to an attachment for the non-payment of these costs (*n*).

Compelling plaintiff to enter discontinuance.

When the plaintiff has obtained a rule to discontinue, the defendant may by motion, or summons and order, compel the plaintiff to enter the judgment of discontinuance, and carry in the judgment roll (*o*), but if the plaintiff had leave to discontinue upon payment of costs, they must first be paid. A judgment of discontinuance is in its nature the same as a judgment of nonsuit (*p*).

When rule to discontinue discharged.

When Rule discharged.]—It is in the power and discretion of the Court or a judge to discharge the side-bar rule to discontinue. Where, in a case before the 1 & 2 *Vict. c.* 110, a plaintiff, merely because he did not like the bail in the first action, discontinued, and held the defendant again to bail in the second action, the Court considered this conduct unwarrantable, and discharged the rule, thereby leaving the first bail still liable on their recognisance (*q*).

New action.

New Action.]—After a discontinuance (*r*), the plaintiff may commence a new action for the same cause. And before the 1 & 2 *Vict. c.* 110, if the first action were upon common non-bailable process, the plaintiff might have held the defendant to bail for the same cause (if bailable), even before the first action was discontinued (*s*), provided he discontinued before declaring, otherwise the defendant might have pleaded the pendency of the prior action in abatement. But if the defendant were held to bail in the first action, he could not have been held to bail a second time without a judge's order (*t*).

Error after.

Error after.]—A writ of error may be brought upon a judgment for the plaintiff on demurrer, to one of several pleas, notwithstanding a subsequent discontinuance, under the rule of *H. T.*, 2 *W.* 4, *s.* 106. The defendant, if he chooses, may, for that purpose, have a judgment of discontinuance entered on the record (*u*).

(*m*) See R. H., 2 W. 4, r. 106.

(*n*) *Stokes* v. *Woodeson*, 7 T. R. 6. And see *Rex* v. *Fenn*, 2 Dowl. 182: *Turner* v. *Gill*, 3 Dowl. 31.

(*o*) See *Mayor of Macclesfield* v. *Gee*, 13 M. & W. 476; Tidd's Prac. Forms, 236.

(*p*) *Mayor of Macclesfield* v. *Gee*, *supra*, per Pollock, C. B.

(*q*) *Belchier* v. *Gansell*, 4 Burr. 2502. See *Obrien* v. *Delany*, 2 Str. 1216: *ante*, Vol. 1, 644.

(*r*) The discontinuance is not complete until the costs are taxed, if the plaintiff has leave to discontinue upon payment of costs. (*Melling* v. *Buckholts*, 3 M. & Sel. 153: *Whitmore* v. *Williams*, 6 T. R. 765; MS., T. 1814).

(*s*) *Bishop* v. *Powell*, 6 T. R. 616: *Anon.*, 1 Dowl. 59; Id. 57. *Sed quære*, since the Uniformity of Process Act, it would seem the first action ought to be discontinued.

(*t*) R. H., 2 W. 4, r. 7: see *ante*, Vol. 1, 644.

(*u*) *Mayor of Macclesfield* v. *Gee*, 13 M. & W. 470; 2 Dowl. & L. 418, S. C.

CHAPTER XIX.

CASSETUR BREVE.

PART V.

What and when entered.

WHEN the defendant pleads a sufficient plea in abatement, and the plaintiff cannot deny it, or demur, he may either obtain leave to amend his declaration, if that will answer his purpose (*a*), and which will be granted upon payment of costs (*b*), or he may at once enter on the roll a judgment that the writ be quashed, in order that he may be enabled to commence a new action. If he adopt the latter mode, let him *get a roll of the day the declaration is delivered, and enter the declaration and plea on it, as in ordinary cases, and lastly the* cassetur (*c*). *Docket it with one of the Masters, as in ordinary cases, and get it marked by him; after which, file it in the treasury of the court.* In the Common Pleas, *instead of docketting the roll with one of the Masters, &c., it seems that you have to take the roll to the Master's, and docket it in the book kept there for the purpose, which the clerk will give you.* Leave of the Court is not necessary in order to make this entry; nor is the plaintiff obliged to pay the defendant's costs (*d*). It may be added, that the practice generally is, not to sign a judgment or make any entry on a roll, but the prayer of judgment that the writ be quashed, and award that it be so, are copied on paper, and delivered to the defendant's attorney or agents, the same as a pleading.

As to quashing a writ of error, see *ante, Vol.* 1, 483.

(*a*) It will not if the writ be wrong also, and if that cannot be amended. The Court will not set aside the plea, or, by amendment, enable the plaintiff to evade the effect of it, even though the time for bringing a new action may have expired. (*Roberts* v. *Bate*, 6 Ad. & E. 778).

(*b*) *Mostaer* v. *Harts*, 3 M. & Sel. 450: and sometimes without: see *Wall* v. *Lyon*, 9 Bing. 411; 1 Dowl. 714, *S. C.*

(*c*) See the form, Chit. Forms. 603.

(*d*) Pr. Reg. 6, *ante*, 821. And see *Poole* v. *Pembrey*, 1 Dowl. 693. Formerly, after entering a *cassetur breve*, the plaintiff might deliver another declaration by the bye for the same cause of action, at any time within the term in which the writ was returnable, (*Miller* v. *Andrew*, 5 T. R. 634); but if that time had elapsed, he must have sued out new process, if he wished to re-commence his action. The practice of declaring by the bye is, however, now abolished.

CHAPTER XX.

PUTTING OFF THE TRIAL.

In what cases.

In what Cases.]—If there be any *bonâ fide* and unavoidable reason or fact properly shewn, on affidavit, why it is unsafe to proceed to trial, and wherever it appears to be necessary for the purposes of justice, the Court or a judge will, in general, put off the trial. Thus, they will, in general, do so, when a material witness for either party is absent; and they will put it off, either to another day of the same sittings, or to another sitting in the same term, or to another term, or even for a longer period, under particular circumstances (*a*); to another day of the same sittings or assizes, at the instance of either party; to another sittings, term, or assizes, at the instance of the *defendant* only, for a plaintiff may have all the effect of such an application by withdrawing his record (*b*). They have put off a trial until a commission should go to examine a material witness abroad who refused to attend, and until the deposition should be certified (*c*). They have refused it, however, in another case, where it did not appear that there was any likelihood of the witness's return (*d*); and the same where the witness did not go abroad until after notice of trial was given, and he might consequently have been served with a *subpœna* in sufficient time (*e*). In an action for libel, where a justification was pleaded, the Court, on the application of the defendant, put off the trial, to enable him to procure the attendance of witnesses from abroad (the nature of the evidence being particularly pointed out in the affidavit), but imposed the terms of his admitting upon the trial the publication of the alleged libel (*f*). Even where the Court had twice before put off the trial, on account of the absence of a material witness on a whaling voyage, and the defendant applied a third time to put off the trial, on account of the witness being still absent, the Court granted the application, upon the terms of the defendant's bringing the money into court, or giving security for it to the satisfaction of the Master (*g*). So, where the copy of a judicial document in the West Indies was stated to be material and necessary evidence for the defendant, the Court put off the trial to give time to procure it, and refused to go into the question of its admissibility (*h*). The Court will also, it seems, in general refuse it, if the party applying have conducted himself unfairly, or have been the cause of any improper delay (*i*).

Absence of material witness, &c.

(*a*) See *Stratford* v. *Marshall*, Barnes, 440: *Grierson* v. *Aird*, 1 Hodg. 76.

(*b*) MS., H. 1826, cor. *Abbott*. C. J.: *Paine* v. *Burtin*, 1 Stark. 74: *Poston* v. *Rose*, 4 C. & P. 271: *Masters* v. *Strachan*, 5 C. & P. 514. But sometimes the Court will grant it on the plaintiff's application. See *Turquand* v. *Dawson*, 1 C., M., & R. 709· *Curtis* v. *Baker*, 2 C. & P. 185: *Anslay* v. *Birch*, 3 Camp. 36.

(*c*) *Rex* v. *Williams*, 1 W. Bl. 512, cited. See *Farley* v. *Newnham*, Doug. 419, 420: *Mostyn* v. *Fabrigas*, Cowp. 171. And see *Calland* v. *Vaughan*, 1 B. & P. 210.

(*d*) *Rex* v. *D'Eon*, 1 W. Bl. 515. See *Lord* v. *Cooke*, 1 W. Bl. 436.

(*e*) *Bourne* v. *Church*, Barnes, 442. And see *Poston* v. *Rose*, 4 C. & P. 271.

(*f*) *Brown* v. *Murray*, 4 D. & R. 830. And see *M'Cauley* v. *Thorpe*, 1 Chit. Rep. 685.

(*g*) MS., E. 1820.

(*h*) *Mackenzie* v. *Hudson*, 1 D. & R. 152.

(*i*) *Saunders* v. *Pitman*, 1 B. & P. 33: *Taylor* v. *Gilbee*, 1 Chit. Rep. 730: *Wade* v. *Birmingham*, 2 Chit. Rep. 5; 1 M. & R. 111 (*a*), *S. C.*

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They have also refused it, upon the application of the plaintiff, in a penal action (*j*); and, in another case, where the evidence of the absent witness was intended to sustain a defence not approved of by the Court (*k*).

Other grounds.

There are also other grounds upon which the Court will put off a trial, besides that above mentioned of the absence of a material witness. Where the defendant's attorney was so ill that he could not attend, the Court, upon application, put off the trial (*l*). And the same where a paper was published immediately before the assizes, with an intent to influence the jury (*m*). And the same, where intelligence had been received of the death of the plaintiff abroad, until the Court or a judge should direct it to be had, the plaintiff's attorney admitting that some doubts existed as to whether his client was alive or not (*n*). As to putting off the trial of issues in fact, until the determination of issues in law, where there are both to be determined, see *ante*, 831. But the Court cannot, without the consent of the parties, postpone the trial of issues in fact, until the decision of a court of error is obtained upon a judgment pronounced upon issues in law, on the same record (*o*). The Court have refused to put off a trial until a suit concerning the same matter in the Ecclesiastical Court should be determined (*p*). So, they have refused to put off the trial of a cause brought by the assignees of a bankrupt, because a petition is pending against the fiat (*q*). And they will not postpone the trial of a cause, on the ground that the defendant has filed a bill in equity against the plaintiff, and is advised that an injunction will be granted, as soon as the matter can be heard, according to the practice of the court of equity (*r*). The Court have refused to put off the trial, where the ground of the application was, that an indictment for perjury, founded on the plaintiff's affidavit of debt, was pending (*s*). They have refused it, also, where the application was made merely because counsel was not prepared (*t*). Also, where the defendant was arrested as he was coming to court to attend his cause, the judge at *Nisi Prius* refused to put off the trial on that account, unless upon payment of costs (*u*).

Patent cause.

The Court of Common Pleas, upon terms, at the instance of the plaintiff, postponed the trial of a patent cause for a definite period, to await the result of a motion pending in the Queen's Bench on a *scire facias*, to repeal the patent, in which the defendant was the moving party (*x*). But, in another case in the same court, the Court would not, upon motion of the defendants, order the trial of a similar action to be postponed till after the proceedings on a *scire facias* to repeal the patent had been determined in the Court of Queen's Bench (*y*).

Issue out of Chancery.

And, lastly, the Court or a judge at *Nisi Prius* will put off

(*j*) Tidd, 771, n.

(*k*) *Robinson* v. *Smith*, 1 B. & P. 454. As a plea in abatement, *Wade* v. *Birmingham*, 2 Chit. Rep. 5.

(*l*) *Hayley*, v. *Grant*, Sayer, 63: *Willis* v. *Farrer*, 3 Y. & J. 381.

(*m*) *Rex* v. *Gray*, 1 Burr. 512; 2 Ken. 276:. *S. C.*: *Rex* v. *Jolliffe*, 4 T. R. 285: *Coster* v. *Merest*, 7 Moore, 87; 2 B. & B. 272, *S. C.*

(*n*) *Chester* v. *Ridgway*, 1 M. & G. 955; 2 Dowl. 67, *S. C.*

(*o*) *Beckham* v. *Knight*, 7 Scott, 346: *Carden* v. *General Cemetery Company*, Id. 348.

(*p*) *Anon.*, 2 Salk. 649: *Salisbury* v. *Procter*, Id. 646.

(*q*) *Anon.*, 2 Chit. Rep. 411.

(*r*) *Vanderstegen* v. *Witham*, 3 Dowl. 369; 6 M. & W. 457, *S. C.*

(*s*) *Johnson* v. *Wardle*, 3 Dowl. 530; 1 Har. & W. 219, *S. C.*

(*t*) *Colebrook* v. *Dobbs*, 3 Burr. 1319.

(*u*) *Solomon* v. *Underhill*, 1 Camp. 229.

(*x*) *Smith* v. *Upton*, 6 Scott, N. R., 894; 1 Dowl. & L. 982, *S. C.*

(*y*) *Munts* v. *Foster*, 1 Dowl. & L. 962; 7 Scott, N. R., 896, *S. C.*

the trial of an issue out of Chancery, for the same reasons and under the same circumstances as in ordinary actions (*z*).

The Application for, &c.]—The application must be made either to the Court or a judge at chambers, or, if the sittings or assizes have commenced, to the judge at *Nisi Prius*. It should be made promptly after the cause for it is known (*a*). And, it would seem, it should be made at least two days before the day of trial (*b*), if the necessity for it was at that time known to the applicant. Or, if the grounds of the application have occurred or become known to him so recently that he cannot make it in the above time, he may apply to the judge at *Nisi Prius* just before or even after the cause has been called on (*c*), but not after the jury are sworn (*d*). In the Common Pleas, it is a general rule of practice that no motion to put off a trial will be entertained at *Nisi Prius*, where it might have been made in banc in term time (*e*). In that Court, also, it is a rule that the Court or judge will never put off the trial of a cause upon the consent of the parties or counsel at *Nisi Prius*, but the plaintiff must either proceed to try or withdraw his record (*f*). A judge sitting at *Nisi Prius* at Westminster, cannot make an order respecting a cause to be tried in London (*g*). It seems that the sheriff has no power to postpone a cause to be tried before him, but the application must be made to a judge (*h*).

The application. When and to whom made.

If the application be made at *Nisi Prius, notice of the intended application, and a copy of the affidavit on which it is founded, should be first given to the plaintiff's attorney* (*i*); which may have the effect of preventing his incurring the expense of bringing up his witnesses (*j*), if he do not intend to oppose the application; or, if he do oppose it, it affords him an opportunity of shewing cause against it in the first instance, which, in practice, is always done. In other cases, it is usual, and seems to be necessary in the Common Pleas, to give previous notice of the intended motion (*k*). The notice should, in general, offer to pay the costs of the postponement, otherwise the defendant will also be ordered to pay the costs of the application (*l*).

Notice to opposite party.

The application must be founded on an affidavit stating the grounds upon which it is made. If made on account of the absence of a material witness, and it is not known where he is, the affidavit, in ordinary cases, states the time issue was joined, the time for which notice of trial was given, the absence of the witness, that he is a material and necessary one, and that the party cannot safely proceed to trial without him, the endeavours which have been made to find him (*m*), and the time at which he is expected to return (*n*). But, if the witness be

The affidavit for.

(*z*) *Buston* v. *Lawton*, 4 Camp. 163.
(*a*) *Dark* v. *Dick*, 1 Price, P. C. 38: *Anon.*, 3 Taunt. 315.
(*b*) See *Roberts* v. *Downes*, Barnes, 437: *Roberts* v. *Hillsborough*, Id. 438: *Bourne* v. *Church*, Id. 442: *Sellon* v. *Chamberlayne*, Id. 444.
(*c*) See *Ansley* v. *Birch*, 3 Camp. 333: *Anon.*, 3 Taunt. 315.
(*d*) *Packham* v. *Newman*, 3 Dowl. 166.
(*e*) See 1 Taunt. 565; Tidd, 9th ed., 772.
(*f*) See 2 Taunt. 221; Tidd, 9th ed., 772.
(*g*) *Atkinson* v. *Dickinson*, 3 Camp. 41.
(*h*) *Packham* v. *Newman*, 3 Dowl. 165; 1 C., M., & R. 584, *S. C.*: *ante*, 412.
(*i*) Cas. T. Hardw. 128; Tidd, 9th ed., 772. See form of notice, Chit. Forms, 604; and of affidavit, Id.
(*j*) If no notice be given, or if not given until expense has been incurred by the plaintiff, the defendant will have to pay that expense. (*Attorney-General* v. *Hull*, 2 Dowl. 111).
(*k*) Tidd, 9th ed., 772.
(*l*) *Ward* v. *Ducker*, 6 Scott, N. R., 45; 5 M. & G. 377, *S. C.*
(*m*) *Anon.*, Lofft, 653: *Dark* v. *Dick*, 1 Price, P. C. 38.
(*n*) See the form, Chit. Forms, 604: see *Dale* v. *Heald*, 1 C. & K. 314.

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abroad, or if, from the nature of the application, it may be suspected that it is made merely for the purpose of delay, the above form will not, in general, be sufficient, and the Court usually require that the affidavit shall state the cause of action, and the evidence expected from the witness, in order that they may judge if it be material, and that it also state circumstances from which they may infer the probability of the witness's return within a reasonable time (*o*). It should also, if possible, state where the witness is (*p*). It is, in general, best, that it should state, if possible, when he is expected to return (*q*). It is not necessary to state the name of the witness (*r*). Formerly, it seems, the affidavit must have been made by the party himself (*s*); but the affidavit of the attorney in the cause (*t*), and even the affidavit of the attorney's clerk, if it state that he is particularly acquainted with the circumstances of the cause, and has the management of it (*u*), has since been deemed sufficient. The affidavit, if made on the part of the defendant, need not swear to a good defence on the merits (*x*).

In deciding upon an application of this kind, the Court will not, in general, enter into any inquiry as to the admissibility of the evidence required (*y*).

Terms imposed.

In thus putting off the trial, the Court or judge frequently impose terms on the defendant, such as the admission of some matters of formal proof (*z*), or the like. In one case, they made the defendant bring money into court (*a*), but this is not usual.

Costs.

Costs, &c.]—When the trial is thus put off it is usually upon the terms of paying any costs the opposite party may have been put to in preparing for trial (*b*). When the motion is made to the Court, or at *Nisi Prius*, and cause is shewn in the first instance, it is not the practice to give the costs of the motion, provided the notice of the intended motion offers to pay the costs of the postponement (*c*). Where the plaintiff sued as a pauper, and the defendant had the trial put off, upon undertaking to pay the costs of the day, the Court of Common Pleas granted an attachment against the defendant for the non-payment of these costs (*d*). The order for putting off the trial, when made at *Nisi Prius*, ought to be drawn up on the terms of the party who obtains it, *undertaking* to pay the costs of the day, otherwise there might be some doubt whether an attachment could be granted for not paying them. But, at all events, if drawn up generally on payment of costs, such payment being a condition precedent, if they be not paid, you may proceed to try the cause. The party gets these costs taxed upon the rule or order, in the usual way.

(*o*) See *Rex* v. *D'Eon*, 3 Burr. 1513: 1 W. Bl. 510, *S. C.*; *Lord* v. *Cooke*, Id. 436.

(*p*) *Zoffani* v. *Jennings*, Lofft, 167: *Attorney-General* v. *Phillips*, M'Clel. 251.

(*q*) 1 Chit. Rep. 730, *a*. See *Anon.*, 2 Chit. 411.

(*r*) *Smith* v. *Dobson*, 2 D. & R. 420: *Buckingham* v. *Banks*, 4 D. & R. 839, n. But, on a second application, the Court might be more strict; and they might not only require to know who he is, but what he is to prove, &c. (*Anon.*, 2 Chit. 686, n.)

(*s*) *Carter* v. *Uppington*, Barnes, 437.

(*t*) *Duberly* v. *Gunning*, Peake, 97.

(*u*) *Sullivan* v. *Magill*, 1 H. Bl. 637.

(*x*) *Attorney-General* v. *Hull*, 2 Dowl. 111: *Hill* v. *Prosser*, 3 Id. 704.

(*y*) See *Mackenzie* v. *Hudson*, 1 D. & R. 152.

(*z*) *Brown* v. *Murray*, 4 D. & R. 830: *Anon.*, Lofft, 769.

(*a*) *Taylor* v. *Gilkes*, 1 Chit. 730. See Id., 686, n.

(*b*) See *Walker* v. *Lewis*, 1 Gale, 32: *Attorney-General* v. *Hull*, 2 Dowl. 111. The costs are generally the same as if the record had been withdrawn.

(*c*) *Ward* v. *Ducker*, 6 Scott, N. R., 45; 5 M. & G. 377, *S. C.*; Tidd, 9th ed., 863.

(*d*) *Rice* v. *Brown*, 1 B. & P. 30. See *Attorney-General* v. *Hull*, 2 Dowl. 111.

CHAPTER XXI.

TRIAL BY PROVISO.

In what cases, &c.

In what Cases, &c.]—In all cases, including cases to be tried before the sheriff (*a*), where the plaintiff, after issue joined, does not proceed to trial, where, by the course and practice of the court, he ought to have done so (and as to which, see *post*, 1303), the defendant may, if he wish, have the action tried by proviso: that is, he may make up the issue, give the plaintiff notice of trial, make up the *Nisi Prius* record, carry it down and enter it, and proceed to the trial as in ordinary cases, as if he were proceeding as plaintiff (*b*). In replevin, prohibition, *quare impedit* against the patron (*c*), and error in fact (*d*), in which cases, both parties being actors, the defendant may make up the *Nisi Prius* record, and thereupon proceed to trial, although no laches or default be imputable to the plaintiff. The Court have also allowed a defendant to carry down the record of an issue, directed by the Court of Chancery, to trial by proviso, upon its being suggested to them that the plaintiff wished to delay the cause (*e*), and judges at chambers have done so, on issues directed under interpleader orders. Where, upon a special jury cause being called on for trial, there was not a full special jury, and neither party prayed a *tales*, it was held that the defendant could not afterwards take down the record by proviso (*f*). After the plaintiff has once proceeded to trial, as where the cause was made a remanet, or where a new trial has been granted, and in other cases noticed, *post*, 1300, this trial by proviso is the only mode by which the defendant can get rid of the action; and, it seems, that in such cases, he must wait for another default before he can proceed.

Court will not exclude defendant's right.

The Court have no right to interfere with defendants in ordinary cases, and prevent them from taking down a cause by proviso, for that is the mode by which it has been determined, that a plaintiff shall be prevented from keeping a cause hanging over the head of a party for an indefinite time (*g*).

Proceeding seldom adopted.

As the delay and expense attending the trial by proviso, however, are material objections to this mode of proceeding, it is seldom adopted, unless in cases where the defendant is particularly anxious that the cause should be finally settled by verdict, and in some other cases specified in the next Chapter:

(*a*) *Harrison* v. *Sutton*, 1 Dowl. & L. 471; 12 M. & W. 307, *S. C.* See *Nicholson* v. *Jackson*, 1 Com. B. 622.

(*b*) After the issue had been joined, if the plaintiff, in causes in London or Middlesex, make default in trying it, or, in country causes, do not proceed to trial at the next assizes, the defendant may afterwards proceed to trial by proviso. (R. M., 4 A. c.)

(*c*) *Reg.* v. *Banks*, 2 Salk. 652; 2 Ld. Raym. 1082, *S. C.* And see *Smith* v. *Blundell*, 1 Chit. Rep. 226: *Worcestershire Canal Company* v. *Trent Navigation Company*, 1 Marsh. 218.

(*d*) 2 Saund. 336 a.

(*e*) *Humpage* v. *Rowley*, 4 T. R. 767. And see *Bassett* v. *Osborne*, 6 Moore, 473.

(*f*) *Phillips* v. *Dance*, 9 B. & C. 769.

(*g*) *Whittaker* v. *Mason*, 6 Dowl. 429; 5 Scott, 740; 4 Bing. N. C. 503, *S. C.*, per *Tindal*, C. J.

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in ordinary cases, the defendant usually moves for judgment as in case of a nonsuit, in preference to this mode of proceeding.

When and how.

Proceedings on.]—By rule of all the courts of *H.*, 2 *W.* 4, *r.* 71, "no trial by proviso shall be allowed in the same term in which the default of the plaintiff has been made, and no rule for a trial by proviso shall be necessary:" and by *R. H.*, 2 *W.* 4, *r.* 70, "no entry of the issue shall be deemed necessary to entitle a defendant to move for judgment as in case of a nonsuit, or to take the cause down to trial by proviso" (*h*).

Notice of trial.

The defendant must give the plaintiff the same notice of trial that the plaintiff is obliged to give him in ordinary cases. The form is, "take notice of trial by proviso," &c. (*i*)

Term's notice.

It is not necessary to give a term's notice, where no proceedings have been had in the cause for four terms, as in the case where the plaintiff takes down the record to trial (*k*).

Jury process.

The jury process is the same as in ordinary cases; excepting that in the *distringas*, after the words "many defaults," or in the *habeas corpus* after the words "to make that jury," you insert this clause: "*Provided always, that if two writs shall come to you thereupon, then you execute and return one of them only; and have there*," &c. (*l*)

Costs of the day.

If the defendant does not proceed to trial by proviso, after notice given by him, that he will do so, or does not countermand it in due time, he is liable to pay the plaintiff his costs (*m*); and where both the plaintiff and defendant give notice of trial, and do not go to trial, both are entitled to costs (*n*), unless the cause was made a remanet by consent of both parties (*o*).

Proceedings where plaintiff also carries down the record.

If both the plaintiff and the defendant carry down records at the same time, the trial shall be by the plaintiff's record, if he enters it with the marshal, otherwise the defendant may proceed upon his record (*p*). But, although the plaintiff have entered his record with the marshal, yet, if he have not given a sufficient notice of trial, his entry will be of no effect; the defendant, in that case, may proceed to trial upon the record he has taken down, and if the plaintiff do not appear to it, he must be nonsuited (*q*). And in all cases where the defendant proceeds upon his record, if the issue happen to be on the plaintiff, who is therefore to begin first, but does not appear, the defendant must not enter upon his proof and take a verdict; but the proper course is to call the plaintiff and nonsuit him (*r*). If, however, instead of doing so, he take a verdict, the Court will not, in general set it aside, except for the purpose of allowing a nonsuit to be entered instead of it (*s*).

(*h*) See the former practice: *Dodson* v. *Taylor*, 2 Str. 1055: *King* v. *Pippet*, 1 T. R. 695. In the Exchequer it was never necessary to enter the issue, (*Collsworth* v. *Martin*, 2 C. & J. 123); and it is now abolished in every case by R. H., 4 W. 4. (*Hodges* v. *Diley*, 7 Dowl. 555).

(*i*) See the form, Chit. Forms, 606.

(*k*) *Theobald* v. *Crickmore*, 2 B. & Ald. 594: 1 Chit. Rep. 317, *S. C.*

(*l*) See Chit. Forms, 605.

(*m*) Tidd, 698: *King* v. *Pippett*, 1 T. R. 696.

(*n*) Sellon, 416: *Reading* v. *Grafton*, Pr. Reg. 305.

(*o*) *Blow* v. *Wyatt*, 4 M. & W. 407.

(*p*) R. M., 4 A. c., Q. B.: *Williams* v. *Jones*, Barnes, 29.

(*q*) *Brown* v. *Ottley*, 1 B. & Ald. 253.

(*r*) *Gardener* v. *Davis*, 1 Wils. 330: *Hicks* v. *Young*, Barnes, 458; 2 Saund. 336 b.

(*s*) *Hodgson* v. *Forster*, 1 B. & C. 110; 2 D. & R. 221, *S. C.*

CHAPTER XXII.

COSTS FOR NOT PROCEEDING TO TRIAL.

In what Cases.]—If the plaintiff in an action, or the plaintiff on a writ of error *coram nobis*, on an issue in fact (*a*), give notice of trial, and neither countermand his notice (*b*), nor proceed to trial in pursuance of it, the defendant will be entitled to such costs as he may have incurred by reason of plaintiff not having done so (*c*); even although he have prevented the plaintiff from entering his cause for trial, by entering a *ne recipiatur* with the marshal (*d*); or, though demurrers to some of the defendant's pleas are pending (*e*); or, though the plaintiff is prevented from trying his cause by an irregularity which the defendant refuses to waive (*f*). But, if the plaintiff be ready to try at the sittings or assizes, according to his notice, and the cause be made a *remanet* by consent (*g*) or otherwise, he will not be liable to these costs, even though he do not re-enter his cause for the next sittings or assizes. In like manner, the plaintiff is entitled to costs if the defendant do not proceed to a trial by proviso after giving notice to that effect (*h*); and if both parties give notice of trial, and neither of them countermand their notice, or proceed to trial in pursuance of it, each of them is entitled to costs from the other (*i*). Also, if the plaintiff do not proceed to execute his writ of inquiry in pursuance of his notice, or countermand it in time, the defendant will be entitled to his costs, in the same manner as for not proceeding to trial (*k*). The plaintiff is not excused from these costs by an offer to refer the cause made after the commission day (*l*). Even a pauper may be liable to these costs, though not dispaupered (*m*).

In what cases Delay of party.

If the party be ready to try according to notice, but the cause be made a *remanet*, he will not be liable to pay costs, because the delay is not the delay of the party, but the delay of the Court; and where the plaintiff was prepared to try at one sittings, but, from the press of business, the cause did not come on, and those sittings lasted till the second sittings commenced, but the plaintiff was obliged to withdraw his record

Delay of the court.

(*a*) *Greville* v. *Chapman*, 15 Law J., N. S., 41, Q. B. And see *Dennis* v. *Dennis*, 2 Saund. 336.

(*b*) *Whitlock* v. *Humphreys*, 2 Str. 849.

(*c*) R. M., 1654, s. 18, Q. B.; s. 16, C. P. And see R. M., 4 A. c.; 14 G. 2, c. 17, s. 5: *R.* v. *Mayor of Great Yarmouth*, 5 B. & Ald. 551.

(*d*) Pr. Reg. 406.

(*e*) *Milton* v. *Griffiths*, 1 Dowl., N. S., 769.

(*f*) *Cook* v. *Smith*, 1 Dowl., N. S., 861.

(*g*) *Blow* v. *Wyatt*, 4 M. & W. 407; 7 Dowl. 66, *S. C.*

(*h*) *Wilkinson* v. *Poole*, 2 Str. 737.

(*i*) Pr. Reg. 405: see *Clarke* v. *Simpson*, 4 Taunt. 591.

(*k*) *Ante*, 893: *Shadford* v. *Howstoun*, 1 Str. 317: *Sutton* v. *Bryan*, 2 Str. 728.

(*l*) *Eaton* v. *Shuckborough*, 2 Dowl. 624, Exch.

(*m*) See R. H., 2 W. 4, r. 10, *ante*, 1134.

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on account of its not having been re-sealed, it was held, that he was not liable to the costs of the first sittings (*n*).

Excuse of such costs.

By *R. M.* 1654, *s.* 18, the defendant is entitled to costs if the plaintiff do not proceed to trial in pursuance of his notice, unless the plaintiff have countermanded his notice, *or*, "shew cause to be allowed in the court in excuse of such costs." And the Court of Common Pleas refused a rule for such costs, where the plaintiff was prevented from going to trial by an accident which happened to a material witness (*o*). As the rule, however, in the Queen's Bench, is absolute in the first instance, the only way of bringing the matter of excuse under the consideration of that court, is by moving to discharge the rule. (See *post*, *Pt.* 6, *Ch.* 1).

When and how obtained, &c.

When and how obtained, &c.]—There is not any limited time within which the motion for these costs must be made, and in general it may be made at any time whilst the cause is in existence, and before execution executed, and perhaps afterwards (*p*). A term's notice is not necessary before making the application, though no proceedings have been had for four terms, that notice being only requisite where the object is to *speed* the cause (*q*).

After rule for judgment as in case of a nonsuit.

By the *R. H.*, 2 *W.* 4, *r.* 69, "no motion for judgment as in case of a nonsuit shall be allowed after a motion for costs for not proceeding to trial for the *same* default, but such costs may be moved for separately, *i. e.* without moving at all for judgment as in case of a nonsuit, or after such motion is disposed of; or the Court, on discharging a rule for judgment as in case of a nonsuit, may order the plaintiff to pay the costs of not proceeding to trial, but the payment of such costs shall not be made a condition of discharging the rule." Therefore, if the defendant intends to move for judgment as in case of a nonsuit, he ought not to move for costs of the day until the former motion is disposed of. The Court, on discharging the rule for judgment as in case of a nonsuit, on a peremptory undertaking, will, in general, grant the costs of not proceeding to trial as part of the rule, without requiring a separate rule for that purpose (*r*): provided it appear by the affidavits that costs have been incurred (*s*); or, they will grant "the costs of the day, if any," whether such costs appear to have been incurred or not, provided the affidavits do not shew, that no such costs could have been incurred (*t*). If the rule for judgment as in case of a nonsuit be made absolute, the costs of the day will not be granted as part of the rule, for these costs form part of the costs of the nonsuit. In a case were the rule was made absolute in the bail court, *Taunton*, J.,

On discharge of such rule.

On making it absolute.

(*n*) *Waters* v. *Weatherby*, 3 Dowl. 398; see per *Patteson*, J.: *Brett* v. *Stone*, 1 Dowl. & L. 140. And see *Cook* v. *Smith*, 1 Dowl., N. S., 861.

(*o*) *Cole* v. *Moffatt*, Barnes, 133. And see *Mullings* v. *Anson.*, 5 Taunt. 29.

(*p*) *Redit* v. *Ludock*, 2 Dowl. 247.

(*q*) *French* v. *Burton*, 2 C. & J. 634: see *ante*, 132.

(*r*) *Piercy* v. *Owen*, 1 Dowl. 362: *Lawniker* v. *Barr*, 2 C. & J. 473: *Duckett* v. *Read*, 1 Tyr. 366. See *post*, 1289.

(*s*) *Ray* v. *Sharp*, 4 Dowl. 284.

(*t*) *Doe* v. *Owen*, 1 M. & W. 322. And see *Pascall* v. *James*, 12 M. & W. 106; 1 Dowl. & L. 415; 13 Law J., N. S., 93, Exch., *S. C.*

said, that those costs must be made the subject of a separate motion (*u*).

Motion in Q. B. and Exch., and proceedings on.

In the Queen's Bench and Exchequer, the motion for these costs and proceedings on it are as follows:—*Let the defendant's attorney make an affidavit, stating when the action was commenced, issue joined, and notice of trial given, and that the plaintiff did not proceed to trial or countermand the notice* (*x*). It need not shew that costs have been expressly incurred by the defendant (*y*). *A notice of this motion is usually given* (*z*), *and the Master will allow for it in costs; if given, the affidavit should state the service. Give this affidavit, with a motion-paper, to counsel, "to move for costs for not proceeding to trial in pursuance of notice," and the Queen's Bench will thereupon grant a rule absolute in the first instance* (*a*).—In the Exchequer, the rule is not a rule absolute in the first instance, nor a rule *nisi* in the common form; but it is a rule, which, if cause is not shewn in four days, makes itself absolute without any motion for that purpose (*b*). *Draw up the rule with one of the Masters* (*c*); *and get an appointment on it from him. Serve a copy of the rule and appointment on the plaintiff's attorney, and afterwards attend before one of the Masters, and have the costs taxed* (*d*).

How in C. P.

In the Common Pleas, the course of proceedings is thus:—*One of the Masters will obtain this rule for you in the Treasury Chamber, or you may give a brief to a serjeant or counsel, and the Court will thereupon grant a rule absolute in the first instance* (*e*) *without affidavit. Draw up the rule with one of the Masters, and get an appointment on it from him; serve a copy of the rule and appointment on the plaintiff's attorney, and afterwards attend before the Master, and, upon producing the usual affidavit, he will tax the costs.*

No stay of proceedings.

In ordinary cases, the rule cannot be moved with a stay of proceedings, nor will the Court, unless under peculiar circumstances, make it part of the rule that the payment of the costs shall be a condition precedent to ulterior proceedings (*f*).

Remedy for costs.

If not so expressed in the rule, the plaintiff may proceed without paying the costs, and the defendant's only remedy for them is by attachment (*g*), or by execution under the 1 & 2 *Vict. c.* 110, *s.* 18 (*h*). Where the Master has made his *allocatur* upon a rule for the costs of the day, which directed the costs to be paid, "if it shall appear to the Master that the costs ought to be paid," a subsequent rule for these costs is unnecessary, and will not be granted (*i*).

(*u*) *Johnson* v. *Smith*, 1 Dowl. 421: see *post*, 1306.

(*x*) See the form, Chit. Forms, 606.

(*y*) *Powell* v. *James*, 12 M. & W. 100; 1 Dowl. & L. 415, S. C.

(*z*) A stay of proceedings cannot be had, although two days' notice of the motion be given: *Eager* v. *Cuthill*, 3 M. & Wels. 60.

(*a*) See *Alderley* v. *Storey*, 2 Dowl., N. S., 326.

(*b*) *Robinson* v. *Robinson*, 3 Dowl. 177. See *Raby* v. *Oberensher*, 11 Price, 512: *Eaton* v. *Shuckburgh*, 2 Dowl. 624.

(*c*) See the form, Chit. Forms, 606.

(*d*) See *Michinson* v. *Allcock*, 1 D. & R. 163.

(*e*) *Russell* v. *Hill*, 6 Jur. 606.

(*f*) *Eager* v. *Cuthill*, 6 Dowl. 125, 3 M. & W. 60, S. C.: *Gibbs* v. *Goles*, 7 Dowl. 325: *Fridon* v. *Bray*, 9 Dowl. 329: *Aime* v. *Chinnock*, 8 Dowl. 736: *Shorediche* v. *Gilbard*, 8 Dowl. 296. See *Henzell* v. *Hocking*, 9 Jur. 181, B. C.

(*g*) See *post*, Pt. 8.

(*h*) *Wilson* v. *Curtis*, 8 Bing. 274: *Doe Evans* v. *Roe*, 2 Dowl. 572. As to the proceeding by attachment, see *post*, Pt. 8; and as to the proceeding by execution on the rule, see *post*, Pt. 6, Ch. 1. And see *Wright* v. *Burroughs*, 2 Dowl. & L. 94; 13 Law J., N. S., 242, Q. B., S. C.: *Hodson* v. *Patterson*, 4 M. & G. 333.

(*i*) *Hodson* v. *Patterson*, and *Wright* v. *Burroughs* *supra*.

CHAPTER XXIII.

JUDGMENT AS IN CASE OF A NONSUIT.

In what Cases, &c. 1298.
In what time Motion for should be made, 1303.
The Motion, Rule, &c., 1304.
Default after peremptory Undertaking, 1310.

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In what cases.

In what Cases, &c.]—Before the statute 14 *G.* 2, *c.* 17, *s.* 1, if a plaintiff made default in taking his cause down to trial, the only course open to defendant, was to take the cause down himself to trial, as noticed, *ante,* 1293. But now, by that act,

14 Geo. 2, c. 17, s. 1.

"where any issue is joined in any action or suit at law, in any of her Majesty's Courts of Record at Westminster, the Court of Common Pleas for the county palatine of Lancaster, or the Court of Pleas for the county palatine of Durham, and the plaintiff, in any such action or suit, hath neglected, or shall neglect to bring such issue on to be tried, according to the course and practice of the said courts respectively, it shall and may be lawful for the judge or judges of the said courts respectively, at any time after such neglect, upon motion made in open court, (due notice having been given thereof), to give the like judgment for the defendant or defendants, in every such action or suit, as in cases of nonsuit, unless the said judge or judges shall, upon just cause and reasonable terms, allow any further time or times for the trial of such issue; and if the plaintiff shall neglect to try such issue within the time or times so allowed him, then and in every such case the said judge or judges shall proceed to give such judgment as aforesaid."

In what actions and proceedings.

This statute extends to an ejectment (*a*), and to *qui tam* actions (*b*), and to actions by executors or administrators (*c*), and to cases where default is made in not proceeding to trial before the sheriff (*d*); and, it would seem from one case, to feigned issues, under the tithe commutation act (*e*). But it does not extend to replevin (*f*); nor, it should seem, to prohibition, *quare impedit* (*g*), or error in fact; for in all these cases, the defendant may himself take down the record without a pro-

(*a*) *Doe Berger* v. *Docker,* 6 Dowl. 479. See *Doe Williams* v. *Smith,* 9 Dowl. 1011, *ante,* 961.

(*b*) *Stone* v. *Farey,* 1 East, 554: *Watson* v. *Jackson,* 1 Wils. 325.

(*c*) *Howard* v. *Rathone,* Willes, 316: Barnes, 1130, *S. C.*: *Herbert* v. *Keal,* 4 D. & R. 634: *Woolley* v. *Sloper,* 2 Dowl. 208: *Pickup* v. *Wharton,* 2 Dowl. 388.

(*d*) *Bayble* v. *Grenville,* 2 Dowl. 238: *Walls* v. *Redmayne,* Id. 508: *Maddelry* v. *Batty,* 3 Id. 805: see *ante,* 1293.

(*e*) *Sandys* v. *Mayor &c., of Beverley,* 12 M. & W. 563; 1 Dowl. & L. 641, *S. C.* But see *Wick* v. *Cotton,* 1 Dowl. & L. 227, *contra.*

(*f*) *Jones* v. *Concannon,* 3 T. R. 661: *Shortridge* v. *Hiern,* 5 Id. 400: *Eggleton* v. *Smith,* 1 W. Bl. 375.

(*g*) *Wyndowe* v. *Bishop of Carlisle,* 11 Moore, 269; 3 Bing. 404, *S. C.*

viso (*h*). Nor does it extend to any case where the plaintiff could not be nonsuited if he had proceeded to trial (*i*). Nor to causes which have abated by the death of one or more of the plaintiffs or otherwise (*k*). It extends to cases where money is paid into court in respect of part of the causes of action, and taken out in satisfaction (*l*); but not so where it is paid into court to the whole action, and it is so taken out. One of several defendants may have this judgment (*m*), and the rule in such a case must be for a nonsuit generally, and not merely confined to the defendant applying for it (*n*). And if one of two defendants in an action of *assumpsit*, suffer judgment by default, the other may have this judgment, for the plaintiff may be nonsuited at the trial (*o*); but, it would seem, this would be otherwise if the action were *ex delicto* (*p*). Where there are several issues in law and in fact, and the defendant has judgment on the issues in law, if the plaintiff do not proceed on the issues in fact, the defendant shall have this judgment; for the plaintiff in such a case might have been nonsuited, had he proceeded to trial (*q*). But, pending a demurrer, the defendant cannot obtain such judgment for not proceeding to trial on the issues in fact (*r*). Nor is the defendant entitled to such judgment, where the plaintiff has served a rule to discontinue, and the costs are taxed but not paid (*s*).

When issue may be deemed to be joined.

Issue must be joined before it can be said that the plaintiff is in default within the meaning of the above statute. Until the *similiter* is added, issue is not joined (*t*). And it has been held that a *similiter* intitled in a wrong court is insufficient for this purpose (*u*). It is not, however, necessary that the issue should have been actually made up and delivered; it is enough if the *similiter* has been delivered (*x*). Issue must be joined as to all the defendants who have pleaded (*y*); and the *similiter* must not be omitted in any one of the issues (*z*); and the cause must be completely at issue, and it will not suffice that it was so at a prior stage of the cause (*a*). The time from which the plaintiff's laches is to commence running, does not begin until the last issue is joined if there be several issues (*b*). Where there is an issue in fact and an issue in law, the time does not begin to run until after judgment on the latter (*c*).

Where a trial has been had.

In all cases within the statute, if the plaintiff once comply

(*h*) *Ante*, 1293.

(*i*) *Weller* v. *Gayton*, 1 Burr. 358. See Vol. 1, 398.

(*k*) *Checchi* v. *Porcell*, 6 B. & C. 253; 9 D. & R. 243, *S. C.*

(*l*) *Doe Stanley* v. *Toorgood*, 2 Dowl. 404.

(*m*) *Jones* v. *Gibson*, 5 B. & C. 768; 8 D. & R. 562, *S. C.*

(*n*) Id.; and see *Sawyer* v. *Hodges*, 10 Law J., N. S., 470, Exch.; 1 Dowl., N. S., 10, *S. C.*; *Downing* v. *Jennings*, 5 Dowl. 303.

(*o*) *Murphy* v. *Donkin*, 5 B. & C. 178; 7 D. & R. 619, *S. C.*, *supra*.

(*p*) *Stuart* v. *Rogers*, 7 Dowl. 185; 4 M. & W. 649, *S. C.* And see *Harris* v. *Butterley*, Cowp. 483.

(*q*) *Paxton* v. *Popham*, 10 East, 366: *Martin* v. *Stone*, 6 Jur. 372, B. C.

(*r*) *Butcher* v. *Kierman*, 1 Marsh. 364; *Milton* v. *Griffiths*, 1 Dowl., N. S., 769. See *Gordon* v. *Smith*, 8 Scott, 560; 6 Bing., N. C., 273, *S. C.* In that case issue was joined on several issues in fact, and there was a demurrer to one of the pleas, but no joinder in demurrer; and defendant afterwards withdrew the plea.

(*s*) *Cooper* v. *Holloway*, 1 Hodges, 76.

(*t*) *Smith* v. *Rigby*, 3 Dowl. 705.

(*u*) *Ray* v. *Goad*, 5 Dowl. 295.

(*x*) *Heath* v. *Boxall*, 7 Dowl. 19.

(*y*) *Crowther* v. *Duke*, 7 Scott, 409: *Fowler* v. *Duke*, 7 Scott, 344: *Jackson* v. *Utting*, 2 Dowl., N. S., 543; 10 M. & W. 640, *S. C.* In that case the defendant, as to whom issue had not been joined, had, since the commencement of the action, been discharged under the insolvent act.

(*z*) *Wright* v. *Oldfield*, 8 Dowl. 899.

(*a*) *Rickards* v. *Middleton*, 1 M. & G. 53.

(*b*) *Crowther* v. *Duke*, *supra*.

(*c*) See *Duberley* v. *Page*, 2 T. R. 394.

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with it, by taking down the issue for trial although he be nonsuited, and the nonsuit be afterwards set aside (*d*), or have a verdict, and a new trial be afterwards granted (*e*), the defendant can never afterwards have judgment as in case of a nonsuit for any subsequent laches upon the part of the plaintiff in not bringing the cause to trial; but if he wish to dispose of the action, he must take it down for trial by *proviso* (*f*). So, if the trial of the cause is delayed by the general course of business, or by press of business, the defendant cannot have this judgment. Thus, in a country cause, if the cause be made a *remanet* (*g*), or in a town cause, if it be made a *remanet* at the request of the defendant (*h*), the defendant shall not afterwards have this judgment; and this whether the plaintiff is passive, and takes no step, or gives a fresh notice of trial, which he abandons (*i*). But this is otherwise in a town cause, where the cause is made a *remanet* from one sittings to another (*k*), or from the sittings after one term to the sittings after another (*l*); for there is a great difference between causes entered for trial in London or Middlesex, and at the assizes in other counties; in the former, the record is not re-entered, nor is any fresh notice of trial given, and the cause comes on as if the sittings had been continued without interruption; and the plaintiff must keep the record and jury process in a state of trial until the cause comes on in its turn. So, the defendant cannot have this judgment, where, in a special jury cause, the trial goes off for default of jurors, and neither party prays a *tales* (*m*). And where a special jury cause had been set down for trial, and stood in the paper so long as three years, the defendant was refused this judgment, he not having made any application to have a day appointed for the trial (*n*). So, the Court refused it, where the judge refused to try a wager cause (*o*). Giving notice that a cause will be taken as an undefended one at the sittings in London, and appearing for the purpose of trying the cause as undefended, will not prevent the defendant from having this judgment (*p*). Nor will the plaintiff's entering the cause for trial, and afterwards withdrawing the record (*q*).

Where delay in trial arises from course of business, &c.

The defendant is not entitled to this judgment, where he or his attorney has been the cause of the delay in trying the cause, or has consented to it (*r*). Where he took out a summons for putting off a trial at the assizes, so late before the commission-day that the plaintiff thought he might be inconvenienced in getting ready for trial if the order was refused, and therefore countermanded it, it was held that the defendant could not, on

Where the defendant causes, or he consents &c. to, the delay.

(*d*) *King* v. *Pippett*, 1 T. R. 492: *Ashley* v. *Fiarman*, 2 Dowl. 697: *Doe Giles* v. *Wynne*, 1 Chit. Rep. 310.

(*e*) *Porcelius* v. *Maddocks*, 1 H. Bl. 101: *Hawley* v. *Shirley*, 5 Dowl. 393: *Brough* v. *Scarby*, 2 Har. & W. 139: *Day* v. *Day*, 1 M. & W. 39, where the trial was before the sheriff. See *Jones* v. *Pritchard*, 2 Tyr. 383, where, under special circumstances, the rule for judgment was granted.

(*f*) *Supra*. n. (*c*); and *Crone* v. *Garment*, 1 Scott, 275.

(*g*) *Brown* v. *Rudd*, 1 Dowl. 371: *Macburn* v. *Langley*, 3 T. R. 1: *Denman* v. *Bull*, 11 Moore, 443; 3 Bing. 499, *S. C.*

(*h*) MS., E. 1830: *post*, 1301, n. (*t*).

(*i*) *Gilbert* v. *Kirkland*, 2 Dowl. 13: *Hawley* v. *Shirley*, 5 Dowl. 393.

(*k*) *Gadd* v. *Bennett*, 2 B. & Ad. 789.

(*l*) *Ladbroke* v. *Williams*, 3 Dowl. 2 L. 368: *Ham* v. *Greg*, 6 B. & C. 128; 9 D. & R. 125, *S. C.*

(*m*) *Phillips* v. *Dance*, 9 B. & C. 788: *post*, 1312.

(*n*) *Rucker* v. *Anstey*, 2 Chit. Rep. 95.

(*o*) *Hankin* v. *Gwarse*, 12 East, 97; 1 Camp. 408, *S. C.*

(*p*) *Estrupp* v. *Dundas*, 1 Dowl. 522.

(*q*) *Burton* v. *Harrison*, 1 East, 365.

(*r*) *Gray* v. *Hutchings*, 3 Dowl. 411:

that account, move for this judgment (*s*). Nor can he move for it, if notice of trial be countermanded at the request of the defendant (*t*). Nor can he rely on an irregular notice of trial, which he has refused to accept (*u*). Nor can he have it, if the record was withdrawn, or the delay in trying it was for the purpose of a reference or the like, and the defendant or his attorney consented to it (*x*). Nor can he have it, if the trial did not take place by reason of a negotiation between the plaintiff and defendant for the settlement of the action (*y*). So, the defendant may waive a right to move for this judgment, by deferring the application until after a commission to examine witnesses has issued, but not returned, and until which the trial cannot take place (*z*).

Proceedings in equity.

Nor will they grant such leave, where the plaintiff was prevented from proceeding by injunction (*a*). Nor where the defendant had taken proceedings in Chancery, which rendered a trial useless (*b*). But it is no answer to the motion, that the plaintiff had been proceeding, both at law and in equity, in respect of the same matter, and had under an order obtained in equity, at the instance of the defendant, been put to his election, and had elected to proceed in equity (*c*).

Where action &c. compromised.

The defendant cannot have this judgment, if he and the plaintiff, though in the absence of their attornies, enter into a *bonâ fide* compromise of the action (*d*). And where it appeared that the bill on which the action was brought had been paid meanwhile by a third party, *Bayley*, B., discharged a rule for such judgment (*e*). But the Court refused to discharge such a rule unconditionally, on the ground that the tenant of defendant (who defended as landlord) in ejectment had delivered possession to the lessor of the plaintiff, the landlord not being privy to the transaction (*f*).

Where parties bankrupt or insolvent, &c.

If the plaintiff become bankrupt (*g*), or discharged under an insolvent act after issue, and the cause of action thereby becomes vested in his assignees, it would seem, the defendant cannot have this judgment (*g*), unless the assignees refuse to proceed with the action (*h*), though he may take the cause down to trial by *proviso*. But the mere insolvency or poverty of the plaintiff, will not in any way prevent such judgment; and if permanent, will not furnish an excuse for not proceeding to trial (*i*). Where, after issue joined, the defendant applied for relief to the Insolvent Court, and filed his schedule, in

Watkins v. *Giles*, 4 Id. 14: *Partridge* v. *Slater*, 5 Id. 68: *Howell* v. *Jacobs*, Id. 394: *Cocker* v. *Shuttleworth*, 9 Id. 321: *Garven* v. *Birch*, 11 M. & W. 544: *Parry* v. *Bells*, 4 Jur. 1016: *Appleyard* v. *Todd*, 7 Scott, N. S., 892; 1 Dowl. & L. 949, S. C.

(*s*) *Rendall* v. *Bailey*, 2 Dowl. 113.

(*t*) *Jenkyns* v. *Charity*, 2 Dowl. 197: *Doe* v. *Lord*, Id. 419.

(*u*) *Clarke* v. *Goldsmid*, 5 Bing. N. C. 120; 7 Dowl. 151, *S. C.*

(*x*) *Hansby* v. *Keene*, 4 M. & W. 365: *Godfrey* v. *Wade*, 6 Moore, 468. And see *Spurr* v. *Rayson*, 7 Dowl. 467, *post*, 1312.

(*y*) *Alford* v. *Fellowes*, 9 Dowl. 326: *Foxbury* v. *Butler*, 2 Dowl., N. S., 380, B. C.

(*z*) *Bordier* v. *Barnett*, 3 Dowl. & L. 370.

(*a*) *Anon.*, 1 Chit. 286, n.

(*b*) *Partridge* v. *Salter*, 6 Dowl. 66.

(*c*) *Johnstone* v. *Friedman*, 2 Scott, N. R., 584; 2 M. & G. 432: 9 Dowl. 395, *S. C.* (nom. *Johnstone* v. *Pring*): *Anderson* v. *Tombs*, 2 Anst. 568.

(*d*) *Page* v. *Doughty*, 4 Scott, N. R., 523. See *Paynes* v. *Haredale*, 1 Dowl., N. S., 532: *Elias* v. *Elias*, 9 Dowl. 104: *Wortley* v. *Gedge*, 2 Dowl., N. S., 937. See *Smith* v. *Jay*, 2 Dowl. 410, where the defendant gave a cognovit. See Vol. 1, 108.

(*e*) *Monk* v. *Bonham*, 2 C. & M. 430; 2 Dowl. 336, *S. C.*

(*f*) *Doe* v. *Dyer*, 3 Dowl. 696. See *Greenslade* v. *Young*, 1 Gale, 46.

(*g*) See *Cross* v. *Robertson*, 7 M. & G. 640.

(*h*) *Taylor* v. *Montague*, 2 M. & W. 315.

(*i*) See *post*, 1307.

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which the plaintiff's debt was admitted, the Court discharged the rule for this judgment, with costs, even though it was not sworn that the plaintiff was not aware of the defendant's insolvency before the commencement of the suit (*k*). As to when a rule will be discharged conditionally, upon the ground that the plaintiff or defendant is in insolvent circumstances, see *post*, 1307, 1308.

Where action brought without authority.

It seems, that it is no answer to a motion for this judgment, that plaintiff's attorney had acted without authority in bringing the action (*l*); but in one such case the Court enlarged the rule for judgment, and granted a rule *nisi* for payment of costs by the attorney (*m*).

Debt recoverable in inferior court.

Nor is it any answer to the motion, that the plaintiff has, since the commencement of the action, discovered that the debt is recoverable in a Court of Requests, and the Court will, notwithstanding, require of the plaintiff a peremptory undertaking (*n*).

Pending rule to discontinue.

A rule to discontinue on payment of costs, is no stay of proceedings: therefore, where a plaintiff served a rule to discontinue, with an appointment to tax costs, and on the following day the defendant obtained a rule for judgment as in case of a nonsuit; it was held, he might have such judgment (*o*).

After fresh notice of trial given, or insufficient notice, &c.

Where plaintiff has been in default in not proceeding to trial, the defendant will not be deprived of his right to move for this judgment, by the plaintiff giving a fresh notice of trial before the motion is made (*p*). But if a plaintiff gives notice of trial for a sitting earlier than is necessary by the practice of the Court, and afterwards extend it by a fresh notice for a later sitting, but which is still within due time, the defendant is not entitled to move for this judgment, although the plaintiff has not proceeded to trial under his first notice, nor countermanded it (*q*); but it would be otherwise, if the plaintiff, instead of extending the notice, withdraws the record, and gives a fresh notice of trial subsequently (*r*). The defendant cannot rely in support of his motion for this judgment on an insufficient notice of trial which he has refused to accept (*s*). And an agreement to take no notice of trial is not equivalent to notice so as to entitle the defendant to this judgment (*t*). In a case in the Exchequer, a plaintiff having withdrawn the record in consequence of the absence of a witness, on a subsequent day gave a fresh notice of trial; prior to the day of trial under this second notice the defendant moved for judgment as in case of a nonsuit, having given one day's notice of motion only; the plaintiff tried the case as undefended, and obtained a verdict: it was held, that the verdict was an answer to the motion, but the Court, on discharging the rule, set aside the verdict on payment of the costs thereof and the costs of the rule, the plaintiff giving a peremptory undertaking (*u*).

(*k*) *Featherstone* v. *Bourne*, 2 Dowl., N. S., 389.
(*l*) *Barber* v. *Wilkins*, 5 Dowl. 305. See Vol. 1, 74, 75.
(*m*) *Munday* v. *Newman*, 5 Dowl. 695.
(*n*) *Nicholson* v. *Jackson*, 1 Com. B. 622.
(*o*) *Baker* v. *Jupp*, 15 Law J., N. S., 190, Exch.: 3 Dowl. & L., 474, S. C.
(*p*) *Bainbridge* v. *Purvis*, 1 Dowl. 444: *Smellie* v. *Christie*, 2 Id. 152: *May* v. *Husband*, 5 M. & W. 493; 7 Dowl. 867, S. C.
(*q*) *Ranger* v. *Bligh*, 5 Dowl. 235.
(*r*) *May* v. *Husband*, *supra*.
(*s*) *Clark* v. *Goldsmid*, 5 Bing. N. C. 120; 7 Dowl. 151, S. C.
(*t*) *Downes* v. *Cross*, 2 C. & J. 466.
(*u*) *Jones* v. *Howe*, 5 Dowl. 600; 2 M. & W. 379, S. C. See *Eager* v. *Cuthill*, 3 M. & W. 60.

By the *R. G., H.*, 2 *W.* 4, *s.* 69, "no motion for judgment as in case of a nonsuit shall be allowed after a motion for costs for not proceeding to trial for the same default" (*x*). But if, after a motion for costs for not proceeding to trial, the plaintiff suffers *another* term or assizes (*y*) to elapse without giving notice of trial, this is a *new* default, and the defendant may move, notwithstanding the rule (*z*).

Where costs for not proceeding to trial have been moved for.

It was observed by *Parke*, B., in a recent case, that he was not disposed to give any facility to motions for this judgment, which were very often more mischievous than otherwise (*a*).

Not favoured in general.

Time of Motion for.]—By the above statute of 14 *G.* 2, the defendant is in no case entitled to this judgment, unless the plaintiff has neglected to bring on the cause to trial according to the course and practice of the Court. He is in no case obliged to give notice of trial until the term after that in which issue is joined (*b*); and, consequently, in *town* causes, where issue is joined in, or in the vacation before (*c*), any term, no motion for judgment as in case of a nonsuit can be made until the second term next after issue so joined; but such motion may then be made. Thus, where issue is joined in, or in the vacation before, Hilary Term, the motion may be made in Trinity Term (*d*). But if the plaintiff have, in fact, given a sufficient notice of trial previously, and not proceeded to trial in pursuance of it (*e*), then, if the notice were given for a trial in the vacation, the defendant may move for the judgment in the following term (*f*); or if the notice were given for a trial in term, he may move in the term after (*g*); and this, although the notice was given earlier than is required by the practice of the Court (*h*). When a town cause has been made a *remanet* from the sittings after Easter Term to the sittings after Trinity Term, and the plaintiff has then made default, the defendant may move for this judgment in the Michaelmas Term following (*i*).

Time of motion for.

In town causes.

(*x*) See *Johnson* v. *Freedman*, 2 Scott, N. R., 431; 2 M. & G. 432, *S. C.*

(*y*) *Hyde* v. *Gardiner*, 1 Dowl. 380: Tidd, N. P. 465. But see *Moseley* v. *Clarke*, 2 Dowl. 66.

(*z*) *Dyke* v. *Edwards*, 2 Dowl. 53: *Smith* v. *Pole*, 5 M. & W. 491; 7 Dowl. 792, *S. C.*: *Doe Jordan* v. *Templeton*, 1 Dowl. & L. 194; 12 Law J., N. S., 367, Q. B., *S. C.*

(*a*) *Harle* v. *Wilson*, 3 Dowl. 660.

(*b*) *Hall* v. *Buchanan*, 2 T. R. 734. And see R. H., 15 & 16 C. 2, r. 2; R. H., 20 & 21 C. 2. *Quære* whether, although special jury causes are not tried at the sittings after Easter Term, the plaintiff in such a cause is bound, nevertheless, to give notice of trial for such sittings: (*Doe Jordan* v. *Templeton*, 1 Dowl. & L. 194).

(*c*) *Gough* v. *White*, 2 M. & W. 303: *Heale* v. *Curtis*, 2 M. & W. 76; 5 Dowl. 294, *S. C.*: *Wyatt* v. *Howell*, 5 Dowl. 585. It makes no difference if the issue be joined as of the preceding term (*Duggan* v. *Wilbraham*, 1 Scott, N. R., 212; 8 Dowl. 582); or if the plaintiff was compelled to join issue by the rule of a prior term: (*Doe Balls* v. *Margrave*, 1 Scott, N. R., 213; 8 Dowl. 824; 1 M. & G. 334, *S. C.*)

(*d*) *Heales* v. *Kidd*, 10 M. & W. 76; 1 Dowl., N. S., 663, *S. C.*, Exch.; *Pierson* v. *Chesson*, 6 Dowl. 507; *Thomas* v. *Jones*, 7 Id. 712, Q. B. And see the rule or directions of the Court of Exchequer in 10 M. & W. 77: 1 Dowl., N. S., 663, pronounced by that Court after a conference with the Common Pleas respecting the case of *Higgins* v. *Stanley*, 2 M. & G. 336. See *Elliott* v. *Stebbing*, 2 Dowl., N. S., 118; 5 Scott, N. R., 167, *S. C.*

(*e*) *Wingrove* v. *Hodson*, 2 Dowl. 379: *Munt* v. *Tremamondo*, 4 T. R. 557: *Gates* v. *Terry*, 1 Dowl. 370, *S. C.*: *Hay* v. *Howell*, 2 New Rep. 327: *Walter* v. *Buckle*, 2 Chit. Rep. 244: *Holah* v. *Fleet*, 1 Chit. Rep. 672.

(*f*) *Shepherd* v. *Taylor*, MS., H. T. 1834, C. P.: *Howell* v. *Powlett*, 1 Moo. & Scott, 355; 8 Bing. 272; 1 Dowl. 263, *S. C.*: *May* v. *Husband*, 5 M. & W. 493; 7 Dowl. 867, *S. C.*, nom. *Ney* v. *Husband*.

(*g*) *Smith* v. *Templemore*, 5 Dowl. 408: *Isaac* v. *Goodman*, 2 Dowl. 34; 1 C. & M. 494, *S. C.*: *Marshall* v. *Foster*, 2 C. & M. 213; 2 Dowl. 213, *S. C.*: *Preedy* v. *Macfarlane*, 2 Dowl. 216, *S. C.*: *Begbie* v. *Grenville*, 2 Dowl. 238: *Lenney* v. *Poulter*, 3 Dowl. 650: *Phillips* v. *Yeardley*, 6 Scott, 602.

(*h*) *Howell* v. *Powlett*, *supra*; *May* v. *Husband*, *supra*.

(*i*) *Ham* v. *Greg*, 6 B. & C. 125; 9 D. & R. 125, *S. C.*

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In country causes.

In country causes, if the issue be joined in (*k*), or in the vacation before (*l*), an issuable term, and no notice of trial be given for the next assizes (*m*), the defendant may move for judgment as in case of a nonsuit, after the plaintiff has failed to bring the cause down for trial at the second assizes after issue joined, but not before. But if the issue be joined in (*n*), or in the vacation before (*n*), a non-issuable term, the motion may be made after the lapse of one assize. In country causes, in an issuable term, the rule should be moved for early in the term, or the Court will perhaps enlarge it till next term, and not permit it to be discussed at chambers (*o*). The issuable terms are Hilary and Trinity, and the non-issuable terms are Easter and Michaelmas (*p*).

In causes before the sheriff.

It seems, that in causes to be tried before the sheriff, the time for moving for this judgment is the same as when the cause is to be tried at *Nisi Prius* (*q*). In a town cause, where issue was joined in Easter term, and notice of trial was given for the sittings after that term, and an order for a writ of trial obtained the same day, but no notice of trial before the sheriff was given, a rule for judgment as in case of a nonsuit was granted on application in Trinity term (*r*). Where notice of trial is given for a day in term, and default made, the motion cannot be made in the same term (*s*). As to what steps the plaintiff is bound to take on a peremptory undertaking to try at the sheriff's court, see *post*, 1310.

After motion for costs of day.

We have seen, *ante*, 1303, that the motion cannot be made after a motion for costs of the day for not proceeding to trial, unless it be for a subsequent default.

Motion may be at any distance of time.

The defendant may in general forbear to make the motion as long as he likes. A rule has been granted, although eight years had elapsed since issue was joined (*t*).

The motion &c. must be to the court.

The Motion, Rule, &c.]—It will be observed, that the statute admitting of this motion directs it to be made in open court (*u*); and, it seems, that a judge at chambers has no power to entertain it (*x*).

(*k*) See the rule in 10 M. & W. 78; 1 Dowl., N. S., 663. And see *ante*, 1303, n. (*d*); see also *Williams* v. *Davis*, 5 Bing., N. C., 297; 7 Scott, 178; 7 Dowl. 946, S. C.: *Simonds* v. *Folkenham*, 1 Dowl. 292; 1 C. & J. 513; 1 Tyr. 501, S. C.: *Redward* v. *Way*, 13 Price, 453: *Crowley* v. *Dean*, 1 C. & J. 18: *Spiers* v. *Parker*, Id. n.: *Prentice* v. *Blest*, 2 Bing. 360: 2 Moore, 637, S. C.

(*l*) See the rule in 10 M. & W. 78; 1 Dowl., N. S., 663; see also *Crook* v. *Merriman*, 1 Dowl. & L. 162: *Ellis* v. *Stebbing*, 5 Scott, N. R., 167; 4 M. & G. 639; 2 Dowl., N. S., 118; 12 Law J., N. S., 93, Q. B.: *Dore* v. *Hayden*, 6 M. & W. 696: *Downes* v. *Bostock*, 9 Dowl. 941: *Harrison* v. *Williams*, 6 Dowl. 772.

(*m*) See *ante*, 1303.

(*n*) See the rule in 10 M. & W. 78; 1 Dowl., N. S., 663; and see *Heath* v. *Bassell*, 7 Dowl. 19: *Robinson* v. *Taylor*, 5 Dowl. 518; *Evans* v. *Barnard*, 3 M. & W. 276: *Williams* v. *Edwards*, 3 Dowl. 183: 1 C., M., & R. 583, S. C.: *Smith* v. *Rigby*, 3 Dowl. 705. See also *Apperley* v. *Morse*, 6 Dowl. 505: *Williams* v. *Davis*, 5 Bing. N. C. 297; 7 Dowl. 946, S. C. The decision in *Smith* v. *Miller*, 3 M. & W. 60, is founded on some mistake of the officer, per *Parke*, B., in *Evans* v. *Barnard*, *supra*.

(*o*) Tidd, 502, 765.

(*p*) See 2 Imp. Prac. C. P. 49.

(*q*) *Harrison* v. *Jones*, 2 Dowl., N. S., 798; 11 M. & W. 105; 12 Law J., N. S., 165, Exch., S. C. See *Stacey* v. *Jeffreys*, 5 Dowl. 534: *Fox* v. *M'Culloch*, Id. 595: *Butterworth* v. *Crabtree*, 3 Dowl. 194: *Harle* v. *Wilson*, Id. 658: *ante*, 416. But see *Banks* v. *Wright*, 3 Dowl. 14, from which case it would seem that the time for moving is regulated by the times at which the sheriff sits.

(*r*) *Mullins* v. *Bishop*, 2 Dowl. 557.

(*s*) *Lemmey* v. *Poulter*, 3 Dowl. 650. And see *Bayble* v. *Grenville*, 2 Id. 238: *Harle* v. *Wilson*, 3 Id. 658: *Harwood* v. *Roberts*, 2 Id. 534.

(*t*) *Curtis* v. *Tubman*, 4 Dowl. 690. And see *Cromer* v. *Broom*, 4 Dowl. 288.

(*u*) See 2 Inst. 103.

(*x*) It has been repeatedly refused at chambers. But see *Doe Mors* v. *Savage*, 5 Dowl. 507. See further as to a judge's jurisdiction at chambers, *post*, Pt. 6, Ch. 2.

Notice of motion.

By that statute it is necessary to give notice of the motion. In the Queen's Bench the rule *nisi* was, of itself, formerly considered a notice(*y*), but it was not so in the Common Pleas or Exchequer (*z*); and now by rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 69, "a rule *nisi* for judgment as in case of a nonsuit may be obtained on motion, without previous notice; but, in that case, it shall not operate as a stay of proceedings." To obtain such stay it should, therefore, be given. But in practice, the rule is rarely, it seems, drawn up with such stay (*a*), unless in cases where it is likely the trial would be had before the rule is disposed of. In the Exchequer, the notice, to operate as a stay of proceedings, must be given two days previously to the motion (*b*). The general rule, which requires a *term's notice* of proceeding, where no proceedings have been had in the cause within four terms, does not extend to motions for judgment as in case of a nonsuit (*c*).

Term's notice.

Affidavit for.

In support of the motion, *you must make an affidavit of the state of the cause, shewing that issue has been joined, and when* (*d*), *and the plaintiff's default* (*e*). For this purpose, it should appear on the affidavit where the venue is laid (*f*); though this is unnecessary, if it appear that issue was joined at such a period, that, whether the cause is a town or country one, the motion is not premature (*g*); nor is this necessary if the motion be for not proceeding to trial pursuant to notice (*h*). An affidavit, which did not state that issue had been joined, but stated that notice of trial had been given, was held to be sufficient (*i*). But an affidavit, merely stating that a rule to reply was duly given, that the plaintiff accordingly replied, and that the cause was "thereby" at issue, is not sufficient (*k*). *If the motion be made for not proceeding to trial pursuant to notice, the affidavit must state that notice of trial was given, and that the plaintiff did not proceed to trial in pursuance of such notice.*

The motion and rule.

Give a motion-paper with the above affidavit to counsel, to move for a rule nisi. Draw up your rule with one of the Masters (*l*); *serve a copy of it on the plaintiff's attorney or agent, and make an affidavit of the service. And afterwards, on the day after that appointed by the rule, give a motion-paper to counsel, to move to make the rule absolute upon this affidavit of service.* The Court refused, on the last day but one of term, to grant a rule *nisi*, cause to be shewn on the morrow (*m*). Where a plaintiff agreed, that, if the defendant would not make the rule absolute, he would go to trial at the next assizes; and that, if he did not,

(*y*) *Anon.*, Lofft, 265.

(*z*) *Geoch* v. *Pearson*, 1 H. Bl. 527; Tidd, 9th ed., 491, 765: *Coulstwith* v. *Marsden*, 2 C. & J. 123; Dax, Prac. 70, 76.

(*a*) See *Archer* v. *Smith*, 9 Dowl. 99. It was so drawn up in *Murray* v. *Silver*, 3 Dowl. & L. 26; 1 Com. B. 638, *S. C.*

(*b*) *Hannah* v. *Wyman*, 3 Dowl. 673: *Brady* v. *Jenks*, 13 Law J., N. S., Exch., 94. And see *post*, Pt. 6, Ch. I.

(*c*) *Ante*, Vol. 1, p. 132.

(*d*) *Meredith* v. *Stocker*, 4 Dowl. 499: *Gilmore* v. *Melton*, 2 Dowl. 632: *Brown* v. *Kennedy*, Id. 639: *Seabrook* v. *Care*, Id. 891.

(*e*) See the form, Chit. Forms, 607.

(*f*) *Withers* v. *Spooner*, 6 Scott, N. R., 164; 2 Dowl., N. S., 884, *S. C.*

(*g*) *Anslow* v. *Cooper*, 2 Dowl. & L. 449.

(*h*) *Withers* v. *Spooner*, *supra*.

(*i*) *Corbyn* v. *Heyworth*, 5 Scott, 355; 6 Dowl. 181, *S. C.* But this may be questionable, considering that notice of trial may be given on pleadings concluding to the country, before issue is actually joined. (See *Smith* v. *Rigby*, 3 Dowl. 705).

(*k*) *Smith* v. *Parsloe*, 1 Dowl. 308; 2 C. & J. 217, *S. C.* And see *Gilmore* v. *Melton*, 2 Dowl. 632: *Smith* v. *Rigby*, 3 Dowl. 705.

(*l*) See the form, Chit. Forms, 608.

(*m*) *Anon.*, 5 Scott, N. R., 778.

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the defendant should move for judgment as in case of a nonsuit, as if the plaintiff had given a peremptory undertaking, and the plaintiff omitted to go to trial, it was held that the defendant could only have a rule *nisi* for judgment (*n*). When one of several defendants moves, the rule should be to shew cause why the judgment should not be entered generally for the defendants (*o*). A rule to take out of court money paid in, under the 7 & 8 *G.* 4, *c.* 71, cannot be incorporated with this rule (*p*). As to the enlarging of rules in general, *see post, Pt.* 6, *Ch.* 1.

Rule absolute.

If no sufficient cause be shewn against the rule *nisi*, shewing either that the defendant is not entitled to judgment as in case of a nonsuit at all, or that there is some excuse for the plaintiff's default in proceeding to trial, the rule will be made absolute. The costs of the day form part of the costs of the nonsuit, and need not be mentioned in the rule. But, in a case in the bail court, *Taunton*, J., said, that these costs must be made the subject of a separate motion (*q*). The defendant should *draw up the rule with one of the Masters* (*r*). *Then bespeak the roll, in order that the Master may mark the costs. The costs being taxed and judgment being signed, you may sue out execution* (*s*).

When rule discharged unconditionally.

The Court, however, instead of making the rule absolute, may either discharge it unconditionally, *or*, "upon just cause *and* reasonable terms," allow a further time for the trial of the issue (*t*). If the defendant be not entitled to the rule at all, it will, of course, be discharged unconditionally, and, in general, with costs. Thus, it will be discharged unconditionally where issue has not been joined, or where the application is made too soon, or where the cause has been already taken down to trial by the plaintiff, or where the cause has been delayed by the general course of business, or where the defendant has prevented the plaintiff from going down to trial, or consented to the delay, or has given a *cognovit*, or where the action has been *bonâ fide* compromised by the plaintiff and defendant, or in some cases where the plaintiff or defendant has become bankrupt or been discharged under an insolvent act, or the like—all which instances have been already pointed out in the preceding pages.

Where discharged upon terms an excuse for not proceeding being shewn.

If the plaintiff shew, by affidavit, some excuse for his not having proceeded to trial, the Court will, in general, discharge the rule upon terms (*u*). A trifling excuse is sufficient (*x*); but it must be such as to satisfy the Court that the plaintiff's not having proceeded to trial arose, not from any wish upon his part to delay the trial of the issue unnecessarily, or for the purpose of vexation (*y*), or from any other improper motive (*z*), but from necessity, or from some other just and reasonable cause (*a*).

(*n*) *Fisher* v. *Ledlard*, 5 Jur. 409—B. C.
(*o*) *Sawyer* v. *Hodges*, 1 Dowl., N. S., 16; 10 Law J., N. S., 470, Exch., *S. C.*; *ante*, 1299.
(*p*) *De Bedolliere* v. *Ryan*, 7 Dowl. 615; *Vale* v. *Gaster*, 4 Jur. 991—B. C.
(*q*) See *Johnson* v. *Smith*, 1 Dowl. 421.
(*r*) See form, Chit. Forms, 606.
(*s*) See forms, Chit. Forms, 197—199.
(*t*) *Vide ante*, 1298.
(*u*) See form of rule, Chit. Forms, 603.
(*x*) *Doe* v. *Bloie*, 8 Dowl. 18.
(*y*) See *Allingill* v. *Pearson*, 1 B. & P. 103.
(*z*) See *Walter* v. *Buckle*, 2 Chit. Rep. 244: *Nicholls* v. *Collingwood*, 2 Dowl. 60.

The absence of a material witness is a sufficient excuse (*a*). So is the want of documentary evidence (*b*), especially if caused by the defendant or his attorney (*c*). Even where, in a country cause, it was sworn by way of excuse, by the clerk to the London agent of the plaintiff's attorney, that he had "been informed, and verily believed, that the plaintiff was not prepared with sufficient evidence to go to trial;" the Court discharged the rule upon a peremptory undertaking (*d*). So they discharged it, where it was sworn generally, that unexpected difficulties had arisen in procuring the necessary evidence to entitle the plaintiff to a verdict in his favour (*e*). So they did so where the record was withdrawn on the recommendation of counsel, in order to obtain a special jury (*f*). And where the plaintiff, in a *qui tam* action, withdrew the record, because his principal witness refused to give evidence, for fear of subjecting himself to a penalty for the same transaction, the Court allowed it to be a sufficient excuse; although it appeared that the time limited for bringing any action against the witness would not expire for three terms, and that the plaintiff could not proceed to trial until after the expiration of that time (*g*). It is a sufficient excuse that the plaintiff's attorney was prevented from proceeding to trial by a domestic affliction (*h*). The Court have even allowed it to be a sufficient excuse, that the attorney was not enabled to prepare briefs for counsel, on account of the plaintiff's absence (*i*). And it has been held to be a good excuse, even after an undertaking, that another action is pending, and in the new trial-paper, for argument, which will decide the point in dispute (*k*). In such a case, the affidavit must state the name of the cause, and shew that the point in dispute in both actions is the same (*l*). It is a sufficient excuse for not proceeding to the trial of a special jury cause, at the sittings after Easter Term, that special jury causes are not tried at such sittings (*m*). The mere poverty of the plaintiff, if of a permanent nature, is no excuse (*n*). But where the plaintiff was only temporarily out of funds, and expected to be in funds within a definite period, the excuse was held sufficient (*o*). And where some other excuse was made, and the plaintiff offered a peremptory undertaking, but it also appeared that he had become insolvent, and had vested his property in trustees, who then had the control of the

(*a*) See *Jones* v. *Stephenson*, Barnes, 316: *Jordan* v. *Martin*, 8 Taunt. 104: *Bunyan* v. *Yerbury*, 1 D. & R. 448. The affidavit in support of the application need not, in general, name the witness: *Montfort* v. *Bond*, 2 Dowl. 403: *Jordan* v. *Martin*, 8 Taunt. 104.

(*b*) *Gromhill* v. *Mitchell*, 6 Taunt. 150: *Millingill* v. *Pearson*, 1 B. & P. 103.

(*c*) *Cocker* v. *Shuttleworth*, 9 Dowl. 321.

(*d*) *Farmer* v. *Cross*, 2 Dowl., N. S., 367.

(*e*) *Doe* v. *Blois*, 8 Dowl. 8.

(*f*) *Webber* v. *Roe*, 3 Dowl. 589.

(*g*) *Raynes* v. *Spicer*, 7 T. R. 178: but see *Bunyan* v. *Yerbury*, 1 D. & R. 448. There seems to be no difference in this respect between penal and other actions: per Lord *Kenyon*, C. J., *Stone* v. *Farey*, 1 East, 554.

(*h*) *Weak* v. *Calloway*, 7 Price, 531.

(*i*) *Stone* v. *Farey*, 1 East, 554. See *Wynn* v. *Bellman*, 6 Taunt. 122.

(*k*) *De Rutzen* v. *Richards*, 1 Har. & W. 110.

(*l*) See *Wynn* v. *Bellman*, 6 Taunt. 122.

(*m*) *Doe Jordan* v. *Tempirton*, 1 Dowl. & L. 194.

(*n*) *Frodsham* v. *Rust*, 4 Dowl. 90: *Cleasby* v. *Poole*, 3 Dowl. 162; 1 C., M., & R. 521, *S. C.* In *Radford* v. *Smith*, 7 Dowl. 26, *Parke*, B., said, that the insolvency of the plaintiff in *Cleasby* v. *Poole*, was a *permanent* one. As to the defendant's bankruptcy or discharge under an insolvent act, see *ante*, 1301.

(*o*) *Radford* v. *Smith*, 4 M. & W. 100; 7 Dowl. 26, *S. C.*

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action, the Court obliged the plaintiff to give not only a peremptory undertaking, but also security for costs (*p*). The insolvency or extreme poverty of the defendant, is a sufficient excuse, if it was not known to the plaintiff until after action brought, and he has not taken any step in the cause since his first hearing of it (*q*). Unless a sufficient excuse is given for the default, the defendant is entitled as of right to have judgment, and he is not bound to accept a peremptory undertaking or other terms (*r*). *It is usual for the plaintiff's counsel to shew his affidavit to the counsel for the defendant; and if the latter be satisfied with the excuse stated in the affidavit, he may consent to the rule being discharged, upon the peremptory undertaking or other terms above mentioned; the briefs may be indorsed accordingly, and handed to one of the Masters.*

Counsel consenting to rule.

When a sufficient excuse is given for the plaintiff's not having proceeded to trial, the rule is, in general, discharged, upon the plaintiff undertaking peremptorily to try the cause at the next sittings or assizes (*s*); or, if it appear that he cannot, from the peculiar circumstances of the case, bring on the trial at that time, at some subsequent sittings or assizes (*t*); but where the justice of the case requires it, the Court will add to this such other terms as they may think reasonable. Thus, where the plaintiff became bankrupt after issue joined, and the assignees refused to proceed with the suit, the Court refused to discharge the rule on a peremptory undertaking unless security for costs were also given (*u*). And the same where the plaintiff was insolvent, and executed an assignment for his creditors, and the action was carried on for the benefit of them (*x*). But they refused to impose such terms where the assignment was made before the commencement of the action (*y*). If it appear that the defendant is insolvent, and that such fact was not discovered by the plaintiff until after action brought (*z*), and that he has taken no step in the action since such discovery (*a*), the Court usually recommend the parties to enter a *stet processus*; and if the plaintiff will not consent, he must give a peremptory undertaking; and if the defendant refuse, the Court will discharge the rule, and sometimes with costs (*b*). Where there were issues in law and in fact, and judgment had been given for the defendant on the former, and the defendant had obtained a rule for judgment as in case of a nonsuit, the plaintiff not having proceeded to trial with the issues in fact: the

Terms upon which rule discharged.

Where plaintiff or defendant insolvent, &c.

(*p*) *Nicholson* v. *Milne*, 1 H. & W. 211.
(*q*) *Infra*.
(*r*) *Nichols* v. *Collingwood*, 2 Dowl. 69: *Mellan* v. *Jopson*, 4 Jur. 73.
(*s*) See form, Chit. Forms, 608.
(*t*) See *Hacker* v. *Hardy*, 1 Chit. Rep. 280, n.: *Raynes* v. *Spicer*, 7 T. R. 178: *Gardner* v. *Moses*, 1 Taunt. 118: *Cook* v. *Brooks*, 1 Dowl., N. S., 504.
(*u*) *Taylor* v. *Montague*, 2 M. & W. 315.
(*x*) *Nicholson* v. *Warne*, 1 H. & W. 211.
(*y*) *Solomon* v. *Leak*, 9 Dowl. 361.
(*z*) *Smith* v. *Davis*, 2 Scott, N. R., 189; 1 M. & G. 961; 9 Dowl. 50, *S. C.* See *Lemon* v. *Hopson*, 6 Dowl. 795: *Faulkner* v. *Whitsall*, 1 Scott, N. R., 216. Where there was an execution in the defendant's house, after a countermand of notice of trial, the Court ordered a *stet processus*, though the plaintiff did not deny knowledge of insolvency before action: *Milner* v. *Tate*, Exch., M. T. 1841.
(*a*) *Badman* v. *Pugh*, 1 Dowl. & L. 540; 6 Scott, N. R., 806: *Mitchenson* v. *Marsh*, 2 Dowl., N. S., 943—B. C.: *Topping* v. *Brown*, 9 Dowl. 582: *Mann* v. *Williamson*, 7 M. & W. 145; 9 Dowl. 289, *S. C.*: *Fisher* v. *Ledard*, 9 Dowl. 563: *Wainwright* v. *Gibson*, 9 Dowl. 106.
(*b*) See *Holland* v. *Henderson*, 4 M. & W. 387: *Gingell* v. *Bean*, 7 M. & G. 486; 1 Scott, N. R., 300: *Faulkner* v. *Whitsall*, 1 Scott, N. R., 216: *Smith* v. *Badcock*, 5 Dowl. 91. In *Faulkner* v. *Whitsall*, the costs were made costs in the cause.

defendant having become bankrupt since the issues were joined, a *stet processus* was offered by the plaintiff; it was held, that inasmuch as the defendant's right to the costs of the issues in law had already accrued, the *stet processus* could only extend to the issues of fact, leaving the defendant to recover the costs of the demurrer: there being, however, a difficulty as to entering a *stet processus* to a part of the record, it was agreed that the plaintiff should enter a *nolle prosequi* as to such parts of the declaration as related to the issues in fact, the defendant consenting that the plaintiff should not be liable to costs on the *nolle prosequi* (*c*). It need not be sworn in express terms that the plaintiff did not know of the insolvency before action brought; if it appear from the facts stated in his affidavit that this is the case, it is sufficient (*d*). It is not sufficient to swear to defendant's insolvency to the "best of deponent's information and belief" (*e*). Where it appeared that notice of trial had been given, and that, previous to the day of the trial, the wife of the defendant (who was separated from her husband) had settled the action, but that the defendant received no regular notice of the abandonment of it, (although, in conversation, the plaintiff mentioned such settlement to the defendant), the Court discharged the rule only upon a *stet processus*, or peremptory undertaking being given, and on payment of the costs of the day (*f*). The 5 & 6 *Vict. c.* 104, enables municipal officers, sued for penalties for being interested in certain contracts, to obtain a stay of proceedings on payment of costs out of pocket: in such a case, the Court discharged a rule for this judgment on a peremptory undertaking, the defendant engaging not to avail himself of the provisions of the statute (*g*). Where, in an action against an executrix, who had pleaded the general issue and *plene administravit*, the plaintiff, in shewing cause against a rule for this judgment, expressed a wish to take judgment *quando*, &c. on the latter plea, instead of denying it, as he had already done, and offered a peremptory undertaking to proceed to trial on the general issue, the Court allowed this to be done, although the defendant objected to it (*h*).

Other cases.

The Court, in *discharging* the rule on a peremptory undertaking, may, as part of the rule, order the plaintiff to pay the costs of not proceeding to trial, and they are generally ordered as of course. It need not expressly (*i*) appear from the affidavits used on the motion, that these costs have been incurred. It is the regular practice, where it appears from the affidavit that notice of trial has been given, and does not appear to have been countermanded in due time, to add to the rule, "Costs of the day, if any." The payment of these costs cannot be made a *condition* of discharging the rule (*k*).

Costs of the day where rule discharged.

(*c*) *Quarrington* v. *Arthur*, 11 M. & W. 491.

(*d*) *Bailey* v. *Elgie*, 1 Dowl., N. S., 853.

(*e*) *Roden* v. *Stewart*, 1 Dowl., N. S., 771: *Symes* v. *Amor*, 6 M. & W. 814; 8 Dowl. 772, *S. C.*: *Mann* v. *Williamson*, 7 M. & W. 145; 8 Dowl. 859, *S. C.*

(*f*) *Worthy* v. *Gedge*, 2 Dowl., N. S., 937.

(*g*) *Simpson* v. *Randy*, 1 Dowl. & L. 449; 13 Law J., N. S., Exch., 5, *S. C.*

(*h*) *Lucas* v. *Jenner*, 2 Dowl. 64.

(*i*) See *Powell* v. *James*, 12 M. & W. 109; 1 Dowl. & L. 415, *S. C.*; *Ray* v. *Sharp*, 4 Dowl. 354; *Doe* v. *Owen*, 1 M. & W. 392.

(*k*) R. H., 2 W. 4, s. 69, *ante*, 1303: *Johnson* v. *Smith*, 1 Dowl. 421. See *Piercy* v. *Owen*, 1 Dowl. 382: *Lemmiker* v. *Barr*, Id. 563; 2 C. & J. 473, *S. C.*: *Dockett* v. *Read*, 1 Tyr. 386.

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Drawing up and service of the discharged rule.

If the rule be discharged upon the peremptory undertaking, either party may draw it up, but if the plaintiff omits to do so, the defendant is bound to draw it up, and serve it within the time limited for proceeding to trial; otherwise he cannot avail himself of it, and it will be considered as abandoned (*m*). The defendant should serve the rule, so as to enable the plaintiff to try, according to his undertaking (*n*), or he will not be able to make it absolute, if the plaintiff should make default in proceeding to trial (*o*).

Opening &c. discharged rule.

If the rule *nisi* is discharged on an affidavit of an excuse which is false in fact, the Court will not afterwards open the matter upon disproof of the contents of such affidavit; although, had they seen reason to doubt the truth of it at the time of shewing cause, they would have suspended their judgment until the matter was examined into (*p*). Nor will they rescind the rule upon a mere suggestion that it was obtained by reason of the Master having erroneously reported upon the practice (*q*). And they have refused to discharge a rule absolute, and to set aside a judgment signed in pursuance of it, upon the ground of its having been moved contrary to an alleged understanding between the plaintiff's attorney and the defendant's counsel (*r*). Where the rule *nisi* was discharged, the costs to be costs in the cause, on the ground that the affidavit did not clearly shew a default, the Court refused to allow the motion to be renewed in the same term, upon an amended affidavit (*s*), but they allowed the motion to be renewed after another assizes in a subsequent term (*t*). See further as to the opening or rescinding of rules in general, *post*, *Pt.* 6, *Ch.* 1.

Renewing motion.

Default after peremptory undertaking.

Default after Peremptory Undertaking.]—If the rule be discharged upon a peremptory undertaking to try at a particular sittings or assize, or at the next practicable sheriff's court, the plaintiff must proceed to trial accordingly, according to the course and practice of the Court; and of which trial he must give a fresh notice (*u*). If the plaintiff neglect thus to fulfil his undertaking by proceeding to trial, the defendant will be entitled to a peremptory rule for judgment as in case of a nonsuit.

What a compliance or not with it.

The plaintiff will sufficiently comply with the undertaking in town causes, if he gives notice of trial, passes the record, and enters the cause for trial, and continues to keep the record and jury process in a state for trial, until the cause comes on in its term; and in country causes, he will comply with it, if he gives notice of trial, and enters the cause for trial with the judge's marshal. The undertaking is not an undertaking to try at all events, for the rule discharging the rule for judgment on the plaintiff's giving the undertaking, is in fact the act of the Court, which gives the additional time to

(*m*) *Knight* v. *Smith*, 7 Scott, N. R., 896; 1 Dowl. & L. 912; 13 Law J., N. S., C. P., 115, *S. C.*; *Gingell* v. *Bean*, 1 Scott, N. R., 183, 390; 1 M. & G. 50, 555, *S. C.*

(*n*) *Sawyer* v. *Thompson*, 9 M. & W. 248; 1 Dowl., N. S., 449, *S. C.*

(*o*) *Sawyer* v. *Thompson*, *supra*.

(*p*) *Davies* v. *Cottle*, 3 T. R. 405: *Bickley* v. *Fell*, 6 Scott, N. R., 706; 5 M. & G. 695, *S. C.*

(*q*) *Gingell* v. *Bean*, 1 Scott, N. R., 390; 1 M. & Gr. 555, *S. C.*

(*r*) *Richardson* v. *Pate*, 9 Dowl. 73

(*s*) *Withers* v. *Spooner*, 6 Scott, N. R., 165; 2 Dowl., N. S., 894, *S. C.*

(*t*) *Withers* v. *Spooner*, 1 Dowl. & L. 17: 5 M. & G. 263; 6 Scott, N. R., 692, *S. C.*

(*u*) *Saich* v. *Cranbrook*, 1 Dowl. 148: *Bainbridge* v. *Purvis*, Id. 444.

try the cause (*x*). Therefore, if the cause, which the plaintiff is ready to try, be made a remanet from press of business (*y*), or the like, still the undertaking will be complied with. So it will if the cause be made a remanet, or postponed by the general course of business, or by the illness or act of the judge (*z*). But, it would be otherwise, if the cause was made a remanet, or the trial postponed, by actual neglect on the attorney's part (*a*). He would not be guilty of such neglect by taking the whole length of the time allowed him by the course and practice of the Court, for entering his cause for trial (*b*). Where the plaintiff obtained a rule for a special jury, and thereby prevented the cause from being tried at the sittings at which he undertook to try it, the Court discharged a rule obtained for this judgment, the case being a proper one to be tried by a special jury (*c*). If the plaintiff fail in trying according to his undertaking, at a particular sittings or assizes, the defendant is not bound to accept a notice of trial for, or to proceed to trial at, another sitting or assize. And when, after the expiration of the time at which the plaintiff had undertaken to try, the plaintiff gave defendant notice of trial, which the latter returned as irregular, and the cause was tried in the absence of the defendant, on the day for which the notice was given, and a verdict found for the plaintiff, the Court set aside the verdict (*d*). Where the rule was discharged on a peremptory undertaking to try at the next assizes, and afterwards an order was obtained, to try before the sheriff, and to relieve the plaintiff from his undertaking, and the plaintiff neglected to try at the next sheriff's court: it was held, that the effect of the order was merely to substitute the trial before the sheriff for the trial at the assizes, and, therefore, that the defendant was entitled to a peremptory rule absolute for judgment as in case of a nonsuit (*e*). If the plaintiff has proceeded at law and in equity for the same cause, his having elected to proceed in equity, under an order to elect, affords no answer to an application for judgment as in case of a nonsuit for not proceeding to trial pursuant to his undertaking (*f*). In an action by husband and wife as executrix, a peremptory undertaking was given to try, and the husband afterwards died: it was held, that the undertaking was not binding on the wife (*g*).

Motion for peremptory rule for judgment.

If the plaintiff neglect to proceed to trial in pursuance of the peremptory undertaking, let the defendant's attorney *make an affidavit of the fact* (*h*), *and give this with a motion-paper to counsel, to move for judgment as in case of a nonsuit for not proceeding to trial in pursuance of such undertaking;*

(*x*) See *per cur.*, in *Lumley* v. *Dubourg*, 3 Dowl. & L. 84.

(*y*) *Lumley* v. *Dubourg*, 3 Dowl. & L. 80.

(*z*) See *per cur.*, *Lumley* v. *Dubourg*, *supra*. See *Ward* v. *Turner*, 5 Dowl. 22: but, in that case, the plaintiff did not apply for an enlargement of the undertaking.

(*a*) See *Petrie* v. *Cullen*, 2 Dowl. & L. 604; 8 Scott, N. R., 705, *S. C.*

(*b*) *Lumley* v. *Dubourg*, 3 Dowl. & L. 83. See *Loud* v. *Green* and *Pacific Steam Navigation Company*, Id., cited in n. (*a*), in which the Court dissented from the contrary doctrine laid down in *Petrie* v. *Cullen*, *supra*.

(*c*) *Twopeden* v. *Stuts*, 6 Scott, 434. And see *per Cur.*, in *Lumley* v. *Dubourg*, *supra*.

(*d*) *Negrete* v. *Martorell*, 7 Scott, N. R., 483; 1 Dowl. & L. 735, *S. C.*

(*e*) *Williams* v. *Edwards*, 3 Dowl. 680.

(*f*) *Anderson* v. *Tombs*, 2 Anst. 568. And see *ante*, 1301.

(*g*) *Lee* v. *Armstrong*, 9 M. & W. 14; 1 Dowl., N. S., 390, *S. C.*

(*h*) See the forms, Chit. Forms, 609.

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and the Court will thereupon grant a rule absolute (*i*). When you have obtained the rule, tax the costs, *sign judgment, and sue out execution.* If the plaintiff's default in complying with the undertaking be made in term, the rule may be obtained in the same term (*k*).

Enlargement, discharge, &c. of peremptory undertaking.

If, however, the plaintiff have been prevented from proceeding to trial in pursuance of his undertaking, he must, in all cases, if possible, before the defendant has moved for judgment, as above mentioned, make an application to the Court to discharge the rule for judgment as in case of a nonsuit, or to enlarge the undertaking, and for liberty to try at a future sitting or assizes, or sheriff's court, upon an affidavit of the facts; upon which, if sufficient, the Court will grant a rule *nisi* accordingly (*l*). If the defendant's rule for judgment above mentioned, be actually drawn up, the plaintiff may and should move at the same time that such rule also, as well as the first rule, be discharged (*m*). The application should be made as early as possible, for, if the defendant has obtained a rule for judgment for non-compliance with the undertaking, it seems that it will not be discharged under circumstances which would have entitled the plaintiff to an enlargement of the undertaking, had he applied in time (*n*). Payment of debt and costs by the defendant, after the giving of the undertaking, is a good ground for moving to discharge it altogether, and the Court, in such a case, cannot compel the plaintiff to enter a *stet processus* (*o*). Where plaintiff was under an undertaking to try at a certain assizes, and after that assizes, and before the next term, both parties agreed to a reference, and the arbitrator made no award, it was held, that the agreement of reference was a waiver by the defendant of the breach of the peremptory undertaking, and that the parties were restored to the same situation as when the peremptory undertaking was given; and a complete default having at that time been made, the peremptory rule for judgment as in case of a nonsuit was discharged on a fresh undertaking (*p*). The absence of all but one of a special jury, in a cause which was a proper one to be tried by a special jury, has been deemed a good excuse for not trying the cause in pursuance of a peremptory undertaking, and the Court discharged the peremptory rule for judgment as in case of a nonsuit, on his giving a fresh peremptory undertaking (*q*). So, the absence of a material witness is a good excuse; and in such case, if it be the *first* default, the affidavit in support of the motion to enlarge the rule need not state the name of the witness (*r*).

(*i*) *Williams* v. *Edwards*, 3 Dowl. 660, Exch. In *Vokins* v. *Snell*, 2 Dowl. 411, *Littledale*, J., decided that the rule was *nisi* when the undertaking was given without a rule of Court; but if the undertaking were given under the authority of a rule of Court, the rule would be absolute in the first instance: see *Hutchinson* v. *Hutchinson*, 9 Price, 389, Exch.: *Willis* v. *Oakley*, 6 Dowl. 766, Q. B.; R. H., 1 Vict. 1838; 4 Bing., N. S., 365.

(*k*) *Ashton* v. *Johnstone*, 8 Dowl. 220.

(*l*) See *Wyatt* v. *Nicholls*, 9 Dowl. 327, where the undertaking was enlarged by the period of four months.

(*m*) *Cherrington* v. *Featheringham*, 4 Dowl. 479. See *Haines* v. *Taylor*, 2 Dowl. 644.

(*n*) See per *Coleridge*, J., *Ward* v. *Turner*, 4 Dowl. 22. And see *Haines* v. *Taylor*, 2 Dowl. 644: *Joyce* v. *Ellis*, 7 Scott, N. R., 430.

(*o*) *Shrimpton* v. *Carter*, 3 Dowl. 668. See *ante*, 1301.

(*p*) *Spurr* v. *Rayner*, 7 Dowl. 467; also reported in 5 M. & W. 339; but with some little difference; which see commented on in *Bordier* v. *Barnett*, 3 Dowl. & L. 372.

(*q*) *Master* v. *Milner*, 1 Bing. 70; 7 Moore, 367, S. C.: *Phillips* v. *Dunne*, 9 B. & C. 769. See *Chapman* v. *Davis*, 1 Dowl., N. S., 239.

(*r*) *Montford* v. *Bond*, 2 Dowl. 403.

But, where the cause of the plaintiff's not proceeding to trial was, that his principal witness was afraid that his evidence might be injurious to him in a matter then before the House of Lords, the Court refused to enlarge the undertaking (*s*). The arrest of the plaintiff, who conducted his cause in person, by which he was prevented from attending to try, and the cause was called on and struck out of the paper, has been held a good ground for discharging the undertaking (*t*). So has the plaintiff's poverty and inability to furnish his attorney with money to pay fees, and his *subsequent* incarceration at the suit of the defendant, for the costs of the day (*u*). So has the absconding of the plaintiff's attorney, by which the trial was prevented (*x*). So has the cause being called on unexpectedly, at a time when the parties were unprepared, in consequence of several other causes having been referred (*y*). So has the plaintiff's deferring proceeding, in order to await the decision of a similar question in another cause (*z*). Also, where a plaintiff, under an undertaking to try, set down his cause for trial at a certain sittings, at which there was no prospect of its being tried, his not having carried in the record to the marshal's office was deemed not sufficient to entitle the defendant to a peremptory rule for judgment as in a case of a nonsuit (*a*). And, in general, if the plaintiff has done his best to perform his undertaking, but fails, in consequence of unavoidable accident, or from some unintentional neglect, mistake, or delay, arising out of the general course of business, and the application is made in proper time (*b*), the undertaking will be enlarged (*c*). But where the plaintiff neglected to go to trial because it was found that his declaration required amendment, and a proposal to refer was going on, the Court discharged a rule for setting aside a rule for judgment as in case of a nonsuit, and enlarging the undertaking (*d*).

Costs of enlargement, &c.

The rule for enlarging the peremptory undertaking, or discharging the peremptory rule for judgment above mentioned, is in general granted only on payment of costs, *i. e.* the costs of the application, the costs of the day, and such other costs as the defendant may have incurred by the plaintiff's non-compliance with the undertaking (*e*); and the payment of these costs may be made a condition precedent (*f*). So, in cases where the non-compliance with the undertaking has arisen from the press of business, or the illness or act of the judge, or the like, and from no fault whatever on the plaintiff's part, the rule may be granted without making the plaintiff pay these costs.

(*s*) *Mouton* v. *Tabard*, 2 H. & W. 138.

(*t*) *Pitt* v. *Evans*, 2 Dowl. 266.

(*u*) *Joyce* v. *Ellis*, 7 Scott, N. R., 430. And see *Radford* v. *Smith*, 7 Dowl. 26; 4 M. & W. 100, S. C., *ante*, 1307, 1308.

(*x*) *Boicot* v. *Hughes*, 1 Chit. Rep. 279.

(*y*) *Saxon* v. *Sarabay*, 4 Dowl. 105.

(*z*) *De Rutzen* v. *Richards*, 1 H. & W. 110. In such a case, the question raised, and the action in which it arises, should be stated in the affidavit: *Wynn* v. *Bellman*, 6 Taunt. 122.

(*a*) *Cope* v. *Holt*, 1 D. & R. 180.

(*b*) See per *Coleridge*, J., *Ward* v. *Turner*, 4 Dowl. 22.

(*c*) *Saxon* v. *Sarabay*, 4 Dowl. 105, and the cases above cited. And see *Lumley* v. *Dubourg*, 3 Dowl. & L. 80. See also *De Rutzen* v. *John*, 5 Dowl. 400, where the undertaking was enlarged five times.

(*d*) *Haines* v. *Taylor*, 2 Dowl. 644.

(*e*) *Pitt* v. *Evans*, 2 Dowl. 266: *Percival* v. *Bird*, 4 Dowl. 748: *De Rutzen* v. *John*, 5 Dowl. 400.

(*f*) *Dennehaye* v. *Richardson*, 4 Dowl. 564.

CHAPTER XXIV.

NOLLE PROSEQUI, RETRAXIT.

PART V.

What it is.

A NOLLE PROSEQUI is in the nature of an acknowledgment or undertaking by the plaintiff, entered on record, to forbear to proceed any further, either in the suit altogether, or as to some part of it, or as to some of the defendants. If entered as to part of the suit only, or as to some of the defendants, he is in general at liberty to proceed as to the rest (*a*). If it be entered *before judgment* it is no bar to a future action for the same cause, except where it is entered against one of several defendants, and where, from the nature of the action, judgment and execution against one is a satisfaction of all the damages sustained by the plaintiff (*b*); but if entered *after* judgment, then it operates as a *retraxit*, and bars any future action for the same cause (*c*). It cannot be entered after verdict or judgment against the plaintiff.

To the whole declaration, &c.

To the whole Declaration.]—If the plaintiff misconceive his action, or make a mistake as to the party sued, (as where he sues a *feme covert*, and she pleads coverture in bar (*d*), or where he discovers that the defendant is an infant, and the action is not for necessaries, or the like), he may enter a *nolle prosequi* as to the whole cause of action, and proceed *de novo* in another action. If the plaintiff enter a *nolle prosequi* as to a plea that covers the whole cause of action, the defendant is entitled to enter up judgment on the whole record, notwithstanding there may be an issue joined upon the plea of non-assumpsit (*e*).

To some of several counts, &c.

To some of several Counts, &c.]—Where the defendant pleads one plea to the whole declaration, and that plea happens to be a complete bar to one or more of the counts, but not to others, the plaintiff may enter a *nolle prosequi* as to the counts to which the plea is a bar. Thus, where infancy is pleaded to the whole of a declaration for goods sold and on an account stated, the plaintiff may enter a *nolle prosequi* as to the count upon an account stated, and reply as to the other count (*f*). In a case before the rules prohibiting the insertion of several counts upon the same cause of action, where the declaration in debt consisted of one special and several general counts; and to the special count there were several special pleas, and to the general counts the general issue, the plaintiff having entered a

(*a*) 1 Saund. 207 b, c.
(*b*) *Cooper* v. *Tiffin*, 3 T. R. 511; 1 Wils. 90; 1 Saund. 207.
(*c*) *Bowden* v. *Horne*, 7 Bing. 716; 5 Moo. & P. 716, *S. C.*: *Amer* v. *Cuthbert*, 3 M. & G. 1; 3 Scott, N. R., 325; 2 Dowl., N. S., 160, *S. C.*: *Haywood* v. *Kain*, M. & M. 313.
(*d*) *Cooper* v. *Tiffin*, 3 T. R. 511.
(*e*) *Peters* v. *Croft*, 6 Scott, 697: *Amer* v. *Cuthbert*, *supra*, per cur.
(*f*) 1 Saund. 207 b.

nolle prosequi on the special count, and joined issue on the others; it was held that he was entitled to recover on the general counts, though the matters proved might have been given in evidence on the special count, and the pleas pleaded thereto (*g*).

Where the defendant demurs.

But where there is a demurrer to the whole declaration, the plaintiff will not, in general, be allowed to rectify his error by entering a *nolle prosequi* as to some of the counts (*h*), or to any particular objectionable part of the declaration (*i*). Thus, where there was a demurrer to a declaration against two defendants, because one of them was not named in one of the counts, it was held that the plaintiff could not enter a *nolle prosequi* as to that count, and proceed on the others (*k*). So, where there is a demurrer to a declaration for a misjoinder of counts, the plaintiff cannot rectify his mistake by entering a *nolle prosequi* as to some of the counts (*l*). So, where the defendant assigned as a ground of demurrer to the entire declaration, that it did not disclose whether the plaintiff's proceeding was in person or by attorney, and that it concluded improperly, "to the damage of the plaintiff," (being an action for a penalty), upon joinder on demurrer, the Court would not allow the plaintiff to enter a *nol. pros.* as to the damages (*m*). But if the defendant demur or plead separately to several counts, the plaintiff may enter a *nolle prosequi* as to some of the counts, and proceed to trial or argument on the others (*n*). If the defendant plead to one count and demur to another, the plaintiff, if he have judgment on the demurrer, and be content to take damages upon that judgment only, may in general execute a writ of inquiry as to it, or, in case of a bill of exchange or the like, may have it referred to the Master, and may enter a *nolle prosequi* as to the issue in fact (*o*). Where, in an action of trespass, the defendant pleaded, first, not guilty; and, secondly, a justification; the plaintiff replied, joining issue on the two pleas, and new assigning: the defendant having demurred to the replication and new assignment, the plaintiff went down to trial, and obtained a verdict for 15*l.* damages on the first issue; after which the plaintiff entered a *nolle prosequi* to the new assignment, and gave the defendant judgment on demurrer: the Court set aside the *nolle prosequi* (*p*).

To part of a count.

To Part of a Count.]—The plaintiff may enter a *nolle prosequi* as to part of a count. Thus, in trespass, where the plaintiff declares that the defendant took and carried away the plaintiff's hay, grass, and corn, he may enter a *nolle prosequi* as to the hay and grass, and proceed for the taking of the corn (*q*).

To one of several defendants.

To one of several Defendants.]—In actions *ex contractu*

(*g*) *Hayward* v. *Kain*, 1 M. & M. 311.
(*h*) *Drummond* v. *Dorant*, 4 T. R. 360; 1 Saund. 207 b.
(*i*) *Butler* v. *Mapp*, 10 Bing. 391; 4 Moo. & Scott, 258, *S. C.*
(*k*) *Drummond* v. *Dorant*, 4 T. R. 360.
(*l*) *Rose* v. *Bowler*, 1 H. Bl. 108. See *Drummond* v. *Dorant*, 4 T. R. 360.
(*m*) *Butler* v. *Mapp*, *supra*.
(*n*) 1 Saund. 207 a. b. 208. 339; 1 B. & P. 157: *Bertram* v. *Gordon*, 6 Taunt. 445; 2 Marsh. 144, *S. C.* And see *Quarrington* v. *Arthur*, 11 M. & W. 491; 2 Dowl., N. S., 1036, *S. C.*
(*o*) *Ante*, 887, 888.
(*p*) *Strother* v. *Randerson*, 5 Dowl. 280.
(*q*) *Wigglesworth* v. *Dallison*, Doug. 190; 1 Saund. 207 b.

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In actions ex contractu.

against several defendants, if they join or sever in their pleas, for he has undertaken to prove a joint contract (*r*), the plaintiff cannot enter a *nolle prosequi* as to any one of them without releasing the others; because the contract being joint, the plaintiff is compellable to bring his action against all the parties thereto, and he shall not by entering a *nol. pros.* prevent the defendant against whom the recovery has been had from calling upon the other defendants for a rateable contribution. But if in such actions the defendants sever in their pleas, as where one pleads some plea which goes to his *personal discharge*, such as bankruptcy, his discharge under the Insolvent Act, or the like, and not to the action of the writ, although he plead also to the action of the writ, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the others (*s*). But a plea of infancy is not within this rule, for it is matter of original personal disability, shewing that there never was a joint contract; in such a case the plaintiff cannot enter a *nol. pros.* as to him, but must discontinue and sue the adult alone (*t*).

In actions ex delicto.

In actions *ex delicto*, the plaintiff may enter a *nolle prosequi* as to some of the defendants, and proceed against the others at any time *before* final judgment, even although they all join in the same plea, and be found jointly guilty (*u*). And *a fortiori* he may do so where the defendants plead severally (*x*); or where they plead jointly, but their plea in its nature is several; as where in ejectment against several, who jointly plead not guilty, the plaintiff may, even at the assizes, enter a *nolle prosequi* as to one or more of the defendants, and proceed against the rest (*y*). Also, if the jury, in an action of trespass, sever the damages where they should not, the plaintiff may take judgment *de melioribus damnis* against one of the defendants, and enter a *nolle prosequi* as to the other (*z*). Where an action of trover was brought against several defendants, and a verdict taken against all, though the plaintiff had previously informed one of them that no evidence would be given against him, as he would be wanted as a witness, in which capacity he accordingly attended, the Court ordered a *nolle prosequi* to be entered as to that defendant (*a*).

How entered.

How entered, &c.]—In practice the *nol. pros.* is not entered of record until it is necessary to make up the record for any purpose. If it be made at the time of the plaintiff's replying or surrejoining or other pleading, it is copied in and delivered with the replication or other pleading. If made at any other time by itself, it is copied on paper and delivered in the same manner as a pleading, to the defendant's attorney or agent (*b*).

(*r*) *Noke* v. *Ingham*, 1 Wils. 90; 1 Saund. 207, n.

(*s*) 1 Saund. 207 c.; *Noke* v. *Ingham*, 1 Wils. 89: 1 Doug. 169, n. *S. C.*: *Hawkins* v. *Ramsbottom*, 6 Taunt. 179: *Moravia* v. *Hunter*, 2 M. & Sel. 444.

(*t*) 1 Saund. 207 a; *ante*, 1693.

(*u*) *Cox* v. *Leather*, 1 Ld. Raym. 397: *Dale* v. *Eyre*, 1 Wils. 306: *Parker* v. *Lawrence*, Hob. 70: *Lover* v. *Salkeld*, 2 Salk. 455.

(*x*) *Walsh* v. *Bishop*, Cro. Car. 239; Id. 243, *S. C.*; 2 Ro. Abr. 160, pl. 5: *Greene* v. *Rolle*, 2 Salk. 457.

(*y*) *Gree* v. *Rolle*, 1 Ld. Raym. 716; 12 Mod. 651, *S. C.*

(*z*) Vol. 1, 450. And see *Elliott* v. *Allen*, 1 Com. B. 18. See form of the entry, Chit. Forms, 610.

(*a*) *Bloomfield* v. *Blake*, 2 Dowl. 237.

(*b*) See *Fleming* v. *Langton*, 1 Str. 532: *Duperoy* v. *Johnson*, 7 T. R. 473: *Bowden* v. *Horne*, 7 Bing. 723; 5 Moo. & P. 795, *S. C.*: *Lischin* v. *Gamperts*, 1 Car. & M. 58. See forms of entries of *nolle prosequi*, Chit. Forms, 610, 611.

If the plaintiff inadvertently enter the *nolle prosequi* in an improper way, the Court or a judge will, perhaps, on application for that purpose in proper time, relieve him from it (*c*).

Costs on.

Costs on.]—Where a *nolle prosequi* is entered as to the whole declaration, the defendant is, and always was, entitled to costs, in the same manner as upon a discontinuance (*d*). But where it was entered as to some of several counts, or as to part of a count, although the plaintiff was not entitled to costs as to these counts, or parts of counts, notwithstanding he had a verdict on the rest (*e*), yet he was not, before the 3 & 4 *W.* 4, *c.* 42, liable to pay the defendant his costs occasioned thereby: now, however, by the 33rd section of that act, "where any *nolle prosequi* shall have been entered upon any count, or as to part of any declaration, the defendant shall be entitled to, and have judgment for, and recover his reasonable costs in that behalf." And since this enactment, a *nolle prosequi* as to part of the cause of action claimed in the declaration, will entitle defendant to the costs on such *nolle prosequi* (*f*). And where, to a declaration in *assumpsit* for money had and received, the defendant pleaded as to all except 3*l.* 5*s.* *non assumpsit*, as to all except 3*l.* 5*s.* a set-off, and as to 3*l.* 5*s.* payment of that sum into Court; the plaintiff, by his replication, admitted the set-off, and replied that he would not further prosecute his suit except as to the 3*l.* 5*s.*, and took that sum out of Court; it was held, that the defendant was entitled to his costs of the two first issues (*g*).

Where nolle prosequi to whole or part of action.

Where a *nolle prosequi* is entered as to one of *several defendants*, the defendant as to whom it is entered is and always was generally entitled to costs (*h*). But he was not so if it was entered as to him on a plea of his *personal* discharge, as of his bankruptcy and certificate (*i*). Now, however, by the statute 3 & 4 *W.* 4, *c.* 42, *s.* 32, he would be entitled to them; that act enacting, "that where several persons shall be made defendants in any personal action, and any one or more of them shall have a *nolle prosequi* entered as to him or them, every such person shall have judgment for, and recover, his reasonable costs."

Where several defendants.

The defendant is not entitled to payment of these costs until the final taxation, when they will be deducted from plaintiff's costs, in the event of plaintiff's being entitled to costs, and those costs equal or exceed the costs of the *nolle prosequi*. If the costs of the *nolle prosequi* exceed plaintiff's costs, then the de-

When to be paid.

(*c*) See *Bowden* v. *Horne*, 7 Bing. 723; 5 Moo. & P. 756, *S. C.*

(*d*) *Cooper* v. *Tiffin*, 3 T. R. 511. The tenant in a real action was not entitled to costs on a *nolle prosequi*: *Williams* v. *Harris*, 1 Bing., N. C., 13; 4 Moo. & Scott, 491, *S. C.*

(*e*) *Hubbard* v. *Briggs*, 16 East, 129: *Goddard* v. *Smith*, 2 Salk. 456: *Bertram* v. *Gordon*, 2 Marsh. 144; 6 Taunt. 444, *S. C.*

(*f*) *Williams* v. *Sharwood*, 3 Bing., N. C., 331; 3 Scott, 761; 5 Dowl. 371, *S. C.* In that case it was considered that after a *nol. pros.* the Court will not inquire as to the propriety of the plea.

(*g*) *Goodes* v. *Goldsmith*, 2 M. & Wels. 202; 5 Dowl. 286, *S. C.* See *Amor* v. *Cuthbert*, 3 Scott, N. R., 325; 3 M. & G. 1; 2 Dowl., N. S., 160, *S. C.*: *Trower* v. *Chadwick*, 3 Bing., N. S., 534.

(*h*) *Jackson* v. *Chambers*, 8 Taunt. 643; 2 Moore, 718, *S. C.*

(*i*) *Booth* v. *Middlecoat*, 6 Bing. 445; 4 Moo. & P. 182, *S. C.*: *Harewood* v. *Mathews*, 2 Tidd, 9th ed. 981.

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fendant will be entitled to judgment and execution for the difference; and, of course, the defendant will be entitled to such judgment and execution where plaintiff is not entitled to any costs.

Retraxit.

Retraxit.]—A *retraxit* is very similar to a *nolle prosequi* to the whole declaration, excepting that the former is a bar to any future action for the same cause; the latter is not, unless made *after judgment* (*k*). The former is also made in person, in open court, when the trial is called on; the latter is made by a mere entry on the roll out of court. After judgment for the plaintiff in error, the Court of Queen's Bench allowed the plaintiff to enter a *retraxit* for the defendant of a plea which involved an issue in fact, and which had been left on the record, and carried up in the transcript, for the sole purpose of explaining the record, which would have been otherwise unintelligible (*l*). As a *retraxit* is very unusual in practice, it is unnecessary to consider it further in this place (*m*).

(*k*) 1 Saund. 207, n.: *Bowden* v. *Horne*, 7 Bing. 716; 5 Moo. & P. 756, *S. C.*

(*l*) *Herbert* v. *Sayer*, 2 Dowl. & L. 49.

(*m*) See the form of the entry on the roll, 2 Sellon, 338. And see the form in 2 Dowl. & L. 49.

CHAPTER XXV.

REMITTITUR DAMNA.

As to a *remittitur damna* on an interlocutory judgment generally, see *ante*, 910. Generally.

In ejectment, if the plaintiff have judgment by confession or default, it is usual for him to remit the damages, and to pray the writ of possession merely (*a*). In ejectment.

In *replevin* of a distress for "rent, customs, services, or *damage feasant*," where the defendant signs judgment of *nonpros* for want of a plea in bar (*b*), he usually remits the damages, rather than be at the expense of a writ of inquiry, and takes his judgment for a return merely (*c*). In replevin.

Where the jury give greater damages than the plaintiff has declared for (*d*), or if the jury on a writ of trial before the sheriff give more than 20*l.* damages (*e*), the mistake may be rectified by entering a *remittitur* for the excess; or, if the plaintiff have signed judgment for the greater sum, the Court will give him leave to amend it, by entering a *remittitur* for the excess, even in a subsequent term, and after error brought (*f*). And the same, if the jury give damages where they ought not, as in a penal action (*g*). If the plaintiff, however, demand in his declaration more than by his own shewing is due, and there be a special *demurrer* for this cause, he cannot rectify the mistake by entering a *remittitur* for the surplus (*h*); but if the declaration be not demurred to, it seems he may (*i*), unless the sum demanded depend upon some deed or other instrument, where the debt or duty to be recovered appears certain and entire upon the face of it, as in debt or covenant to pay 20*l.*; in which case a demand of more than appears due is bad, and cannot be aided by the entry of a *remittitur* (*k*). But if the sum to be recovered may be more or less, by matter extrinsic, as in debt or avowry for rent, if more be demanded than is due, the excess may be remitted (*l*); so, where the debt or duty is composed of several parcels, a demand of more than is due may be aided by a *remittitur* (*m*). Where the damages demanded or found are too large or not recoverable.

In an action against several defendants, if the jury sever the damages by mistake, the plaintiff, by entering a *remittitur* as to the lesser damages, may have judgment for the greater damages against all the defendants (*n*). In action against several.

(*a*) See form of judgment for plaintiff by *nil dicit* in ejectment, with a *remittitur damna*, Chit. Forms, 357.

(*b*) See *ante*, 908.

(*c*) See the form, Chit. Forms, 427.

(*d*) *Parsevel* v. *Spencer*, Yelv. 45: *Wray* v. *Lister*, 2 Str. 1110: *Coy* v. *Hymas*, Id. 1171; Vol. 1, 448.

(*e*) *Pryer* v. *Smith*, 12 Law J., N. S., 223, C. P.

(*f*) MS., M. 1814: *Usher* v. *Dancey*, 4 M. & Sel. 94. See *Wray* v. *Lister*, 2 Str. 1110: *Pickwood* v. *Wright*, 1 H. Bl. 643: *Mills* v. *Fawcett*, 4 D. & R. 561: 2 B. & C. 899, S. C.

(*g*) *Hardy* v. *Cathcart*, 1 Marsh. 180.

(*h*) 1 Saund. 285, n. (5).

(*i*) 1 Ro. Abr. 784, R. pl. 2; 785, S. pl. 1; Com. Dig. Pleader, C. 48.

(*k*) 1 Saund. 285 a. See *Coy* v. *Hymas*, 2 Str. 1171.

(*l*) *Ingledew* v. *Cripps*, 2 Salk. 659; 7 Mod. 87; 2 Ld. Raym. 814, S. C.: *Morris* v. *Geister*, Id. 317; Carth. 437, S. C.

(*m*) *Pamberton* v. *Shalton*, Cro. Jac. 499: *Ingledew* v. *Cripps*, 2 Ld. Raym. 815; 7 Mod. 88, S. C.

(*n*) Vol. 1, 450. See forms of the entry of a *remittitur* of the damages referred to in Chit. Forms, 611.

CHAPTER XXVI.

NEW TRIAL.

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What, and when the proper remedy.

If any error in the proceedings appear upon the face of the record, the party injured by it has his remedy by *demurrer*, motion in arrest of judgment, or writ of error, according to circumstances; and, therefore, in such cases, a new trial will not be granted (*a*). But if any defect of judgment happen from causes wholly extrinsic, arising from matter foreign to or *dehors* the record, the only remedy the party injured by it has, (if we except the writ of error *coram nobis* or *coram vobis* in some few cases), is by application to the Court for a new trial (*b*). This granting of a new trial was substituted for a bill of exceptions (*c*), and, therefore, a new trial will not be granted, where a bill of exceptions has been tendered on the same point, unless the party undertakes to waive the exceptions (*d*). The Court must be satisfied that there are strong probable grounds to suppose that the merits have not been fully and fairly discussed, and that the decision is not agreeable to the justice and truth of the case, before they will grant a new trial (*e*). They will not grant it where they can see clearly that real and substantial justice has been done or may be done without it (*f*). It is not grantable *de jure* (*f*), unless, perhaps, in the case of a misdirection of the judge or the like (*g*). It may be added, that an inferior court cannot grant a new trial, except on the ground of fraud or irregularity in obtaining the verdict (*h*). The law on this subject will now be stated under the following heads:—

1. In what Cases granted.
 - *Mistake, &c. of Judge*, 1321.
 - *Default, &c. of Officer of Court*, 1324.
 - *Default or Misconduct of Jury*, 1324.
 - *Absence, &c. of Counsel or Attorney*, 1328.

1. In what Cases granted—continued.
 - *Default or Misconduct of opposite Party*, 1329.
 - *Default or Misconduct of Witnesses*, 1330.
 - *Party taken by Surprise at Trial*, 1331.

(*a*) *Law* v. *Crochett*, 7 Price, 366. See Tidd, 9th ed., 913.

(*b*) See *Gee* v. *Swann*, 1 Dowl., N. S., 886, per *Parke*, B.

(*c*) See *Barnasconi* v. *Parebrother*, 3 B. & Ad. 372.

(*d*) *Fabrigas* v. *Mostyn*, 2 W. Bl. 929, *post*, 1324.

(*e*) 3 Bl. Com. 392. See *Rex* v. *Mawbey*, 6 T. R. 628: *Edge* v. *Frost*, 4 D. & R. 243.

(*f*) See per *Tindal*, C. J., in *Mure* v. *Tankerell*, 15 Law J., N. S., 153, C. P., citing *Edmondson* v. *Machell*, 2 T. R. 4: *Twigg* v. *Potts*, 1 C., M., & R. 89.

(*g*) See *Hawtayne* v. *Bourne*, 8 M. & W. 295, n.: *Earl of Harborough* v. *Hardham*, Id.

(*h*) *Reg.* v. *Mayor of Oxford*, 3 Nev. & M. 877.

1. In what Cases granted—continued.
Fresh Evidence, &c., 1332.
Where one of several Issues wrongly decided, 1333.
Where Leave reserved to enter a Nonsuit or Verdict, 1333.
Irregularity or Error in Proceedings or Pleadings, 1334.
Where Action or Defence is trifling or vexatious, 1335.
In Penal Actions, 1336.
In Ejectment, 1336.
In Replevin, 1336.
After Writ of Trial or Inquiry before the Sheriff, 1336.
After a Feigned Issue, 1337.

1. In what Cases granted—continued. Chap. xxvi.
After Motion in Arrest of Judgment, Writ of Error, &c., 1337.
After a previous New Trial, 1337.

2. The Application for, and Proceedings on.
To what Court, 1338.
By whom made, 1338.
Time for making the Motion, 1338.
Affidavits on, 1340.
The Motion itself, and Proceedings on, 1340.
Costs, &c., 1343.

3. The New Trial, and Proceedings to, &c. 1347.

1. In what Cases granted, &c.

Mistake, &c. of the Judge.]—If the judge misdirect the jury (*i*), even in a penal action (*k*), it is a good ground for a new trial; unless the Court be satisfied that justice has been done between the parties, notwithstanding the misdirection (*l*); for instance, if the jury paid no attention to it (*m*). An incorrect direction to the jury upon a point collateral to and independent of that upon which their verdict proceeded, is not a ground for a new trial (*n*). Nor is a wrong observation by a judge on a matter of fact, which is left as a question of fact for the jury (*o*). And the Court have refused a new trial where there has been a misdirection with respect to one item only of the plaintiff's demand, and the plaintiff consents to reduce the damages by the whole sum in respect of which the misdirection took place (*p*). So, if the sheriff or his deputy misdirect the inquest, the Court will set aside the execution of the writ of inquiry (*q*), unless it appear that substantial justice

(*i*) *Anon.*, 2 Salk. 649: *How* v. *Strode*, 2 Wils. 269, 273.
(*k*) *Wilson* v. *Rastall*, 4 T. R. 753: *Brooke* v. *Middleton*, 1 Camp. 480: *Calcraft* v. *Gibbs*, 5 T. R. 19. And this, although the ground for it be not a misdirection: *Gregory* v. *Tavarner*, 1 C., M., & R. 310.
(*l*) *Ellenborough* v. *Mackell*, 2 T. R. 4, and per *Tindal*, C. J., in *Moore* v. *Tuckwell*, 15 Law J., N. S., 153, C. P. And see *Cox* v. *Kitchin*, 1 B. & P. 338: *Calcraft* v. *Gibbs*, 5 T. R. 20: *Robinson* v. *Cook*, 6 Taunt. 636: *Wicker* v. *Clutterbuck*, 2 Bing. 483; 10 Moore, 63, S. C.
(*m*) *Twigg* v. *Potts*, 1 C., M., & R. 69: *Duke of Newcastle* v. *Inhabitants of Broxtowe*, 1 Nev. & M. 590.
(*n*) *Bessey* v. *Windham*, 8 Jur. 894, Q. B.
(*o*) *Taylor* v. *Ashton*, 12 Law J., N. S., 263, Exch.
(*p*) *Moore* v. *Tuckwell*, 15 Law J., N. S., 153, C. P.
(*q*) *Markham* v. *Middleton*, 2 Str. 1259.

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has been done between the parties (*r*). Where a jury gave a general verdict for the defendant on three issues, having been misdirected on one, the Court granted a new trial on payment of costs (*s*).

Improper discharge of jury.

In trespass *quare clausum fregit*, issues were joined on three pleas:—1. Of a public carriage-way; 2. Of a public bridle-way; 3. Of a public foot-way: the jury found a verdict for the plaintiff on the first issue, and for the defendant on the third; and the judge, without the plaintiff's consent, discharged the jury from giving a verdict on the second issue; the Court granted a new trial, although the plaintiff, at the beginning of the trial, had agreed that the damages, if any, should be merely nominal (*t*). Where, however, there were two issues, and the jury found upon both, but the judge, under a misapprehension that the finding upon the first issue rendered the second useless, discharged the jury upon the second issue, it was held, that the proper course was to apply to the judge to have the verdict entered according to his notes, and not to move for a new trial (*u*). It may be added, that, after a finding on all the material issues, the judge may discharge the jury without the consent of the parties (*x*).

Wrong nonsuit.

As to granting a new trial when the judge has improperly nonsuited the plaintiff, see *Vol.* 1, 435.

Wrong admission or rejection of evidence.

If a judge at the trial, or a sheriff upon a trial before him, or upon the execution of a writ of inquiry, admit improper evidence (*y*), or reject evidence which ought to be admitted (*z*), by which means the result of the trial or inquiry has been different from what it otherwise would have been, the Court will, in general, grant a new trial or inquiry (*a*). And if evidence be improperly rejected, a new trial will be granted, unless, with the addition of the rejected evidence, a verdict for the party offering it would be clearly and manifestly against the weight of evidence (*b*). In some cases, however, the Court may refuse a new trial, though evidence has been improperly rejected; as where the fact which such evidence was offered to establish was proved by other means, or was not disputed (*c*), or was admitted by the opposite counsel (*d*); or where, assuming the rejected evidence to have been received, a verdict in favour of the party offering it would have been clearly and manifestly against the weight of evidence, and certainly set aside, on application to the Court, as an improper verdict (*e*). The Court refused a new trial before the sheriff, because the under-sheriff refused to allow the defendant's attorney to cross-examine some

(*r*) Id. And see *Brown* v. *Storey*, 1 Scott, N. R., 9: *Beckham* v. *Osborne*, 7 Scott, N. R., 530; and per *Tindal*, C. J., in *Moore* v. *Tuckwell*, 15 Law J., N. S., 153, C. P.

(*s*) *Lord* v. *Wardle*, 3 Bing., N. C., 680; 4 Scott, 402, S. C.

(*t*) *Tinkler* v. *Rowland*, 4 Ad. & E. 868.

(*u*) *Isles* v. *Turner*, 3 Dowl. 211.

(*x*) *Rex* v. *Johnson*, 5 Ad. & E. 448, *ante*, Vol. 1, 401.

(*y*) *Tutton* v. *Andrews*, Barnes, 448: *Baron de Rutzen* v. *Farr*, 4 Ad. & E. 53; 5 Nev. & M. 617, S. C.; *Doe Tatham* v. *Wright*, 1 H. & W. 729; 7 Ad. & E. 313, S. C.

(*z*) *Smedley* v. *Hill*, 2 W. Bl. 1165.

(*a*) Rejecting competent witness. *Robinson* v. *Williamson*, 9 Price, 136: rejecting secondary evidence of lost document, *Freeman* v. *Arkell*, 2 B. & B. 494. See *Grosvenor* v. *Woodhouse*, 1 Bing. 38.

(*b*) *Crease* v. *Barrett*, 1 C., M., & R. 919.

(*c*) *Edwards* v. *Evans*, 3 East, 451: *Ex* v. *Teal*, 11 East, 311: *Alexander* v. *Barker*, 2 C. & J. 133.

(*d*) *Mortimer* v. *M'Callan*, 6 M. & W. 58.

(*e*) Per *Parke*, B., 1 C., M., & R. 933.

of the plaintiff's witnesses, it appearing that the cross-examination was not necessary (*f*). Nor will the Court grant a new trial for the admission of improper evidence; although a verdict is found for the party adducing it, if they see clearly that the improper evidence could not have weighed with the jury, or that the verdict, if given the other way, would have been set aside as against evidence (*g*). And the Court have refused a new trial for the improper admission of evidence, where there clearly appeared to be sufficient evidence to support the verdict, independently of the evidence so admitted (*h*). If the plaintiff's counsel proposes to give evidence in anticipation of the intended defence, but does not do so, the judge then intimating an opinion that the defence cannot be gone into, as it was not specially pleaded, and the judge afterwards allows the defence to be gone into, and the plaintiff adduces his evidence in reply, and there be a verdict for the defendant; these circumstances are no ground for granting a new trial (*i*). Nor is stating as admitted on record a fact taken for granted throughout the trial, though not admitted on the record (*k*).

Where objection not raised or waived at Nisi Prius.

The Court will not grant a new trial for an objection, either to the direction of the judge at the trial (*l*), or to the admission (*m*) or rejection (*n*) of evidence, unless such objection was distinctly raised at the trial. Thus, the non-production of a promissory note at a trial before the secondary is no ground for moving a new trial, unless the objection to its non-production was taken at the time (*o*). Where evidence is tendered for a purpose for which it is not admissible, and rejected, a new trial will not be granted merely because such evidence was admissible for another purpose, not stated at the trial (*p*). In an ejectment by a devisee, it was objected at *Nisi Prius*, that the legal fee was in trustees named in the will; but the Court were of opinion that they took a chattel interest, and the defendant was held precluded from availing himself of this objection as a ground for a new trial, inasmuch as, if the objection had been correctly stated at the trial, the plaintiff might have removed it, by shewing that the chattel interest was determined (*q*). An objection to the applicability of evidence must be made before the summing up (*r*). If a defendant neglect to point out on the trial a limitation in a covenant which would have protected him from part of the damages given against him, the Court will not grant a new trial (*s*). Nor will they do so upon an objection which has been waived at *Nisi Prius*, even

(*f*) *Power* v. *Horton*, 3 Hodg. 14.

(*g*) *Baron De Rutzen* v. *Farr*, 4 Ad. & E. 53; 5 Nev. & M. 617, *S. C.*: *Doe Tatham* v. *Wright*, 1 H. & W. 729; 7 Ad. & E. 313, *S. C.*

(*h*) *Horford* v. *Wilson*, 1 Taunt. 12. And see *Doe Tegnham* v. *Tyler*, 6 Bing. 561; 4 Moo. & P. 377, *S. C.*

(*i*) *Smith* v. *Marrable*, Car. & M. 479, Exch.

(*k*) *Stracey* v. *Blake*, 1 M. & W. 168.

(*l*) *Robinson* v. *Cook*, 6 Taunt. 336: *Morish* v. *Murray*, 13 M. & W. 52; 2 Dowl. & L. 199: *Wardman* v. *Bellhouse*, 9 M. & W. 596: *Hasseldine* v. *Grove*, 3 Q. B. 997: *Watson* v. *Whitmore*, 8 Jur. 964: *Hearne* v. *Stowell*, 6 Jur. 458.

(*m*) *Malin* v. *Taylor*, 2 Hodg. 3: *Williams* v. *Wilcox*, 8 Ad. & E. 314: *Walker* v. *Needham*, 1 Dowl., N. S., 220: *Doe Gilbert* v. *Ross*, 7 M. & W. 102: *Doe Phillips* v. *Benjamin*, 9 Ad. & E. 649; where an objection, that an instrument was not properly stamped, was held to be waived, by not taking such objection at the trial. See also *Foss* v. *Wagner*, 7 Ad. & E. 116, n.

(*n*) *Gibbs* v. *Pike*, 9 M. & W. 351; 1 Dowl., N. S., 409, *S. C.*; *ante*, Vol. 1, 398: *Goslin* v. *Corry*, 8 Scott, N. R., 94: *Sorden* v. *Cowton*, 3 Jur. 1027.

(*o*) *Henn* v. *Neck*, 3 Dowl. 163.

(*p*) *Rex* v. *Grant*, 3 Nev. & M. 106.

(*q*) *Doe Gord* v. *Needs*, 2 M. & W. 129.

(*r*) *Abbott* v. *Parsons*, 7 Bing. 563.

(*s*) *Short* v. *Kalloway*, 11 Ad. & E. 28.

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though the objection be, that evidence required by law was not produced (*t*).

Where there is a bill of exceptions.

Where a bill of exceptions has been tendered, the Court will never grant a new trial upon the same point of law, unless the party consent to waive such bill (*u*); but they will on some other point (*x*).

Where amendment refused.

As to granting a new trial, when the judge has improperly refused to allow an amendment at the trial, under 3 & 4 *W.* 4, *c.* 42, see *Vol.* 1, 395.

Or improper beginning allowed.

As to granting a new trial, when the judge has improperly allowed a party to begin, see *Vol.* 1, 372.

Default &c. of officer of the court.

Default or Misconduct, &c. of Officer of the Court.]—Where the judge's marshal entered the cause, by mistake, in a wrong list, and the cause was consequently tried as undefended in the absence of the defendant, the Court granted a new trial (*y*). And the same where the under-sheriff who returned the panel was attorney for the opposite party (*z*). And the same where the sheriff returned, prisoners for debt taken out of custody on purpose to serve as an inquest on a writ of inquiry, and the Court would have made the sheriff pay the costs had he been a party to the rule (*a*). On a motion for a new trial, upon the ground that the verdict was entered by mistake, the Court will receive the affidavit of a juryman as to what occurred in open court upon the delivery of the verdict (*b*).

Default or misconduct of the jury.

Default or Misconduct of the Jury.]—If a juror have been sworn on the jury by a wrong surname, (particularly if he be not the person summoned or intended to be sworn), a new trial may be granted (*c*); but otherwise if sworn by a wrong christian name (*d*). It is discretionary, however, with the Court to grant a new trial in such a case or not; and they will not do so unless the mistake as to the juror has been productive of some injustice (*e*).

Where sworn by wrong name.

Perverse verdict.

If the jury return a perverse verdict, the Court will grant a new trial, and, in general, without payment of costs (*f*). In an action against an infant, an Oxford student, for the hire of horses, &c., the jury having, contrary to the opinion of the judge, found for the plaintiff upon an issue whether they

(*t*) *Shirloff* v. *Matthews*, 1 Jur. 57: *Mellin* v. *Taylor*, 2 Hodg. 3: *Morrish* v. *Murray*, *supra*.

(*u*) *Fabrigas* v. *Mostyn*, 2 W. Bl. 929; Cowp. 161, *S. C.* See *Minchin* v. *Clement*, 1 B. & Ald. 252: *Goddard* v. *Ingram*, 5 Jur. 1197, Q. B.

(*x*) *Crotty* v. *Price*, 5 Jur. 434, Q. B.

(*y*) *Hunter* v. *Hornblower*, 3 Dowl. 491.

(*z*) *Baylis* v. *Lucas*, Cowp. 112. But see *Mason* v. *Viskary*, 1 Smith, 364. See *Briggs* v. *Sowton*, 9 Dowl. 105, where the deputy sheriff, who tried the cause, was attorney for the defendant, and the Court refused a new trial on that ground.

(*a*) *Stainton* v. *Beadle*, 4 T. R. 473.

(*b*) *Roberts* v. *Hughes*, 7 M. & W. 399; 1 Dowl., N. S., 23: *Dauntsey* v. *Hyde*, 6 Jur. 133, Exch. See *Davis* v. *Taylor*, 2 Chit. Rep. 268. As to when the affidavit of a juryman is inadmissible, see *post*, 1397, 1398.

(*c*) *Norman* v. *Beaumont*, Willes, 484; Barnes, 453, *S. C.*: *Wray* v. *Thorn*, Id. 454: *Parker* v. *Thornton*, 1 Str. 640; 2 Ld. Raym. 141, *S. C.* And see *Doeg* v. *Hobson*, 6 Taunt. 460: *Gee* v. *Sweeny*, 9 M. & W. 666, per *Parke*, B.; *ante*, Vol. 1, 425, 365.

(*d*) *Hill* v. *Yates*, 12 East, 231, n. And see *Wray* v. *Thorn*, Willes, 488.

(*e*) *Hill* v. *Yates*, 12 East, 229. See *Dickenson* v. *Blake*, 7 Bro. P. C. 177; and *ante*, 425.

(*f*) See *Harrison* v. *Fane*, 1 Scott, N. R., 297: *Gibson* v. *Muskett*, 3 Scott, N. R., 427: *Mould* v. *Griffiths*, 8 Jur. 1010, Exch.: *Parker* v. *Great Western Railway Company*, 3 Railw. Cas. 17, C. P. In this last case, as the verdict did not appear to have been given deliberately with determination against the judge's direction, the rule was granted only on payment of the costs of the former trial.

were necessaries or not, the Court granted a new trial, without costs (*g*). And where the jury found a verdict for the plaintiff on all the counts, notwithstanding they were told by the judge that there was no evidence which applied to one count, a new trial was granted (*h*). But the Court refused to set aside a verdict as perverse, because the jury had, contrary to the direction of the judge, given more than nominal damages, for the avowed purpose of enabling the plaintiff to obtain the costs of the action (*i*).

Where it is against evidence.

If the jury find a verdict contrary to evidence, the Court will in general grant a new trial (*k*), even in the case of a trial at bar (*l*), particularly if the justice of the case require it (*m*). But not so if the verdict be such as the justice of the case required (*n*). Nor will they grant a new trial, if a verdict be found for the defendant against evidence, in a vexatious or hard action; or if found for the plaintiff, after an unconscionable defence set up by the defendant (*o*). And it was refused, where the credibility of a witness was left to the jury, and they found a verdict against his evidence, although there was no evidence to impeach his credit (*p*). In general, the Court will not grant it, if there was any evidence to warrant the finding of the jury; but if the verdict is very unsatisfactory, they might (*q*).

Where the evidence is conflicting

Also, where evidence has been given on both sides, a new trial will seldom be granted, unless the evidence against the verdict very strongly preponderate (*r*). In a question, however, relating to real property, where the inheritance would have been for ever bound by the verdict, the Court granted a new trial, although the case had been left to the jury upon conflicting evidence (*s*).

Where damages are excessive.

For excessive damages, the Court will grant a new trial of course, or set aside the execution of a writ of inquiry, in all cases where the damages may be ascertained by mere calculation (*t*); and in other cases of actions *ex contractu*, if it appear clearly that the damages are excessive (*u*). But they have re-

(*g*) *Harrison* v. *Fane*, *supra*.

(*h*) *Hope* v. *West*, 7 Scott, 876.

(*i*) *Chilvers* v. *Greaves*, 6 Scott, N. R., 539; 5 M. & G. 578, S. C.

(*k*) *Bright* v. *Eynon*, 1 Burr. 390: *Miller* v. *Taylor*, 4 Scott, 313: *Letz* v. *Milne*, 12 Moore, 418.

(*l*) *Musgrave* v. *Nevinson*, 2 Ld. Raym. 1358.

(*m*) *Morris* v. *Cleasby*, 1 M. & Sel. 576.

(*n*) *Wilkinson* v. *Payne*, 4 T. R. 468: *Sampson* v. *Applegard*, 3 Wils. 273: *Goslin* v. *Wilcock*, 2 Id. 302: *Aylett* v. *Lowe*, 2 W. Bl. 1221: *Foxcraft* v. *Devonshire*, 2 Burr. 936: *Dunn* v. *Barnard*, Cowp. 307: but see 3 B. & Ald. 692. In *Leake* v. *Deer*, (1 Jur. 983), it is reported to have been decided that the Court will not grant a new trial on the ground of the verdict being against evidence, unless the judge who tried the cause recommends it. Such seems to be the practice.

(*o*) *Mackrow* v. *Hall*, 1 Burr. 11: *Farewell* v. *Chaffey*, Id. 54: *Rassely* v. *Mainwaring*, 3 Id. 1306: *Dunkley* v. *Wade*, 2 Salk. 643: *Smith* v. *Brampston*, Id. 644; 1 Ld. Raym. 62; 5 Mod. 87, *S. C.*: *Sparke* v. *Spicer*, 2 Salk. 648.

(*p*) *Lacey* v. *Forrester*, 3 Dowl. 668. But see the observations of *Tenterden*, C. J., and *Bayley*, J., in *Davis* v. *Hardy*, 6 B. & Cres. 231.

(*q*) See *Glynn* v. *Houston*, 2 Scott, N. R., 548.

(*r*) *Ashley* v. *Ashley*, 2 Str. 1142: *Doe Mason* v. *Mason*, 3 Wils. 63: *Swain* v. *Hall*, Id. 47: *Anon.*, 1 Id. 22. See *Norris* v. *Freeman*, 3 Id. 39: *Malin* v. *Taylor*, 3 Bing., N. C., 109, where the jury, on conflicting evidence, had found for defendant, and, on new trial granted, there was a verdict for plaintiff, with 1000*l*. damages.

(*s*) *Swinnerton* v. *Marquis of Stafford*, 3 Taunt. 91. See Id. 232, *S. C.*: *Lee* v. *Shore*, 2 D. & R. 196; 1 B. & C. 94, *S. C.*: *Hodgson* v. *Forster*, 2 D. & R. 221; 1 B. & C. 110, *S. C.*: *Loudon* v. *Hivons*, 2 Moore, 102.

(*t*) See *Day* v. *Edwards*, 1 Taunt. 491: *Sowerby* v. *Lockerby*, 1 Jur. 796.

(*u*) 3500*l*. against a gentleman of considerable property for breach of promise of marriage has been holden not excessive: *Wood* v. *Hurd*, 2 Bing., N. C., 166. And see *Harrison* v. *Cage*, Carth. 467.

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fused to grant a new trial in an action on a bill or note, where the jury found for no greater amount than that of the bill or note, though it was alleged that less was due (*y*). And where the value on which the damages were calculated was assented to by both sides at the trial, the Court refused to reduce the damages, on the ground that the basis of the calculation was erroneous (*z*). And, in an action for an apothecary's bill, consisting of a great number of items, where the jury gave a verdict for the whole sum claimed, the Court refused to grant a new trial, upon the ground that every item was not proved, evidence having been given as to some of them (*a*). In actions *ex delicto*, such as actions for trespass (*b*), for diverting a watercourse (*c*), for criminal conversation (*d*), seduction (*e*), battery (*f*), false imprisonment (*g*) or other personal torts (*h*), malicious prosecution (*i*), slander (*k*), or the like, where there is no certain measure of damages (*l*), a new trial is seldom granted on this account, unless the damages are outrageous (*m*), or the Court is satisfied that the jury acted under the influence of undue motives, or of gross error or misconception (*n*); and the same as to the execution of writs of inquiry (*o*). A very clear case of excess must be made out; the mere uncorroborated affidavit of the defendant seems to be insufficient for this purpose (*p*). And it may be here mentioned, that, for this purpose, the Court will not receive affidavits of the defendant's witnesses, to explain or add to evidence given by them at the trial (*q*). It is very usual in cases of assault, where an excessive verdict has been given, for the judge to suggest to the counsel to agree on a sum, to prevent the necessity of a new trial (*r*).

Where damages too small.

A new trial will sometimes also be granted, or the execution of a writ of inquiry set aside, and fresh inquiry granted, if it appears clear to the Court that the damages are too small (*s*); or if the smallness of the damages has arisen from some mistake upon the part either of the Court (*t*) or the jury (*u*), or

(*y*) *Selby* v. *Powis*, 1 H. & W. 2.
(*z*) *Hilton* v. *Fowler*, 5 Dowl. 312.
(*a*) *Wheeler* v. *Sims*, 5 Jur. 151, B. C.: but see *Brewer* v. *Jackson*, 5 Jur. 701.
(*b*) *Benson* v. *Frederick*, 3 Burr. 1845: *Ducker* v. *Wood*, 1 T. R. 277: *Marset* v. *Harvey*, 5 Taunt. 442; 1 Marsh. 139, *S. C.*: *Lockley* v. *Pye*, 8 M. & W. 133.
(*c*) *Pisgdell* v. *Earl of Dorchester*, 7 T. R. 539; 1 Chit. Rep. 729 a.
(*d*) *Duberley* v. *Gunning*, 4 T. R. 651: *Wilford* v. *Berkeley*, 1 Burr. 609. See *Chambers* v. *Caulfield*, 6 East, 244.
(*e*) *Irwin* v. *Dearman*, 11 East, 23; *Tuldge* v. *Wade*, 3 Wils. 18.
(*f*) *Jones* v. *Sparrow*, 5 T. R. 257: *Grey* v. *Grant*, 2 Wils. 252, 200*l.* for an assault.
(*g*) *Huckle* v. *Money*, 2 Wils. 205: *Leeman* v. *Allen*, Id. 160: *Beardmore* v. *Carrington*, Id. 244, 1000*l.* for false imprisonment, under warrant of secretary of state: *Edgell* v. *Francis*, 1 Scott, N. R., 118, 200*l.* for a night in the cage.
(*h*) *Fabrigas* v. *Mostyn*, 2 W. Bl. 929: *Gilbert* v. *Burtenshaw*, Cowp. 230. In *Bland* v. *Bland*, 1 H. & W. 167, 1000*l.* for a forcible entry into a dwelling-house, and staying there three or four days, and distraining, to enforce an unfounded claim to the property, was holden not to be excessive.
(*i*) *Leith* v. *Pope*, 2 W. Bl. 1327: *Norris* v. *Tyler*, 1 Cowp. 37.
(*k*) *Smith* v. *Brampston*, 2 Salk. 644.
(*l*) See *Bennett* v. *Allcott*, 2 T. R. 166: *Day* v. *Holloway*, 1 Jur. 794.
(*m*) *Price* v. *Severne*, 7 Bing. 316; 5 Moo. & P. 125, *S. C.*: *Sharpe* v. *Brice*, 2 W. Bl. 942: *Leith* v. *Pope*, Id. 1327: *Pisgdell* v. *Earl of Dorchester*, 7 T. R. 539: *Bruce* v. *Rawlins*, 3 Wils. 61.
(*n*) *Chambers* v. *Caulfield*, 6 East, 244: *Edgell* v. *Francis*, 1 Scott, N. R., 118.
(*o*) *Benson* v. *Frederick*, 3 Burr. 1845: *Bruce* v. *Rawlins*, 3 Wils. 61, 63: *Irwin* v. *Dearman*, 11 East, 23.
(*p*) *Lathbury* v. *Brown*, 10 Moore, 106.
(*q*) *Phillips* v. *Hatfield*, 8 Dowl. 862.
(*r*) Per *Alderson*, J., 7 Bing. 330. See *Lesson* v. *Smith*, 4 Nev. & M. 301.
(*s*) *Armytage* v. *Haley*, 5 Jur. 671; 12 Law J., N. S., 323, Q. B.
(*t*) *Markham* v. *Middleton*, 2 Str. 1259: *Noble* v. *Kennoway*, 2 Doug. 510.
(*u*) *Woodford* v. *Eades*, 1 Str. 425: *Lery* v. *Baillie*, 7 Bing. 349; 5 Moo. & P. 208, *S. C.*

from some unfair practice upon the part of the defendant (*x*). Where, in an undefended action on a mortgage deed, a verdict was taken for the plaintiff by mistake for the principal only, the Court refused to increase the damages by adding the interest, but offered to grant a new trial (*y*). But, as a general rule, the Court will not grant a new trial in an action for a tort, on account of the smallness of the damages (*z*); and they refused to grant it in a recent case, where, in an action against a surgeon for negligence, whereby the plaintiff lost a leg, the jury gave only nominal damages (*a*). And in actions of libel or slander, the Courts never grant a new trial merely upon the ground of the damages being too small, and this though the judge is not satisfied with the verdict (*b*); but if the smallness of the damages has arisen from any of the above reasons, perhaps they might. It is no ground for setting aside a verdict in an action for a libel, that the jury have given only 1*s.* damages, under a mistaken impression that it would carry costs (*c*). As to when the Court will increase or reduce the amount of the damages, see *ante*, *Vol.* 1, 448, 449.

Misconduct of jury.

For the misconduct of the jury, also, the Court will in general grant a new trial, if the misconduct be such as to satisfy the Court that the verdict has been determined on without that grave and serious deliberation, that right exercise of judgment, and that total absence of all partiality, so necessary to the proper execution of the important duties of jurymen. Thus, if the jurors eat or drink, after the summing up, at the expense of the party for whom they afterwards find a verdict; or if they determine their verdict by lots; or if they or any of them have previously declared that the plaintiff should never have a verdict (*d*), or the like; the Court will set aside the verdict, and grant a new trial (*e*). Where two of the jury, during the progress of a trial, which lasted two days, dined and slept at the house of the defendant on the evening of the first day, and, consequently, before the summing up, the Court held that it was discretionary with them whether they would set aside the verdict and grant a new trial; and as the party making the application declared that he did not entertain any belief that the jurors, in giving their verdict, were influenced by their visit, and there were no grounds for suspicion of unfairness, the Court refused to do so (*f*). And the Court refused to set aside a trial had before the sheriff, upon the ground that one of the jurors had served the defendant with process in the action (*g*).

The Court will not receive affidavits made by any of the

(*x*) *Wits* v. *Polshampton*, 2 Salk. 647. See *Hall* v. *Stone*, 1 Stra. 515.

(*y*) *Baker* v. *Brown*, 2 M. & W. 109; 5 Dowl. 313, *S. C.*

(*z*) *Manton* v. *Bates*, 1 Com. B. 444: *Gibbs* v. *Turmaley*, Id. 640: *Mauricet* v. *Brackneck*, 2 Doug. 509.

(*a*) *Gibbs* v. *Turmaley*, 1 Com. B. 640.

(*b*) *Armytage* v. *Haley*, *supra*: *Rendall* v. *Hayward*, 5 Bing., N. C., 424; 7 Scott, 487, *S. C.*: *Hayward* v. *Newton*, 2 Str. 940.

(*c*) *Mears* v. *Griffin*, 2 Scott, N. R., 15; 1 M. & G. 796, *S. C.*

(*d*) *Dent* v. *Hundred of Hertford*, 2 Salk. 645: 2 Comyn, 601. See *Gainsford* v. *Blachford*, 6 Price, 36.

(*e*) Vol. 1, 267: see *Hughes* v. *Rudd*, 8 Dowl. 315. See a case where all the jury were not present when the verdict was given, *Rex* v. *Woollar*, 2 Stark. 111; 6 M. & Sel. 366, *S. C.*

(*f*) *Morris* v. *Vivian*, 10 M. & W. 137; 2 Dowl., N. S., 235, *S. C.* See *R.* v. *Kinnear*, 2 B. & Ald. 468; 1 Chit. Rep. 401, *S. C.*

(*g*) *Prime* v. *Titchmarsh*, 7 Jur. 202, Exch.

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jurymen (*h*), or affidavits of what any of the jurors have said, to prove or respecting such misconduct (*i*); it must be proved in some other way (*k*). And this is the case, though the misconduct is in some degree confirmed *aliunde* (*l*). Though it seems, that, when affidavits are used in moving for a new trial, imputing personal misconduct to a jury, affidavits of any of the jury, rebutting such imputation, may be used in answer (*m*). As to the Court receiving the affidavit of a juryman, to show that the verdict has been entered by mistake for the wrong party, see *ante*, 1324.

Absence, &c. of counsel or attorney.

Absence, &c. of Counsel or Attorney.]—If the cause be tried in the order in which it is inserted in the cause list, in the absence of the opposite party or his counsel, the Court will not grant a new trial, unless under very special circumstances; in which case it would be granted only on payment of costs (*n*). In a recent case, where, in an action for *crim. con.*, the plaintiff was nonsuited by the accidental absence of his attorney, and a fresh action would be barred by the Statute of Limitations, a new trial was granted on payment of costs as between attorney and client (*o*). Where a cause was called on and tried as an undefended cause, in consequence of the defendant's attorney neglecting to deliver his briefs, the Court granted a new trial, but ordered the defendant's attorney to pay the costs, as between attorney and client, out of his own pocket (*p*). Where a cause, which stood thirty off at the assizes, was taken out of its turn as undefended, in the absence of the defendant's attorney, who was casually absent, no notice having been given that it would be taken as an undefended cause, the Court set aside the verdict and granted a new trial, the costs to abide the event (*q*). But where a cause in the written list for the day was tried out of its order, as an undefended cause, in the absence of the defendant's attorney, the Court granted a new trial, only upon payment of costs, and an affidavit of merits (*r*); and even if it were not in the written list, the Court would not, in such a case, grant a new trial, except upon an affidavit of merits (*s*). Where a cause was taken out of its turn, upon the statement of the plaintiff's counsel that it was undefended, and it appeared that counsel had been instructed for the defendant,

(*h*) *Harvey* v. *Hewitt*, 8 Dowl. 598: *Roberts* v. *Hughes*, 7 M. & W. 399: *Vaise* v. *Delaval*, 1 T. R. 11: *Onions* v. *Naish*, 7 Price, 283: *Hartwright* v. *Badham*, 11 Price, 383: *R.* v. *Wooler*, 6 M. & Sel. 366: *Bridgwood* v. *Wynn*, 1 H. & W. 574.

(*i*) *Harvey* v. *Hewitt*, 8 Dowl. 598: *Straker* v. *Graham*, 7 Dowl. 223; 4 M. & W. 721, *S. C.*; *Burgess* v. *Langley*, 6 Scott, N. R., 818; 1 Dowl. & L. 21; 12 Law J., N. S., 257, C. P., *S. C.*: *Addison* v. *Whitehouse*, 5 Jur. 466: *Davis* v. *Taylor*, 2 Chit. Rep. 266.

(*k*) See *Harvey* v. *Hewitt*, 8 Dowl. 598, where affidavits were made by persons who witnessed the jury drawing lots for their verdict.

(*l*) *Owen* v. *Warburton*, 1 N. R. 326. See *Hindle* v. *Birch*, 6 Taunt. 96; 1 Moore, 455, *S. C.*

(*m*) *Standerwicke* v. *Watkins*, 9 Jur. 161, B. C. See *Taylor* v. *Webb*, Trials per pais, 24.

(*n*) *Ante*, Vol. 1, 364. See *Anon.*, 2 Salk. 645.

(*o*) *Ayling* v. *Goldney*, 1 Com. B. 635.

(*p*) *De Rougby* v. *Peale*, 3 Taunt. 484. *Greatwood* v. *Sims*, 2 Chit. Rep. 269. But see *Moody* v. *Dick*, 2 B. & B. 395; 5 Moore, 164, *S. C.*: *Watson* v. *Reeve*, 5 Bing., N. C., 112, *contra*.

(*q*) *Aust* v. *Fenwick*, 2 Dowl. 245: *Dorriere* v. *Howell*, 8 Scott, 508; 6 Bing. N. C. 245; 8 Dowl. 277, *S. C.*; *cont.*, Vol. 1, 364.

(*r*) *Fourdrinier* v. *Bradbury*, 3 B. & Ad. 328. See *Springer* v. *Rutherford*, 2 Dowl. 429, where it was granted without costs.

(*s*) *Blackhurst* v. *Bulmer*, 5 B. & Ald. 907; 1 D. & R. 553, *S. C.* See as to the affidavit of merits, *Nash* v. *Steinburn*, *infra*, n. (*x*).

but that notice that the cause would be defended was not served till late on the previous night, the Court granted a new trial, upon payment of the amount of damages into court; the costs of the trial and of the application to abide the event (*t*). It has been held, that if the marshal enters a cause as undefended for the day on which undefended causes are taken, in Middlesex, the defendant, if he mean to defend it, must instruct counsel to appear on that day, and state that it is defended; or, at any rate, must give the plaintiff notice to that effect; and, in default of this, if the plaintiff try the cause as undefended, and obtain a verdict, the defendant, though he will, upon an affidavit of merits, have the verdict set aside, it will only be so on payment of costs (*u*). The Court will not grant a new trial, even on payment of costs, where the defendant or his attorney, having an opportunity of trying, carelessly permits a verdict to be taken against him as in an undefended cause (*x*).

Default or misconduct of the opposite party.

Default or Misconduct of the opposite Party.]—If the party for whom a verdict is afterwards given, deliver to the jury, after they have left the bar, evidence which has not been shewn to the Court, a new trial will be granted (*y*). So, if he have laboured the jury, or used improper influence with them, to induce them to give a verdict in his favour, a new trial will be granted. Where hand-bills reflecting on the plaintiff's character were distributed in court, and shewn to the jury on the day of trial, a verdict against him was set aside, and a new trial granted, although the defendant, by his affidavit, denied all knowledge of the hand-bills (*z*). But merely desiring a juror to attend at the trial of the cause is no ground for a new trial (*a*).

Improperly influencing the jury.

Misleading or taking by surprise the opposite party.

Where, by a fraudulent trick upon the part of the defendant, the plaintiff's counsel were taken by surprise, and the defendant thereby obtained a verdict, the Court granted a new trial (*b*). Where a plaintiff was nonsuited in consequence of a refusal by the defendant's counsel at the trial to admit certain documents in evidence, which had been agreed to be admitted by the defendant's attorney's agent, the Court granted a new trial, with costs to be paid by the defendant; but they refused to make the defendant's attorney pay the costs, because he was not present at the trial when the objection was taken, and had given no instructions to the counsel so to do (*c*). Where a particular of demand was so penned as to mislead the defendant, the Court granted a new trial (*d*). And where a cause,

(*t*) *De Medina* v. *Sharpnell*, 12 Law J., N. S., 37, C. P.

(*u*) *Bland* v. *Warren*, 7 Ad. & E. 13; *ante*, 138.

(*x*) *Watson* v. *Reeve*, 5 Bing., N. C., 112; 7 Dowl. 127, *S. C.*: *Breach* v. *Casterton*, 7 Bing. 234; 4 Moo. & P. 867, *S. C.* And see *Masters* v. *Barnwell*, Id., n.; and *Gwilt* v. *Crawley*, 8 Bing. 144; 1 Moo. & Scott, 229, *S. C.*: *R.* v. *Richardson*, 3 Dowl. 511: *Nash* v. *Swinburn*, 4 Scott, N. R., 326; 3 M. & G. 630; 1 Dowl., N. S., 190, where the defendant's attorney's clerk misread the notice of trial. And see *ante*, Vol. 1, 364.

(*y*) Vol. 1, 400.

(*z*) *Coster* v. *Merest*, 3 B. & B. 272; 7 Moore, 87, *S. C.* And see *Spencer* v. *De Willott*, 3 Smith, 321.

(*a*) *Snell* v. *Timbrell*, 1 Str. 643.

(*b*) MS., E. 1814. See *Anderson* v. *George*, 1 Burr, 352: *Edie* v. *East India Company*, 1 W. Bl. 298: *Hewlett* v. *Cruchley*, 5 Taunt. 277. And see *Long* v. *Bilke*, 1 Scott, N. R., 176, where the effect of a judgment produced as evidence was misrepresented.

(*c*) *Doe Tindal* v. *Roe*, 5 Dowl. 490.

(*d*) *Stevens* v. *Willingale*, 4 Scott, 255; 7 C. & P. 702, *S. C.* See *Correll* v. *Cattell*, 5 Dowl. 598.

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marked as a special jury cause, was tried by a common jury, in the absence of the defendant's attorney, (without any default upon the part of the plaintiff's attorney), the Court set aside the trial and verdict, and granted a new trial with costs, to be paid by the plaintiff (*e*).

Where no notice of trial given.

If the plaintiff gave no notice of trial, or an insufficient one, the Court will grant a new trial (*f*). So, if no notice of executing a writ of inquiry, or an insufficient one, was given, the Court will set aside the execution of the writ (*g*). But these irregularities are waived by the defendant appearing and making a defence (*h*). A defendant, who has become bankrupt, and obtained his certificate since a trial, may apply to set aside a verdict against him, on the ground that no notice of trial has been given (*i*).

Default or misconduct of witnesses. Non-attendance of.

Default or Misconduct of Witnesses.]—A new trial has been granted on account of the non-attendance of a material witness (*k*); and the Court in one case granted it without costs, where a material witness for the defendant was kept out of the way by the contrivance of the plaintiff, to prevent him from being served with a *subpœna* (*l*): but in a later case, where a witness for the plaintiff was kept out of the way by the contrivance of the defendant, the Court refused a new trial, observing, that the plaintiff ought to have applied for a postponement of the trial, or withdrawn the record (*m*). And the general rule is, that a new trial will not be granted on the ground that evidence has not been given that might have been given at the trial (*n*): and the Court will not, on motion for a new trial, hear an affidavit of any facts which might have been brought forward at *Nisi Prius* (*o*). The plaintiff ought, if unprepared with his evidence, either to make application to put off the trial before the jury are sworn, or should withdraw his record, and not take the chance of a verdict (*p*).

Perjury of witness.

The Court have granted a new trial, where it appeared clearly that the plaintiff's case was a mere fiction supported by perjury, which the defendant could not at the time of the trial be prepared to answer (*q*). They, however, will not in general be satisfied with the mere affidavit of the party making the application, contradicting the witnesses on the other side (*r*); the witnesses must in general be indicted and con-

(*e*) *Hague* v. *Hall*, 6 Scott, N. R., 705.

(*f*) *Thermolin* v. *Cole*, 2 Salk. 646: *Williams* v. *Williams*, 2 Dowl. 350. And see *Sprigg* v. *Rutherford*, 2 Dowl. 429.

(*g*) *Yate* v. *Swaine*, Barnes, 233.

(*h*) *Thermolin* v. *Cole*, 2 Salk. 646: *Yate* v. *Swaine*, Barnes, 233. And see *Doe Antrobus* v. *Jepson*, 3 B. & Ad. 402: *Frean* v. *Paravicini*, 4 Taunt. 545: *Sherman* v. *Tinsley*, 4 Scott, 286; 3 Hodges, 32, S. C.: *ante*, Vol. 1, 297.

(*i*) *Shepheard* v. *Thompson*, 1 Dowl., N. S., 345; 9 M. & W. 110, S. C.: *ante*, Vol. 1, 297.

(*k*) *Anon.*, 2 Salk. 645.

(*l*) Bull. N. P. 328.

(*m*) *Turquand* v. *Dawson*, 1 C., M., & R. 709. And see *Edwards* v. *Dignum*, 2 Dowl. 642: *Peckham* v. *Newman*, 3 Id. 165: *Henning* v. *Samuel*, 2 Dowl. 766; 3 Moo. & Sc. 818, S. C.

(*n*) *Cooke* v. *Berry*, 1 Wils. 98. And see 1 C., M., & R. 710, n.: *Macbeath* v. *Ellis*, 4 Bing. 578.

(*o*) *Hope* v. *Atkins*, 1 Price, 143.

(*p*) *Harrison* v. *Harrison*, 9 Price, 89: *Edwards* v. *Dignum*, 2 Dowl. 642: *Ellustie* v. *Wildman*, 8 Taunt. 236; 2 Moore, 179, S. C.

(*q*) *Fabrilius* v. *Cock*, 3 Burr. 1771.

(*r*) *Feize* v. *Parkinson*, 4 Taunt. 640: see *Aitken* v. *Howell*, 1 Nev. & M. 191: *Sprague* v. *Mitchell*, 2 Chit. 271. But see *Lister* v. *Mundell*, 1 B. & P. 427.

victed (*s*), or some other satisfactory proof of the perjury must be offered to the Court. Even where the witnesses were indicted, we have seen that the Court refused to stay execution until the indictment should be tried (*t*). It is no ground for a new trial, that a witness who described himself as a Christian, and by a wrong name, and was sworn on the New Testament, was really a Jew, unless objected to at the trial, for he may be indicted for perjury (*u*). Also, it seems to be no ground for a new trial that new witnesses have been discovered who can contradict the witnesses at the former trial (*x*).

Mistake of witness.

Where a witness made a mistake in his evidence, by reason of which a verdict was given against the party who called him, the Court refused a new trial, although the mistake was explained to them by the affidavit of the witness himself (*y*); but in a more recent case, under similar circumstances, the Court of Common Pleas granted a new trial (*z*). Where a defendant insisted that he was surprised by a mis-statement made by one of the plaintiff's witnesses, that Court refused a new trial, the mis-statement having been made in answer to a question that was collateral and beside the issue (*a*).

Incompetency of witness.

An objection to the competency of witnesses, discovered after the trial, is not of itself a sufficient ground for a new trial; although it may have some weight with the Court, where the party applying appears to have merits (*b*). Nor is it a sufficient ground that a witness was admitted at the trial on the opposite attorney's undertaking to have him released, which, since the trial, he has refused to do (*c*).

Party taken by surprise.

Party taken by Surprise.]—In some cases, where a party is taken by surprise at the trial, the Court will grant a new trial (*d*). Thus, they will grant it, if, by a fraudulent trick upon the part of the defendant, the plaintiff's counsel was taken by surprise, and the defendant thereby obtained a verdict (*e*). But the Court never grant a new trial upon the ground of surprise, unless satisfied that the first verdict was substantially wrong (*f*). And they refused to grant it, where, by reason of the defendants having insufficiently disclosed their case to their attornies, the latter were taken by surprise, and unprepared to prove a certain document at the trial, and a verdict was given for the plaintiff (*g*). So, a party nonsuited for non-production of a document from a public office, is not entitled to a new trial on the ground of surprise, where he has served a clerk in the office with a *subpœna duces tecum* to produce the document, but has omitted to apply to the head of the office for permission for its production (*h*). And where, at

(*s*) *Beesfield* v. *Petrie*, 2 Tidd, 936: *Seeley* v. *Mayhew*, 4 Bing. 561: *Hampshire* v. *Harris*, 3 Jur. 980, C. P.

(*t*) *Ante*, Vol. 1, 531: *Warwick* v. *Bruce*, 4 M. & Sel. 140. See *Thurtell* v. *Beaumont*, 1 Bing. 339; 8 Moore, 612, *S. C.*

(*u*) *Sells* v. *Hoare*, 3 B. & B. 232.

(*x*) *Dickenson* v. *Blake*, 7 Bro. P. C. 177.

(*y*) *Huish* v. *Sheldon*, Say. 27.

(*z*) *Richardson* v. *Fisher*, 7 Moore, 546; 1 Bing. 145, *S. C.*

(*a*) *Magney* v. *Knight*, 2 Scott, N. R., 71; 1 M. & G. 944, *S. C.*

(*b*) *Turner* v. *Pearte*, 1 T. R. 717.

(*c*) *Hemming* v. *English*, 3 Dowl. 155.

(*d*) See *Todd* v. *Emly*, 2 Dowl. N. S., 570: *Bell* v. *Thompson*, 2 Chit. 194: *Harrison* v. *Harrison*, 9 Price, 89.

(*e*) *Ante*, 1329.

(*f*) *Tharpe* v. *Stallwood*, 6 Scott, N. R., 730; 1 D. & L. 24, *S. C.*, per *Coltman*, J.

(*g*) *Tharpe* v. *Stallwood*, *supra*.

(*h*) *Austin* v. *Evans*, 2 Man. & G. 430; 9 Dowl. 408, *S. C.*

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the trial, the defendant produced a deed which he had had notice to produce, and there being an attesting witness to it who was not called, the plaintiff was nonsuited: it was held, that the plaintiff was not entitled to a new trial on the ground of surprise, though he was not aware, before the trial, that there was an attesting witness; it not appearing that he had made any inquiry upon the subject (*i*).

Fresh evidence, &c.

Fresh Evidence, &c.]—A new trial will seldom be granted, where a verdict has been given against a party, or a plaintiff has been nonsuited, for want of evidence which might have been produced at the trial, because it would tend to introduce perjury (*k*). Even although the evidence was briefed, and his counsel thought fit not to produce it (*l*), unless the verdict is manifestly against the justice and equity of the case (*m*). And where a verdict passed against the defendant, and a material witness for him arrived on the following day, the Court of Common Pleas refused him a new trial, because he had not moved to put off the first trial on account of the absence of the witness (*n*). But if new evidence have been discovered after the trial, such as to satisfy the Court, that, if the party had had it at the trial, he must have had a verdict, the Court will grant a new trial upon payment of costs, in order to do justice between the parties. Where the defendant was sued as executor, and was absent from the kingdom at the time the action was brought, the Court of Common Pleas granted a new trial, upon the discovery of evidence after verdict for the plaintiff, although such evidence was in the possession of the defendant's attorney at the time of the trial, but not known by him to be so (*o*). The discovery of witnesses who can contradict those produced on the former trial, seems to be no ground for a new trial (*p*).

Examination of witnesses stopped.

A cause having been stopped while a witness was under examination, and the plaintiff nonsuited, upon a statement by his counsel of the facts he was prepared to prove, the Court granted a new trial on payment of costs, upon an affidavit that the witness could have proved a more complete case than that presented by the counsel (*q*). The Court will not grant a new trial, to let the party into a defence of which he was apprised at the first trial (*r*). But where, in an action for a nuisance, which was defended by the defendant's landlord, the defendant not attending at the trial in consequence of his being told that he need not do so, the attorney employed by the landlord entered into a consent-rule to abate the nuisance, without the consent and against the directions of the defendant; the Court, upon strong affidavits shewing that the grievance complained of was not a nuisance, set aside an attach-

(*i*) *Reardon* v. *Minter*, 5 M. & G. 204; 6 Scott, N. R., 237, S. C.

(*k*) *Cooke* v. *Berry*, 1 Wils. 98: *King* v. *Alberton*, 3 Salk. 361. See *Witt* v. *Felthampton*, 2 Salk. 647.

(*l*) *Spong* v. *Hogg*, 2 W. Bl. 802: *Hall* v. *Stothard*, 2 Chit. 267.

(*m*) *Martyn* v. *Podger*, 5 Burr. 2631.

(*n*) *Elmslie* v. *Whitman*, 6 Taunt. 236.

(*o*) *Broadhead* v. *Marshall*, 2 W. Bl. 955. And see *Weak* v. *Calloway*, 7 Price, 677. *Thurtell* v. *Beaumont*, 1 Bing. 339.

(*p*) *Dickenson* v. *Blake*, 7 Bro. P. C. 177.

(*q*) *Edgar* v. *Knapp*, 6 Scott, N. R., 707: 1 D. & L. 73, S. C.

(*r*) *Vernon* v. *Hankey*, 2 T. R. 113. See *Buston* v. *Mardin*, 1 T. R. 64: *Ritchie* v. *Bousfield*, 7 Taunt. 309: *Pickering* v. *Dawson*, 4 Taunt. 779.

ment which had issued on the consent-rule, and granted a new trial (*s*). CHAP. XXVI.

Where one of several Issues, &c. wrongly decided.]—If a party be entitled to a new trial, *ex debito justitiæ*, upon one of several issues, the Court cannot confine the new trial to such issue only, but must grant it as to all of them (*t*). Therefore, if the judge at the trial allow evidence to be given upon one of several issues, which is inadmissible (*u*); or if he, in his direction to the jury, mistake the law (*x*); or, it seems, in any other case in which he might have been required to seal a bill of exceptions, a new trial can only be granted upon all the issues (*y*). But if the granting of the new trial upon one of several issues be a matter in the discretion of the Court, as, if the verdict upon such issue be against evidence or the like, it may be granted upon such issue only (*z*). The issue thus found against evidence must be a material one, to induce the Court to grant the new trial (*a*). A jury having assessed damages upon an erroneous principle, the Court, in granting a new trial, refused to limit the inquiry to the question of damages (*b*). The parties on the second trial, whether under special issues or the general issue, will be confined to the same issues raised on the first trial (*c*). Where two issues were raised by the pleadings, and the jury found upon both, but the judge before whom the cause was tried discharged the jury upon the second issue, upon a misapprehension that the verdict upon one issue rendered the other issue immaterial, the Court held that the proper course was, not to move for a new trial, but to apply to a judge to have the verdict corrected according to his notes (*d*). Where one of several issues, &c. wrongly decided.

Where, in a case against seventeen defendants, two suffered judgment by default, and fifteen pleaded the general issue; plaintiff entered a *nolle prosequi* against one of the two, obtained upon a writ of inquiry a verdict for 900*l.* against the other, and the jury found their verdict in favour of the fifteen: the verdict as to five of the fifteen being unwarranted, the Court granted a new trial against them, leaving the verdict against the others, and against the defendants who suffered judgment by default, undisturbed (*e*). As to all of several defendants joining in an application for a new trial, see *post*, 1338. Where there are several defendants.

Where Leave reserved to enter a Nonsuit or Verdict.]—If the judge at the trial, when there is a doubt whether the action will lie, allow the plaintiff to take a verdict, with liberty for the defendant to move to set aside the verdict and enter a nonsuit, the defendant may move accordingly, and so obtain the opinion of the Court upon the subject; but without such Where leave reserved to enter a nonsuit or verdict.

(*s*) *Bodington* v. *Harris*, 1 Bing. 187.
(*t*) *Earl of Macclesfield* v. *Bradley*, 7 M. & W. 570; 9 Dowl. 313, S. C.: *Hutchinson* v. *Piper*, 4 Taunt. 555.
(*u*) *Bernasconi* v. *Farebrother*, 3 B. & Ad. 373.
(*x*) *Hutchinson* v. *Piper*, 4 Taunt. 555.
(*y*) *Bernasconi* v. *Farebrother*, *ubi supra*.
(*z*) *Earl of Macclesfield* v. *Bradley*, 7 M. & W. 570: *Hutchinson* v. *Piper*, 4 Taunt. 555. But see Bull. N. P. 326 b. See, as to a *venire de novo*, *Davies* v. *Lowndes*, 4 B. & C. 478.
(*a*) Bull. N. P. 326.
(*b*) *Mahoney* v. *Frasi*, 1 C. & M. 325.
(*c*) *Thwaites* v. *Swinsbury*, 7 Bing. 437; 5 Moo. & P. 321, S. C.
(*d*) *Iles* v. *Turner*, 3 Dowl. 211.
(*e*) *Price* v. *Harris*, 10 Bing. 331; 4 Moo. & Scott, 474, S. C.

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leave, he cannot move to enter a nonsuit (*e*). And on this motion, it seems the Court will consider not merely the point reserved, but the whole case (*f*). So, where a plaintiff has been nonsuited, the Court may order the nonsuit to be set aside, and a verdict entered for him, if the judge at *Nisi Prius* gave him leave to move to that effect (*g*); but not otherwise. And, on either of these motions, it seems that the Court, instead of allowing a nonsuit or verdict to be entered, may remodel the rule, and send down the case for a new trial, if that course be more in accordance with the justice of the case (*h*).

Irregularity in proceedings.

Irregularity or Error in Proceedings or Pleadings, &c.]—Where a new trial was applied for, on account of a variance between the issue delivered and the *Nisi Prius* record, the Court refused it (*i*). And where a Welsh cause was tried in Monmouthshire instead of Hereford, the Court refused to set aside the verdict on that account, as the notice of trial was for Monmouthshire, and the defendant did not object to it; besides which, the objection appeared upon the record, and, therefore, if well founded, the party had another remedy (*k*). As to when the Court will grant a new trial for error in the jury process, see *Vol.* 1, *Pt.* 1, *Ch.* 12. For what errors in the writ of trial, &c., where the cause is tried under the writ of trial act, the Court will grant a new trial, see *Vol.* 1, *Pt.* 1, *Ch.* 16. And in what other cases, for errors in different proceedings, the Court will grant a new trial, see the different titles throughout this work.

Error in pleadings.

In an action on a replevin-bond, where the plaintiff was nonsuit because of a variance between the replevin-bond and the record, the Court gave leave to amend upon payment of costs, and ordered a new trial (*l*). And, in one case, the Court granted the defendant a new trial, and allowed him, upon terms, to amend a plea of a right of way, by stating the right according to the finding of the jury, or in such other manner as he might be advised (*m*). And where there was no definite issue, and a verdict had been found for the plaintiff, the Court granted a new trial, with liberty for both parties to amend (*n*). And where, by mistake, the damages had been laid at 10*l.*, and the jury at the trial had found for the plaintiff, damages 150*l.*, the Court granted a new trial on payment of costs, with liberty to the plaintiff to amend (*o*). But where the plaintiff went to trial without adding the *similiter* to a plea concluding to the country, and obtained a verdict, the Court held, that, after verdict, the "&c." at the end of the plea was equivalent to a *similiter*, and refused a new trial (*p*). And so, a new trial has

(*e*) Vol. 1, 433: *Minchin* v. *Clement*, 1 B. & Ald. 252: *Watkins* v. *Towers*, 2 T. R. 275 to 281.

(*f*) See *Doe* v. *Dodd*, 2 Nev. & M. 838.

(*g*) *Treacher* v. *Hinton*, 4 B. & Ald. 413.

(*h*) See *Doe Wyatt* v. *Staff*, 5 Bing. N. C. 494: *Higgins* v. *Nichols*, 7 Dowl. 551.

(*i*) *Mather* v. *Brinker*, 2 Wils. 243: *Doe Caterill* v. *Wylde*, 2 B. & Ald. 472: *Jones* v. *Tatham*, 8 Taunt. 634. See *ante*, Vol. 1, 339.

(*k*) *Ambrose* v. *Rose*, 11 East, 370.

(*l*) *Halhead* v. *Abrahams*, 3 Taunt. 81: *Williams* v. *Pratt*, 5 B. & Ald. 866. S. P.: but see *Brown* v. *Knill*, 4 Nev. & M. 348.

(*m*) *Higham* v. *Rabett*, 7 Scott, 857; 7 Dowl. 653, S. C. See Vol. 1, 272, 273.

(*n*) *Spong* v. *Wright*, 12 Law J., N. S. 144, Exch.

(*o*) *Tebbs* v. *Barron*, 5 Scott, N. R., 837: *Tomlinson* v. *Blacksmith*, 7 T. R. 132: *ante*, Vol. 1, 205.

(*p*) *Swain* v. *Lewis*, 3 Dowl. 700. See cases where the "&c." was omitted, and

been refused to the defendant, where his object was to plead specially, and rely upon a defence which he was not permitted to give in evidence under the general issue (*q*). And the same where the defendant's object was to amend a plea of right of way in which the way had been incorrectly described (*r*). And in the last-mentioned case, the Court intimated that there was no case in which the defendant would be entitled to a new trial, where the verdict was clearly right, though the pleadings were wrong. An error which may be taken advantage of on motion in arrest of judgment or writ of error, &c., is not a ground for a new trial (*s*).

Defect in special case.

As to granting a new trial when a verdict is taken subject to the opinion of the Court on a *special case*, which turns out to be so defectively stated that the Court cannot give judgment upon it, &c., see *Vol.* 1, 443.

Where the action or defence is trifling or vexatious.

Where the Action or Defence is trifling or vexatious.]—The Court will not, in general, grant a new trial, where the value of the matter in dispute, or the amount of damages to which the plaintiff would be fairly entitled, is too inconsiderable to merit a second examination (*t*). The value or amount must, in general, be 20*l.*, to induce the Court to interfere (*u*); unless on trials before the sheriff (*x*), (in which the limited sum is 5*l.* (*y*)), or the verdict involve some particular right independent of the damages (*z*), and this whether the verdict be for plaintiff or defendant (*a*). This rule applies to actions of trover (*b*), to cases of surprise (*b*), and though other actions depend upon the result of the verdict (*c*). But, it seems, it does not apply if the verdict was obtained by the fraud of the party obtaining it (*d*). And the Court will sometimes grant a new trial on the ground of a misdirection of the judge, though the verdict be under 20*l.* (*e*). In a recent case, it was granted for a misdirection, though the amount in question was less than 1*l.* (*f*).

Also, if the defendant succeed in a hard or vexatious action, the Court will, in general, refuse a new trial (*g*), unless, per-

amendment allowed, even after error brought: *Siboni* v. *Kirkman*, 3 M. & W. 46: Vol. 1, 278.

(*q*) *Kirby* v. *Simpson*, 3 Dowl. 791: *Tavernor* v. *Little*, 5 Bing. N. C. 678. See *Hart* v. *Crowley*, 12 Ad. & E. 378, where it was not objected at the trial that the defence ought to have been specially pleaded.

(*r*) *Edwards* v. *Brereton*, 2 C. & J. 18. See *Higham* v. *Rabett*, *supra*.

(*s*) *Lane* v. *Crockett*, 7 Price, 566.

(*t*) *Marsh* v. *Bower*, 2 W. Bl. 851: *Macrow* v. *Hull*, 1 Burr. 11: *Burton* v. *Thompson*, 2 Id. 664: *Roberts* v. *Karr*, 1 Taunt. 495. And see *Vernon* v. *Hankey*, 2 T. R. 113: *Woods* v. *Pope*, 1 Bing., N. C., 467; 1 Scott, 536, *S. C.*: *Haine* v. *Davy*, 2 H. & W. 30.

(*u*) *Sawell* v. *Champion*, 2 Nev. & P. 627; 6 Ad. & E. 407. See *Arthur* v. *Barton*, 6 M. & W. 144.

(*x*) *Taylor* v. *Helps*, 5 B. & Ad. 1068: *Edwards* v. *Dignum*, 2 Dowl. 642: but see *Hanning* v. *Samuel*, Id. 767; 3 Moo. & Scott, 818, *S. C.*, *contra*: *sed quære*.

(*y*) *Peckham* v. *Newman*, 1 C., M., & R. 585: *Williams* v. *Evans*, 2 M. & W. 220: *Lyddon* v. *Coombes*, 5 Dowl. 560: *Fleetwood* v. *Taylor*, 6 Dowl. 796: *Watts* v. *Judd*, *infra*.

(*z*) See *Dyball* v. *Duffield*, Tidd, 9th ed., 910; 1 Chit. Rep. 265; 1 Y. & J. 402: *Bevan* v. *Jones*, 2 Y. & J. 264.

(*a*) *Young* v. *Harris*, 2 C. & J. 14; Tidd, 9th ed., 913: *Watts* v. *Judd*, 6 Scott, N. R., 630; 5 M. & G. 598, *S. C.*; and per *Erskine*, J., "Where the verdict is found for the plaintiff, that of course ascertains the limit: when the verdict is for the defendant, the limit necessarily is the utmost the plaintiff could have recovered."

(*b*) *Benson* v. *Didsbury*, 4 P. & D. 441; 12 Ad. & E. 631; 9 Dowl. 199, *S. C.*; *Watts* v. *Sheriff of Herts*, 5 Jur. 1009, Q. B.

(*c*) *Lees* v. *Sylvester*, 12 Law J., N. S., 250, C. P.

(*d*) *Benson* v. *Didsbury*, *supra*.

(*e*) *Anon.* v. *Phillips*, 1 C. & M. 26; *Twigg* v. *Potts*, 1 C., M., & R. 93: *Rendall* v. *Hayward*, 7 Scott, 407.

(*f*) *Haine* v. *Davey*, 4 Ad. & El. 892.

(*g*) *Macrow* v. *Hull*, 1 Burr. 11: *Penprase* v. *Johns*, 2 Nev. & Man. 376: *Johnson* v. *Piper*, Id. 672.

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haps, where the verdict is contrary to the direction of the judge (*h*). And in many cases the Court have refused to disturb a verdict according to the justice of the case, though there has been a misdirection (*i*).

Plea in abatement, or defence not on the merits.

On the other hand, if, on a plea in abatement, the jury find against the defendant, the Court will not grant a new trial, even on payment of costs (*k*): nor will they grant one to let in a defence not on the merits (*l*).

Cases of strict right.

Nor will the Court grant it in any other case of strict right, or *summum jus*, where the rigorous exaction of extreme legal justice would be hardly reconcileable to conscience. Where a man recovered a sum composed of several items, some of which he was not in strict law entitled to recover under the declaration in that action, but which he would clearly be entitled to recover in a different form of action, the Court refused to grant a new trial, or reduce the damages (*m*).

In penal actions.

In Penal Actions.]—In penal actions, if there be a verdict for the plaintiff, the Court will grant a new trial in the same cases as in other actions; but if the jury have found a verdict for the defendant, a new trial is never granted (*n*), unless for a mistake of law (*o*), or misdirection of the judge (*p*), or where the verdict has been given from a misapprehension of the law by the jury, or from a desire on their part to take the law into their own hands (*q*). But it is otherwise in penal actions by parties aggrieved (*r*), in which cases the rule is the same as in other actions.

In ejectment.

In Ejectment.]—In ejectment, where the verdict is for the defendant, the Court will seldom grant a new trial, because the plaintiff may, if he will, bring a new action; but otherwise if found for the plaintiff, and the circumstances of the case in other respects warrant them in granting it (*s*).

In replevin.

In Replevin.]—In replevin, where the verdict is for the plaintiff, the Court will be more cautious in granting a new trial than in other actions, and will not grant it unless upon very clear grounds; for the landlord has other remedies for his rent, and a new trial would renew the liability of the sureties, and the plaintiff's risk of paying double costs (*t*).

After writ of trial or inquiry before sheriff.

After Writ of Trial or Inquiry before the Sheriff.]—The execution of a writ of inquiry may be set aside, and a new writ awarded for the same causes as a verdict. As to this, see

(*h*) See *Farrant* v. *Olmius*, 3 B. & Ald. 692.

(*i*) See *Edmonson* v. *Machell*, 2 T. R. 4: *Wilkinson* v. *Payn*, 4 T. R. 468: *Cas* v. *Kitchen*, 1 B. & P. 338.

(*k*) *Shaw* v. *Hislop*, 4 D. & R. 941.

(*l*) *Glet* v. *Mason*, 1 T. R. 84: *Tullidge* v. *Wade*, 3 Wils. 18.

(*m*) *Mayfield* v. *Wadsley*, 3 B. & C. 357.

(*n*) *Brook* v. *Middleton*, 10 East, 268: *Matthison* v. *Allanson*, 2 Str. 1228: *Jarvis* v. *Hall*, 1 Wils. 17: *Fancreau* v. ——, 3 Wils. 59: *Rawston* v. *Bitteridge*, 2 Chit. 273. See *Rex* v. *Sutton*, 5 B. & Ad. 52.

(*o*) *Gregory* v. *Tuffs*, 2 Dowl. 711; 1 C., M., & R. 310, *S. C.*: *Attorney-General* v. *Rogers*, 11 M. & W. 670; 2 Dowl., N. S. 1037; 12 Law J., N. S., 385, Exch.

(*p*) *Wilson* v. *Rastall*, 4 T. R. 753: *Cowcraft* v. *Gibbs*, 5 T. R. 19: *Attorney-General* v. *Rogers*, *supra*.

(*q*) *Attorney-General* v. *Rogers*, *supra*.

(*r*) *Lord Salisbury* v. *Purcell*, 6 Taunt. 327.

(*s*) *Goodtitle d. Alexander* v. *Clayton*, Burr. 2224: *Wright d. Clymer* v. *Littler*, Id. 1244; 1 W. Bl. 542, *S. C.* See *Smith* v. *Dormer* v. *Parkhurst*, 2 Str. 1166: *Cook* v. *Appleby*, 4 P. & D. 538; 9 Dowl. 88: *Doe Cassne* v. *Cassne*, 1 Q. B. 485: *Gilbert* v. *Rose*, 7 M. & W. 102.

(*t*) *Parry* v. *Duncan*, 7 Bing. 363; 5 M. & P. 19, *S. C.*; *ante*, 308.

ante, 896, 898. The execution of a writ of trial may also be set aside, and a new trial granted thereon, for similar causes. As to this, see *ante*, *Vol.* 1, 416. And as to when a new trial will be granted for a defect in the writ of trial, &c., see *ante*, *Vol.* 1, 414, 415.

After feigned issue.

After a Feigned Issue.]—As to this, see *Vol.* 1, 811.

After motion in arrest of judgment.

After Motion in Arrest of Judgment, Writ of Error, &c.]—A new trial cannot in general be moved for, even within the four days, if a motion in arrest of judgment has been made previously, and has failed: for by moving in arrest of judgment the party affirms the verdict (*u*); and the usual and proper course is, in cases where there may be a ground for moving in arrest of judgment, to move, at the time of moving for a new trial, in arrest of judgment also (*v*). It should seem, indeed, that the practice requiring the motion for a new trial to be made before that in arrest of judgment, extends only to cases where the party has knowledge of the fact at the time of moving in arrest of judgment; and, therefore, a new trial was granted after such motion, on an affidavit that the jury drew lots for their verdict (*x*). A cause went down to trial at the sittings in Hilary Term, with issues joined upon *non assumpsit*, and several special pleas, (each going to the whole cause of action): the plaintiffs had a verdict upon the first five issues, and the defendants upon the sixth and seventh: in Easter Term the plaintiffs obtained a rule *nisi* for a new trial, or for judgment *non obstante veredicto* on the sixth and seventh issues, which rule was made absolute in Trinity Term, as to the latter alternative: it was held, that it was too late for the defendants then to move for a new trial, as for a verdict against evidence (*y*).

After error, &c. brought.

The motion cannot, in general, be made after error brought by the party making the application (*z*): nor, as we have seen, after a bill of exceptions has been tendered on the same point of law, unless the party consent to waive the bill of exceptions (*a*).

After a previous new trial.

After a previous new Trial.]—If the jury at the second trial find for the party against whom the former verdict was given, the Court, if the case be doubtful, or the second verdict do not accord with the justice of the case, may be induced, under circumstances, to grant a third trial. It is entirely in the discretion of the Court, however, to do so or not; for the losing party, in such a case, is not entitled to it by any rule or practice of the Court (*b*); and they have accordingly refused it where the second verdict was satisfactory (*b*). It is also in the discretion of the Court to grant a third trial after two concurring verdicts (*c*). But this is seldom done (*d*), and the

(*u*) Bright v. Page, 2 C. 189; 1 B. & P. 295; Samuel v. Bloxsy, 2 East, 221; Tidd, 9th ed. 871. Rex v. Hall, 1 Stark. N. P. C. 418. Rex v. Mawbey, 6 T. R. 619, where the rule was made absolute on the 2nd day. 1 & 2 Will. 4, c. 58, s. 2.

(*v*) Anon. 1 Salk. 402.

(*x*) Parker v. Arnold, 2 W. Bl. 788.

(*y*) Cowdroy v. Gibbons, 4 Burr. 2016; Gibson v. Blanchet, 3 Smith, N. R. 467, where the question decided by the verdict was almost a question of law.

(*z*) See Parker v. Steele, 3 Bing. N. C. 882.

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Court have refused to grant it, after a new trial for excessive damages, and the same damages given by the second verdict (*e*). And the same where the two concurring verdicts were for the defendant, even although the judge before whom the second trial was had expressed himself dissatisfied with the verdict (*f*). But where, in such a case, the action was brought for a matter savouring of the realty, and the plaintiff would have been concluded by the verdict, the Court, under circumstances, set aside the last verdict, and ordered a nonsuit to be entered, leaving the plaintiff to contest the matter a third time, if he would (*g*).

2. THE APPLICATION, &c. FOR A NEW TRIAL.

To what court.

To what Court.]—The motion for a rule to shew cause why a verdict should not be set aside, and a new trial granted, is made in the court from which the *venire* issued, even in cases where the action is brought under the Lord Chancellor's order (*h*); but in the case of an issue out of Chancery (*i*) the motion must, in general, be made in the court which directed the issue. A motion for a new trial, in an action brought in the Common Pleas at Lancaster (*k*), or Durham (*l*), may be made in any of the courts at Westminster sitting in banco (*m*); but, as a matter of convenience, it should be made in the court in which the judge sits who presided at the trial (*n*).

Common Pleas at Lancaster or Durham.

By whom applied for.

By whom applied for.]—The motion may, in general, be made by the party who has been aggrieved by the first trial; but when the action is against several defendants, the application should, in general, it seems, be made on behalf of all of them; and, therefore, in trespass against several, where the verdict was contrary to evidence as to one of them, a new trial was refused (*o*). But where one defendant is found guilty and the other acquitted, it seems the former may have a new trial (*p*). Where, after a verdict for plaintiff in an action for a debt, the defendant became bankrupt and obtained his certificate, it was held, that he still had a sufficient interest in the question to enable him to move for a new trial, on the ground of there not having been any notice of trial (*q*).

Motion, in what time to be made.

Time for making the Motion.]—If the cause has been tried

(*e*) *Clerk* v. *Udall*, 2 Salk. 649: *Chambers* v. *Robinson*, 2 Str. 692.

(*f*) *Swinnerton* v. *Marquis of Stafford*, 3 Taunt. 232.

(*g*) *Lee* v. *Shore*, 2 D. & R. 196; 1 B. & C. 94, *S. C.*

(*h*) *Carstairs* v. *Stein*, 4 M. & Sel. 192; Tidd, 9th ed., 913.

(*i*) *Ante*, Vol. 1, 811. But since the 8 & 9 Vict. c. 109, s. 19, the Court generally orders a writ of summons to be issued according to that act, and not a feigned issue.

(*k*) 4 & 5 W. 4, c. 62.

(*l*) 2 & 3 Vict. c. 16, s. 23.

(*m*) The acts apply only to verdicts or nonsuits, and not to awards: *Smithurst* v. *Taylor*, 1 Dowl. & L. 375; 13 Law J., N. S., 38, Exch., *S. C.*: *Plumley* v. *Isherwood*, 12 M. & W. 199; 13 Law N. S., 38, Exch., *S. C.* A recognizance given in pursuance of the 4 & 5 W. c. 62, s. 27, is satisfied by obtaining a rule *nisi* for a new trial, though [illegible] afterwards discharged: *Howard* v. [illegible] moved, 13 Law J., N. S., 205, Q. B.

(*n*) *Smithurst* v. *Taylor*, *Plumley* v. *Isherwood*, *supra*: *Foster* v. *Jolly*, 1 C. M., & R. 703.

(*o*) *Sir Charles Barrington's case*, 3 Salk. 362.

(*p*) *Green* v. *Elgie*, 1 Jur. 187, *per* Denman, C. J., &c. And see *R.* v. [illegible], 6 T. R. 638: *Cooper* v. *Smith*, 4 Taunt. 802; *Parker* v. *Godin*, 2 Str. 814: *Anon.* v. *Sparke*, 12 Mod. 275.

(*q*) *Shepherd* v. *Thompson*, 9 M. & W. 110.

ante, 896, 898. The execution of a writ of trial may also be set aside, and a new trial granted thereon, for similar causes. As to this, see *ante*, *Vol.* 1, 416. And as to when a new trial will be granted for a defect in the writ of trial, &c., see *ante*, *Vol.* 1, 414, 415.

After feigned issue.

After a Feigned Issue.]—As to this, see *Vol.* 1, 811.

After motion in arrest of judgment.

After Motion in Arrest of Judgment, Writ of Error, &c.]—A new trial cannot in general be moved for, even within the four days, if a motion in arrest of judgment has been made previously, and has failed: for by moving in arrest of judgment the party affirms the verdict (*u*); and the usual and proper course is, in cases where there may be a ground for moving in arrest of judgment, to move, at the time of moving for a new trial, in arrest of judgment also (*u*). It should seem, indeed, that the practice requiring the motion for a new trial to be made before that in arrest of judgment, extends only to cases where the party has knowledge of the fact at the time of moving in arrest of judgment; and, therefore, a new trial was granted after such motion, on an affidavit that the jury drew lots for their verdict (*x*). A cause went down to trial at the sittings after Hilary Term, with issues joined upon *non assumpsit*, and six special pleas, (each going to the whole cause of action): the plaintiffs had a verdict upon the first five issues, and the defendants upon the sixth and seventh: in Easter Term the plaintiffs obtained a rule *nisi* for a new trial, or for judgment *non obstante veredicto* on the sixth and seventh issues, which rule was made absolute in Trinity Term, as to the latter alternative: it was held, that it was too late for the defendants then to move for a new trial, as for a verdict against evidence (*y*).

After error, &c. brought.

The motion cannot, in general, be made after error brought by the party making the application (*z*): nor, as we have seen, after a bill of exceptions has been tendered on the same point of law, unless the party consent to waive the bill of exceptions (*a*).

After a previous new trial.

After a previous new Trial.]—If the jury at the second trial find for the party against whom the former verdict was given, the Court, if the case be doubtful, or the second verdict do not accord with the justice of the case, may be induced, under circumstances, to grant a third trial. It is entirely in the discretion of the Court, however, to do so or not; for the losing party, in such a case, is not entitled to it by any rule or practice of the Court (*b*); and they have accordingly refused it where the second verdict was satisfactory (*b*). It is also in the discretion of the Court to grant a third trial after two concurring verdicts (*c*).. But this is seldom done (*d*), and the

(*u*) *Philpot* v. *Page*, 4 B. & C. 160; 6 D. & R. 281, S. C.; *Tubervil* v. *Stamp*, 2 Salk. 647.

(*x*) Bull. N. P. 326; Tidd, 913.

(*y*) *Price* v. *Reid*, 6 Scott, N. R., 1010.

(*z*) *Bennett* v. *Hurst*, Tidd, 913: when it may, see 1 B. & P. 109, n.

(*a*) *Ante*, 1334.

(*b*) *Parker* v. *Ansell*, 2 W. Bl. 963.

(*c*) *Goodwin* v. *Gibbons*, 4 Burr. 2101: *Gibson* v. *Musket*, 3 Scott, N. R., 427, where the question decided by the verdict was almost a question of law.

(*d*) See *Foster* v. *Steele*, 3 Bing. N. C. 892.

PART V. Court have refused to grant it, after a new trial for excessive damages, and the same damages given by the second verdict (*e*). And the same where the two concurring verdicts were for the defendant, even although the judge before whom the second trial was had expressed himself dissatisfied with the verdict (*f*). But where, in such a case, the action was brought for a matter savouring of the realty, and the plaintiff would have been concluded by the verdict, the Court, under circumstances, set aside the last verdict, and ordered a nonsuit to be entered, leaving the plaintiff to contest the matter a third time, if he would (*g*).

2. THE APPLICATION, &c. FOR A NEW TRIAL.

To what court.

To what Court.]—The motion for a rule to shew cause why a verdict should not be set aside, and a new trial granted, is made in the court from which the *venire* issued, even in cases where the action is brought under the Lord Chancellor's order (*h*); but in the case of an issue out of Chancery (*i*), the motion must, in general, be made in the court which directed the issue.

Common Pleas at Lancaster or Durham.

A motion for a new trial, in an action brought in the Common Pleas at Lancaster (*k*), or Durham (*l*), may be made in any of the courts at Westminster sitting in banco (*m*); but, as a matter of convenience, it should be made in the court in which the judge sits who presided at the trial (*n*).

By whom applied for.

By whom applied for.]—The motion may, in general, be made by the party who has been aggrieved by the first trial; but when the action is against several defendants, the application should, in general, it seems, be made on behalf of all of them; and, therefore, in trespass against several, where the verdict was contrary to evidence as to one of them, a new trial was refused (*o*). But where one defendant is found guilty, and the other acquitted, it seems the former may have a new trial (*p*). Where, after a verdict for plaintiff in an action for a debt, the defendant became bankrupt and obtained his certificate, it was held, that he still had a sufficient interest in the question to enable him to move for a new trial, on the ground of there not having been any notice of trial (*q*).

Motion, in what time to be made.

Time for making the Motion.]—If the cause has been tried in

(*e*) *Clark* v. *Udall*, 2 Salk. 649: *Chambers* v. *Robinson*, 2 Str. 692.

(*f*) *Swinnerton* v. *Marquis of Stafford*, 3 Taunt. 232.

(*g*) *Lee* v. *Shore*, 2 D. & R. 198; 1 B. & C. 94, *S. C.*

(*h*) *Carstairs* v. *Stein*, 4 M. & Sel. 192; Tidd, 9th ed., 913.

(*i*) *Ante*, Vol. 1, 811. But since the 8 & 9 Vict. c. 109, s. 19, the Court generally orders a writ of summons to be issued according to that act, and not a feigned issue.

(*k*) 4 & 5 W. 4, c. 62.

(*l*) 2 & 3 Vict. c. 16, s. 23.

(*m*) The acts apply only to verdicts or nonsuits, and not to awards: *Smithurst* v. *Taylor*, 1 Dowl. & L. 375; 13 Law J., N. S., 38, Exch., *S. C.*: *Plumley* v. *Isherwood*, 12 M. & W. 190; 13 Law J., N. S., 38, Exch., *S. C.* A recognizance given in pursuance of the 4 & 5 W. 4, c. 62, s. 27, is satisfied by obtaining a rule *nisi* for a new trial, though it is afterwards discharged: *Haworth* v. *Ormerod*, 13 Law J., N. S., 208, Q. B.

(*n*) *Smithurst* v. *Taylor*, *Plumley* v. *Isherwood*, *supra*; *Foster* v. *Jolly*, 1 C., M., & R. 703.

(*o*) *Sir Charles Berrington's case*, 3 Salk. 362.

(*p*) *Green* v. *Elgie*, 1 Jur. 127, per *Denman*, C. J., &c. And see *R.* v. *Mawby*, 6 T. R. 638: *Cooper* v. *Smith*, 4 Taunt. 802; *Parker* v. *Godin*, 2 Str. 814: *Bond* v. *Sparke*, 12 Mod. 275.

(*q*) *Shepherd* v. *Thompson*, 9 M. & W. 110.

term, the motion for the rule *nisi* must be made within four days after the *distringas* or *habeas corpora* is returnable; or if the cause be tried in vacation, then within the first four days of the term next after the trial (*s*). The four days are reckoned inclusive of the first and last day, and Sunday, though not the last, is not reckoned as one (*t*), nor is any other day on which the Court do not sit (*u*). If the cause be tried in term, a new trial may be moved for at any time within four days after the return of the *distringas* or *habeas corpora*, although more than four days have elapsed since the trial (*x*). If there be not so many as four days in the term after the return of the *distringas* or *habeas corpora*, then it would seem that the motion must be made on or before the last day of the term (*y*). Where the finding on one issue is for the plaintiff, and on the other for the defendant, and cross rules are sought for to set aside the verdicts on such findings, each party must move within the first four days of term (*z*). The motion cannot be made after the four days, though the parties consent thereto (*a*); and the practice as to moving within this time is most rigidly adhered to (*b*). But, under particular circumstances, the Court will sometimes allow the motion to be made after this time (*c*), and they may, in their discretion, allow it to be made at any time before judgment has been actually signed (*d*). So, it seems, the Court will grant a rule after the above time, where the motion has been delayed through mistake, and the case is one of importance, or one by which the title to property would be bound (*e*). So, perhaps, they would do so, if the foundation for the motion be a fact not disclosed to the party till after that time (*f*). Thus, where a new trial was moved for by mistake in the Queen's Bench instead of the Exchequer, and the mistake was not discovered until after the first four days of the term had elapsed, the Court of Exchequer allowed the motion to stand good as of that court (*g*). The Court have refused to do so, after two terms had elapsed from the time of the trial, although upon a suggestion of fraud (*h*). When counsel cannot be heard on all the motions for new trials within the first four days of Michaelmas and Easter Terms, such motions as cannot be heard are allowed to be inserted in a list, and heard within the fifth and successive days (*i*). But, in ge-

(*s*) *Kirkham* v. *Marter*, 2 B. & Ald. 613: 1 Chit. Rep. 382: *Mason* v. *Clarke*, 1 C. & J. 411; 1 Dowl. 288, *S. C.*: *Birt* v. *Barlow*, 1 Doug. 171: *Res* v. *Holt*, 5 T. R. 436: *Lee* v. *Carlisle*, 3 Id. 642: *Cheese* v. *Scales*, 2 Dowl., N. S., 436; 10 M. & W. 488; 12 Law J., N. S., 13, Exch.; *S. C.* Tidd's New Prac. 542.

(*t*) Tidd, 9th ed., 912: *Kirkham* v. *Marter*, 1 Chit. Rep. 382; 2 B. & Ald. 613, *S. C.*: *Chapman* v. *Eley*, 4 M. & G. 631; 2 Dowl., N. S., 93; 5 Scott, N. R., 169, *S. C.*

(*u*) *Bromley* v. *Foster*, 1 Chit. Rep. 562.

(*x*) *Mason* v. *Clarke*, 1 Dowl. 288; 1 C. & J. 411, *S. C.*: *Ames* v. *Lettice*, 6 M. & W. 216: *Perkins* v. *Vaughan*, 1 Dowl., N. S., 700: *Carpenter* v. *Lee*, Id. 706.

(*y*) See *Kirkham* v. *Marter*, 2 B. & Ald. 613; 1 Chit. Rep. 382, *S. C.*

(*z*) *Deacon* v. *Stodhart*, 2 M. & G. 317; 2 Scott, N. R., 557, *S. C.*

(*a*) *Kirkham* v. *Marter*, 1 Chit. Rep. 382: *Res* v. *Holt*, 5 T. R. 436.

(*b*) *Langon* v. *Kelly*, 8 Law J., 40, Q. B.

(*c*) *Birt* v. *Barlow*, 1 Doug. 171. In *Thomas* v. *Edwards*, 2 Dowl. 664; 1 C., M., & R. 362, *S. C.*, the Court granted further time where the under-sheriff refused to furnish his notes of the trial. And see *Williams* v. *Andrews*, 9 Dowl. 122.

(*d*) *Res* v. *Gough*, 2 Doug. 797. And see *Res* v. *Holt*, 5 T. R. 436. And see as to ejectments, 1 G. 4, c. 87, s. 3, *ante*, 977.

(*e*) *Price* v. *Duggan*, 2 M. & G. 641; 3 Scott, N. R., 47, *S. C.*

(*f*) *Willis* v. *Bennett*, Barnes, 443.

(*g*) *Piggott* v. *Kemp*, 2 Dowl. 20.

(*h*) *Pilmore* v. *Hood*, 8 Scott, 180.

(*i*) 3 C. & P. 111 a; Tidd's Sup. 159; Chit. Sum. Prac. 189.

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neral, if there is not time to hear a motion for a new trial on the fourth day of Hilary or Trinity Term, the Court will not hear it afterwards; therefore, care should be taken in these terms to move for a new trial as soon as possible (*l*). When a motion for a new trial has been inserted in a list as above, notice ought to be given to the other side, otherwise the expense of intermediate proceedings—as of signing judgment, if judgment should be signed—will fall on the party delaying to move (*m*).

After certificate for speedy execution.

Where the judge at the trial grants a certificate for speedy execution, under the 1 *W.* 4, *c.* 7, *s.* 2, the issuing or levying of the execution does not prevent the defendant's afterwards moving within the usual time for a new trial, see *Vol.* 1, 459.

After a trial or inquiry before the sheriff.

As to the time for moving for a new trial in causes tried before the sheriff, see *Vol.* 1, 418. As to the time for applying to set aside the execution of a writ of inquiry, and for a fresh writ, see *ante*, 898, 899.

Affidavits on.

Affidavits on.]—In some cases, the motion for a new trial is made on an affidavit on some ground that cannot be collected from the judge's notes. Such affidavit must, in support of the motion, be sworn within the four days above mentioned, unless the special permission of the Court to the contrary be obtained (*n*); and this is the case, though the motion is made after the four days, in consequence of the number of motions to be made (*o*). The affidavits must in all cases be made before obtaining the rule *nisi;* and this is strictly adhered to. As a general rule, the Court will not receive affidavits of witnesses examined at the trial (*p*). As to when the Court will not receive affidavits made by any of the jurors, see *ante*, 1327, 1328. The judge's notes are conclusive as to the evidence, &c., and the Court will not allow them to be contradicted, even upon affidavit (*q*). As to the affidavits and sheriff's notes to be produced on a motion for a new trial, under a writ of trial before the sheriff, &c., see *Vol.* 1, 416.

The application for.

The Motion itself, and Proceedings upon it.—Costs, &c.]—*The application is generally made merely from the notes of the counsel taken on the trial at Nisi Prius or the assizes, and sometimes the Court will not grant a rule nisi, until after they have seen the notes of the judge before whom the cause was tried. In cases where the ground for the application cannot be collected from the judge's notes, it should be supported by affidavits; and as to which, see supra.* It may be here mentioned, that the rule may be obtained by a different attorney from the one who has been engaged in the action for the party, without an order to change the attorney (*r*).

Rule nisi.

The rule is, in the first instance, only a rule nisi. The oppo-

(*l*) 3 C. & P. 111 *a*; R. E., 2 G. 4, C. P.

(*m*) *Lester* v. *Lazarus*, 4 Dowl. 444: *Doe Duncan* v. *Edwards*, 7 Dowl. 547: *Emblin* v. *Dartnell*, 1 Dowl. & L. 1010; 13 Law J., N. S., 265, Exch.; 12 M. & W. 880, *S. C.*

(*n*) R. T., 5 G. 4; 4 D. & R. 836; 3 B. & C. 176: *Gibbs* v. *Tunnaley*, 1 Com. B. 640.

(*o*) *Williams* v. *Mortimer*, 11 M. & W. 164; 2 Dowl., N. S., 583, *S. C.*

(*p*) *Phillips* v. *Hatfield*, 10 Law J., N. S., 33, Exch.; 8 Dowl. 882, *S. C.*: *Edgar* v. *Knapp*, 7 Jur. 883, C. P., where an affidavit made by a witness was received.

(*q*) *R.* v. *Grant*, 3 Nev. & M. 106. And see *Gibbs* v. *Pike*, 1 Dowl., N. S., 409; 9 M. & W. 351, *S. C.*

(*r*) *Doe* v. *Bransom*, 6 Dowl. 490.

site party cannot shew cause against it in the first instance, even though he has given notice that he will do so (*s*). The Court will, on the subsequent argument of the rule, in general, only act upon the points on which the rule *nisi* was granted (*t*); therefore, *all the points relied upon should be brought forward on moving for this rule. If there be ground for a new trial, and for an arrest of judgment, the application should be in the alternative, viz. for a new trial or an arrest of judgment* (*u*). Inasmuch as the granting of the rule *nisi* suspends the judgment and execution, and occasions an accumulation of the heavier description of business, the Court (unless the judge who tried the cause has expressed a strong opinion in favour of the application) will in the first instance examine the grounds of the motion, and refuse it, unless there is a probable ground to expect that the rule will ultimately be made absolute. If the ground of the application is an irregularity in the proceeding, or on account of surprise, or the absence of counsel or attorney, or other mere practical point, they will direct that the rule *nisi* shall not be placed in the new trial paper, but come on for discussion as a common rule. But where the case requires the report of the judge who tried the cause to be read, then the rule *nisi* will come on in the new trial paper, on particular days set apart for discussion of that description of business (*x*).

When not put in new trial paper.

When the Court have granted the rule *nisi, draw it up* (*y*), *and serve a copy of it upon the attorney or agent of the opposite party, in the ordinary way. Then, before the time of shewing cause, if the action were tried in London or Middlesex, deliver a note in writing* (*z*) *at the house or chambers of the Lord Chief Justice, or Lord Chief Baron, according to the court in which the action is, "specifying the name of the cause, and the time and place where the same was tried, together with the nature of the motion"* (*a*); *and if tried by any of the puisne judges, intimation should be given to his clerk, of the rule nisi having been granted, at least the evening before the case is to be argued. If the cause were tried in any other county, by a judge of the same court in which the action is, mention to his clerk that the rule* nisi *has been granted, and the judge will have his notes and minutes of evidence in court when the case is called on. If tried by a judge of another court, serve a copy of the rule nisi on his clerk, who will thereupon deliver the judge's report of the trial to the junior puisne judge of the court in which the action is pending. Deliver to your counsel one of the briefs in the original cause, together with such further instructions and observations as you may think fit.* As to the course to be pursued on a motion for a rule for a new trial on a writ of trial, see *Vol.* 1, 418.

Service of rule, how drawn up and brought on for argument, &c.

The Court will not, in general, amend the rule *nisi* (*b*), nor will they allow another rule to be moved for upon another point, omitted in the first motion, to come on at the same

Amendment, &c. of rule.

(*s*) *Doe* v. *Smith*, 9 Ad. & E. 255.
(*t*) See *Courne* v. *Garment*, 1 Bing., N. S., 330: *Robertson* v. *Barker*, 2 Dowl. 39; *post*, 1341, 1342.
(*u*) *Ante*, 1337.
(*x*) Chit. Sum. Prac. 122.
(*y*) See a form of rule *nisi*, stating the grounds of motion, Chit. Forms, 612. In the Queen's Bench and Exchequer, the rule is not drawn up upon reading the record; but in the Court of Common Pleas it is: see *Beaty* v. *Warren*, 4 Scott, N. R., 725, *post*, 1342.
(*z*) See form, Chit. Forms, 613.
(*a*) R. M., 40 G. 3, Q. B.
(*b*) *Lopes* v. *De Tastet*, 8 Taunt. 712.

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time (*c*). It may be added, that though the rule be for a nonsuit, yet the Court may remodel it, and grant a new trial instead (*d*).

Death of plaintiff after rule nisi.

Where, after a verdict for the plaintiff, and pending a rule for a new trial, the plaintiff died, it was held, that no cause could be shewn against the rule until there was a personal representative (*e*). Cause cannot, in such a case, be shewn on behalf of the attorney who claims a lien on the verdict for his costs (*e*).

The argument, &c.

The rule will be called on for argument in the order in which it stands in the new trial paper. The argument may take place on the last day of term (*f*). It is no ground for taking a case out of the paper, and bringing it on as a motion, that several of the witnesses are infirm, and of an advanced age (*g*). When the case is called, the judge who tried the cause will read his report of the trial, or the junior puisne judge, if it were tried by a judge of another court, will read his report of the trial; after which the counsel for the party opposing the rule shew cause against it; the counsel for the party who moved for the rule *nisi* speak in support of it, and the Court then state their opinion, and either discharge the rule or make it absolute. The Court will look only to the judge's report for the evidence given at the trial, and the manner in which the judge summed up the case, (if that be stated in it), and will not attend to any contrary statement of them by counsel, or even by affidavit (*h*). The Court of Queen's Bench and Exchequer (*i*) may look at the record in discussing a motion for a new trial, although in these courts the rule is not drawn up on reading it; in the Common Pleas, the rule is drawn up on reading the record (*k*). If the rule was obtained for a new trial or in arrest of judgment, the Court will first dispose of that branch of the rule which applies to a new trial (*l*). It may be added, that though the motion be for a nonsuit, yet the Court may remodel the rule, and grant a new trial instead of allowing a nonsuit to be entered (*m*).

Terms imposed, if rule made absolute.

If the Court make the rule absolute, they may do so upon terms, if necessary, unless, perhaps, where the new trial is a matter of right, as in the case of a misdirection of the judge (*n*); such as that witnesses infirm or going beyond sea may be examined upon interrogatories, or that their evidence may be read from the judge's notes of the first trial (*o*); that certain deeds, books, papers, &c., may be produced at the trial; that certain facts, not intended to be litigated, may be admitted (*p*);

(*c*) *Robertson* v. *Barker*, 2 Dowl. 39. And see *Cowne* v. *Garment*, 1 Bing., N. S., 320.

(*d*) *Higgins* v. *Nichols*, 7 Dowl. 551; *Doe Wyatt* v. *Staff*, 5 Bing., N. S., 494. And see *Bate* v. *Kinsey*, 1 C., M. & R. 38.

(*e*) *Sloman* v. *Allen*, 1 M. & G. 96. See *Doe Cozens* v. *Cozens*, 1 Q. B. 426, *ante*, 960, 1071.

(*f*) *Lambert* v. *Heath*, 15 Law J., N. S., 296, Exch.

(*g*) *Anon.*, 13 Law J., N. S., Q. B., 80; 1 Dowl. & L. 725, *S. C.*

(*h*) *Rex* v. *Grant*, 3 Nev. & M. 109, per *Denman*, C. J. See *Gibbs* v. *Pike*, 1 Dowl., N. S., 409; 9 M. & W. 351, *S. C.*

(*i*) *Angel* v. *Ibler*, 5 M. & W. 600; 7 Dowl. 846, *S. C.*

(*k*) *Sherry* v. *Oke*, 3 Dowl. 349; 1 H. & W. 119, *S. C.* And see *Platt* v. *Hall*, 2 M. & W. 391.

(*l*) *Rose* v. *Groves*, 1 Dowl. & L. 61, C. P.

(*m*) *Higgins* v. *Nichols*, *Doe Wyatt* v. *Staff*, *Bate* v. *Kinsey*, *supra*.

(*n*) See *Hewetsons* v. *Bourne*, 8 M. & W. 215, n.: *Earl Harborough* v. *Shardlow*, Id: *Mahony* v. *Frasi*, 1 C. & M. 325; 1 Dowl. 70, *S. C.*

(*o*) *Anon.*, 2 Chit. 425: *Doe Gilbert* v. *Rose*, 7 M. & W. 102: *Anon.*, 13 Law J., N. S., 80, Q. B.; 1 Dowl. & L. 725, B. C.

(*p*) See *Thwaites* v. *Swinsbury*, 7 Bing. 487.

or that the party may make discovery of certain facts upon oath, in order to prevent the necessity of having recourse to a court of equity for it. Where an action was carried on by a bankrupt for the benefit of his creditors, the Court refused a new trial, unless the assignees would consent to be bound by the event of the action, and to be responsible for the costs (*r*). Where the plaintiff has died after verdict, the Court may grant a new trial, on the application of the defendant, on the same grounds on which a new trial may be granted in other cases, and will, in such case, impose terms on the defendant to prevent his taking advantage of the plaintiff's death (*s*). In an ejectment, where the Court granted a new trial, upon the ground that it was unexpectedly tried as an undefended cause, the Court refused to require, as a condition, the payment of costs as between attorney and client, but imposed as a condition that the defendant should not set up an outstanding term (*t*). Where a rule *nisi* for a new trial is granted on the terms of bringing the amount of the verdict into Court, the money must be brought in before the rule *nisi* is drawn up (*u*). It may be added, that it is the practice to allow amendments to be made, on terms, after the trial, where the justice of the case requires it (*x*).

Costs on.

Costs.]—It is entirely in the discretion of the Court whether they will oblige the party applying for a new trial to pay the costs of the former trial. If they do, they will not, in general, name in the rule a particular time for the payment of these costs (*y*); the rule generally is for the new trial on payment of the costs. They will grant the new trial without costs, where the plaintiff submits to an erroneous nonsuit (*z*), or where the new trial is rendered necessary by the misdirection or other mistake of the judge, or the like (*a*). In such cases, the costs of the first trial will not be given, whatever may be the event of the second (*b*), except under special circumstances (*c*). And, where the defendant had a verdict on one of two issues in a cause, and the plaintiff on the other issue, and the defendant obtained a rule for a new trial on the ground of misdirection, whereupon the plaintiff discontinued; it was held, that the defendant was not entitled to the costs of the trial (*d*). Where the new trial is granted for the misconduct of the jury, as where the verdict is perverse or the like, the costs are usually directed to abide the event of the second trial (*e*). If granted, because the verdict was contrary to law or to the opinion or direction of the

(*r*) *Noble* v. *Adams*, 7 Taunt. 59.

(*s*) *Griffiths* v. *Williams*, 1 C. & J. 47; and a case in Queen's Bench there cited.

(*t*) *Doe Cooling* v. *Appleby*, 4 P. & D. 538. See *Doe Cozens* v. *Cozens*, 1 Q. B. 426.

(*u*) *Clare* v. *Frestal*, 2 Dowl. 617.

(*x*) *Tomlinson* v. *Blacksmith*, 7 T. R. 132; *Wilder* v. *Handy*, 2 Str. 1151: *Marshall* v. *Rigge*, Id. 1162: *Dennis* v. *Edwards*, Comb. 4: *Doe Bacon* v. *Brydges*, 1 Dowl. & L. 964. When not; see *Price* v. *Severn*, 7 Bing. 402; 5 Moo. & P. 250; 1 Dowl. 215, *S. C.*

(*y*) *Bland* v. *Warren*, 6 Dowl. 21.

(*z*) *Parkins* v. *Panley*, 1 W. Bla. 670: *Burrell* v. *Hogg*, 3 Wils. 146.

(*a*) *Vale* v. *Bayls*, Cowp. 297: *Harris* v. *Butterley*, 2 Id. 485: *Jackson* v. *Duchaire*, 3 T. R. 553: *Goodright* v. *Saul*, 4 Id. 359. See *Doe Gilbert* v. *Ross*, 7 M. & W. 102: *Edwards* v. *Scott*, 2 Scott, N. R., 966.

(*b*) *Lord* v. *Wardle*, 3 Bing., N. S., 680.

(*c*) Id.: *Edwards* v. *Scott*, 2 Scott, N. R., 966.

(*d*) *Earl of Macclesfield* v. *Bradley*, 7 M. & W. 570; 10 Law J., N. S., 182, Exch., *S. C.*

(*e*) *Hale* v. *Cove*, 1 Str. 642: *Hodgson* v. *Barvis*, 2 Chit. 268: *Shillitoe* v. *Claridge*, Id. 425. It may be added, that if, from a failure, or from the misconduct of a jury, the parties have gone to a trial a second time, no costs will be awarded in respect of the first trial: *Brown* v. *Clarke*, 12 M. & W. 25; 13 Law J., N. S., 36, Exch, *S. C.*

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and costs in the cause; the costs of the pleadings, for instance, are never allowed. Costs of obtaining admission of documents, and of giving notice to produce documents at the first trial of an action, are costs in the cause; but costs of preparing briefs may be allowed as costs of the trial, when the necessity for doing so is shewn (*d*). The costs incurred by a cause being made a *remanet*, are costs in the cause, and, therefore, not chargeable, upon a defendant obtaining a new trial on payment of costs (*e*). In an action upon a statute which gives double costs, if a new trial be granted on payment of the costs of a first trial generally, it would mean the double costs (*f*). Where there have been two trials, and the successful party is entitled to the costs of the second trial only, the Master, in taxing costs, may allow fees on the second trial with reference to those given on the first (*g*). Costs of resisting an unsuccessful application for a new trial, are costs in the cause (*h*).

Proceedings on rule absolute, and mode of recovering costs.

Proceedings on Rule, &c.]—*If the rule be made absolute, draw it up without delay with one of the Masters* (*i*), *and serve a copy on the opposite attorney or agent. If made absolute upon payment of costs, get an appointment on the rule from the Master, serve a copy of the rule and appointment on the opposite attorney, get the costs taxed, and pay them without delay; otherwise the opposite party may move to rescind the rule* (*j*). *So, he may move to rescind it, if after the costs are taxed and demanded, the opposite party does not pay them in a reasonable time. A rule for this purpose is absolute in the first instance in Queen's Bench* (*k*). *In the Exchequer it is a rule nisi, which makes itself absolute if cause is not shewn in a limited time* (*l*). In the Common Pleas it seems to be a rule *nisi* (*m*). If the motion is not made until the lapse of more than a year after the rule for the new trial is obtained, it seems that a notice of the motion to discharge it is necessary (*m*). Where a plaintiff, after setting aside a nonsuit upon payment of costs, proceeded to a second trial without paying these costs, and obtained a verdict, the Court set it aside, and gave the defendant leave to sign his judgment in the original action, unless the costs were paid in ten days (*n*). On the other hand, when a new trial is granted to the defendant on payment of costs, the plaintiff should not carry down the cause for trial until they are paid; for if he do so, he will, it seems, have no remedy for the costs of the former trial, even though he should again obtain a verdict (*o*).

On rule discharged.

If the rule be discharged, sign judgment and tax your costs as in ordinary cases. The costs of opposing the rule will be costs in the cause (*p*).

(*d*) *Lord* v. *Wardle*, 6 Dowl. 174.
(*e*) *Bentley* v. *Carver*, 15 Law J., N. S., 173, C. P.; overruling *Robinson* v. *Day*, 5 B. & Ad. 814, *contra*.
(*f*) *Semble*, *Loader* v. *Thomas*, 1 C. & J. 54: see now as to double costs in all cases, the 5 & 6 Vict. c. 97, s. 6, *post*, 1383.
(*g*) *Wilkinson* v. *Malin*, 2 Dowl. 65. See *Lord* v. *Wardle*, 6 Dowl. 174.
(*h*) *Eyre* v. *Thorp*, 6 Dowl. 768: *Dellasor* v. *Towne*, 1 Q. B. 333; 4 P. & D. 644, *S. C.*
(*i*) See *Lopez* v. *De Tastet*, 8 Taunt. 712; 7 Moore, 120, *S. C.*
(*j*) See *Chase* v. *Goble*, 4 Scott, N. R., 317; 3 M. & G. 635: *Farrer* v. *De Flinn*, Jur. 779, B. C.: *Rust of Hurlbrough* v. *Sheridine*, 8 M. & W. 265.
(*k*) *Champion* v. *Griffiths*, 1 Dowl., N. S. 319, B. C. See *Selby* v. *Langford*, 13 M. & W. 151; 2 Dowl & L. 250, *S. C.*
(*l*) *Phillips* v. *Warren*, 15 Law J., N. S., 3, Exch.; 3 Dowl. & L. 301, *S. C.*
(*m*) *Lord* v. *Wardle*, 15 Law J., N. S. 250, C. P.
(*n*) *Nicholls* v. *Bacon*, 13 East, 188. See Hullock, 401, *S. C.*
(*o*) *Doe Davie* v. *Haddon*, Tidd, 9th ed. 915: *Farrer* v. *De Flinn*, 8 Jur. 779, *S. C.*
(*p*) *Ante*, 1346.

on which the new trial is granted (*s*). Where, therefore, on the trial of a right of way in one count claimed as a public, and in another as a private way, a general verdict was found for the defendants, and the Court afterwards directed a new trial, expressly by the rule confining it to the right claimed in the second count, but in the rule no mention was made of costs, nor any reservation of defendant's verdict on the first count; the Court held that the defendants were nevertheless entitled to the costs of the issues found for them on the first trial, and not in contest on the second, they having succeeded on such second trial (*t*).

Where costs ordered to abide event.

Where the costs are ordered to abide the event of the second trial, if the same party succeed on both trials, he shall have the costs of the first as well as the second (*u*); but otherwise the costs of the first shall not be allowed (*x*). And where the defendant obtained a rule for a new trial, the costs to abide the event, and the plaintiff then discontinued the action, it was held that the defendant was not entitled to the costs of the trial (*y*). Where, however, the second trial was granted on the application of the plaintiff on account of the smallness of the damages, and the costs were to abide the event, and the plaintiff at the second trial obtained only the same amount of damages; he was held entitled to the costs of the second trial only (*z*). By "the event of the second trial" is meant the ultimate event of the cause; and, therefore, if the verdict at the second trial be set aside, and on the third trial the ultimate event be the same as on the first trial, the party will be entitled to the costs of the first trial (*a*). After a verdict for a defendant, the Court made a rule absolute for a new trial, and ordered that the costs of the former trial should abide the event of such new trial: the record was carried down to the spring assizes following, and made a *remanet:* it was tried a second time at the summer assizes, when a verdict was again found for the defendant: the Court afterwards ordered that the verdict should be set aside, and a new trial had between the parties, upon payment of the costs of the last trial, and that the costs of the first trial should abide the event of such new trial: upon the third trial a verdict was found for the plaintiff: and the Court held, that the plaintiff was entitled to the costs occasioned by the cause having been made a *remanet* at the assizes next following the term when the first rule was made absolute for a new trial (*b*).

Where question of costs reserved till second trial.

Where the question of costs is reserved by the Court until after the second trial, it will then be entirely in their discretion, whether they will allow the costs of the first trial to the party who succeeds at the second, or not (*c*).

Amount of costs, &c.

Where a rule for a new trial has been obtained on payment of costs, there is a broad distinction between costs of the trial

(*s*) As to granting a new trial upon one of several issues, see *ante*, 1353.

(*t*) *Bower* v. *Hill*, 2 Scott, 535, 540; 5 Dowl. 183, S. C.: *Earl of Macclesfield* v. *Bradley*, *supra*, n. (*q*).

(*u*) *Treleaven* v. *Thomas*, 1 H. Bl. 641: *Cashan* v. *Fisk*, 2 C. & J. 126; Id. 128, n.: *Sherlock* v. *Barnes*, 8 Bing. 21.

(*x*) *Austen* v. *Gibbs*, 8 T. R. 619: *Chapman* v. *Partridge*, 2 N. R. 362: *Bird* v. *Appleton*, 1 East, 111: *Dodd* v. *Neal*, 2 C. & M. 225.

(*y*) *Howarth* v. *Samuel*, 1 B. & Ald. 566: *Jolliffe* v. *Mundy*, 8 Law J., 100, Exch.

(*z*) *Hudson* v. *Majoribanks*, 8 Moore, 440; 1 Bing. 383, S. C.

(*a*) *Meade* v. *Goddard*, 5 B. & Ald. 766.

(*b*) *Gibbons* v. *Phillips*, 8 B. & C. 437.

(*c*) See *Body* v. *Esdaile*, 3 Bing. 174.

CHAPTER XXVII.

VENIRE DE NOVO.

PART V.

When awarded.

THE *venire de novo* is the old common law mode of proceeding to a second trial, and differs materially from the granting a new trial, inasmuch as it is awarded for some defect appearing upon the face of the record (*a*), while a new trial is granted for matter entirely extrinsic. A *venire de novo* is not awarded for every defect appearing upon the face of the record, but for a defective finding in the verdict only (*b*). If a verdict be entered generally on all the counts or breaches in a declaration, and entire damages given, and one of the counts (*c*) or breaches (*d*) be bad, the Court will not arrest the judgment, but will award a *venire de novo*. So if the jury have found for the plaintiff, but neglected to assess the damages (*e*); or, if in an action on a bond, conditioned for the performance of covenants, &c. within the statute 8 & 9 *W.* 3, *c.* 11, *s.* 8, the jury do not assess damages for the breaches (*f*); or if a special verdict be so imperfect that the Court cannot give any judgment upon it (*g*), a *venire de novo* will be awarded. Where there were several pleas, and the jury found a verdict upon one of them only for the defendant, which afterwards was found to be bad, a court of error awarded a *venire de novo* (*h*). It cannot be awarded where general damages are assessed, upon a declaration containing a misjoinder of counts (*i*). Where, in an action on the case in the nature of a conspiracy, the plaintiff obtained judgment on a demurrer to a plea of justification, and the jury process was awarded *tam quam*, the jury having found a verdict for the defendants upon the general issue, it was held, that their neglect to assess damages for the plaintiff upon the demurrer was no ground for a *venire de novo*, as the Court would pronounce judgment upon the whole record (*k*). A *venire de*

(*a*) See *Gee* v. *Swann*, 9 M. & W. 635, per *Parke*, B.: *Lewis* v. *Witham*, 2 Str. 1185; 1 Wils. 55, *S. C.*: *Corner* v. *Showe*, 4 M. & W. 163.

(*b*) *Goodtitle* v. *Jones*, 7 T. R. 52: *Witham* v. *Lewis*, 1 Wils. 55. See *Rex* v. *Woodfull*, 5 Burr. 2661: *Holt* v. *Scholefield*, 6 T. R. 691: *Crowder* v. *Rooke*, 2 Wils. 144: *Hicks* v. *Keats*, 6 D. & R. 68; 4 B. & C. 69, *S. C.*: *Eichorn* v. *Lemaitre*, 2 Wils. 367.

(*c*) *Ayray* v. *Fearnsides*, 4 M. & W. 168; 6 Dowl. 654, *S. C.*: *Mubtin* v. *Dartnell*, 12 M. & W. 830; 1 Dowl. & L. 1010; 13 Law J., N. S., Exch. 255, *S. C.*: *Lewin* v. *Edwards*, 1 Dowl., N. S., 639; 9 M. & W. 720, *S. C.*: *ante*, 324. As to amending the verdict by the judge's notes, by confining the damages to the good counts, see *ante*, 450.

(*d*) *Gould* v. *Oliver*, 2 Scott, N. R., 241: *Leach* v. *Thomas*, 2 M. & W. 427; 5 Dowl. 612, *S. C.*: *Dadd* v. *Crease*, 2 Cr. & M. 233.

(*e*) *Grout* v. *Glasier*, 1 Dowl., N. S., 58: *Corner* v. *Showe*, 4 M. & W. 163; 6 Dowl. 688, *S. C.*: *Clement* v. *Lewis*, 3 Brod. & B. 297; 7 Moore, 200: 10 Price, 181, *S. C.*: *Eichorn* v. *Le Maitre*, 2 Wils. 367. See *Pim* v. *Reed*, 6 Scott, N. R., 1011. As to where the omission to assess damages can be supplied by a writ of inquiry, see *ante*, 711.

(*f*) *Hardy* v. *Burn*, 5 T. R. 636.

(*g*) *Tancred* v. *Christy*, 12 M. & W. 316: *R.* v. *Trafford*, 8 Bing. 204; 1 M. & Scott, 401; 2 C. & J. 265. See *Sandars* v. *Vanzelle*, 4 Q. B. 260; 2 G. & D. 244, *S.C.*, *ante*, 441.

(*h*) *Hicks* v. *Keats*, 6 D. & R. 68.

(*i*) *Corner* v. *Shawe*, 6 Dowl. 688; 4 M. & W. 163, *S. C.*

(*k*) *Gregory* v. *Brunswick* (*Duke of*), 1 Dowl. & L. 803; 13 Law J., N. S., C. P., 34; 1 Scott, N. R., 972, *S. C.*

novo is never awarded for a defect which can be amended (*l*). It may be granted on error out of a superior court, such as the Queen's Bench, Common Pleas, or Exchequer: thus, where on a bill of exceptions as to the admissibility of evidence, the evidence was held inadmissible, the Court awarded a *venire de novo* (*m*). And the same where there was a misdirection (*n*). But it cannot be granted by a court of error on a proceeding out of an inferior court (*o*).

An application for a *venire de novo* may be made by the plaintiff on a subsequent day, in the same term, after a rule for arresting the judgment has been made absolute (*p*). Time for applying for.

Where a *venire de novo* is awarded, the party succeeding at the second trial is not entitled to the costs of the first (*q*). And the Court have no power to award the costs of the first trial to either party, whatever may be the event of the second (*r*). Costs on.

(*l*) Where a verdict can be amended, see *ante*, 451.

(*m*) *Davies* v. *Pierce*, 2 T. R. 125.

(*n*) *Davies* v. *Lowndes*, 4 Bing. N. C. 478.

(*o*) *Trower* v. *Wall*, 2 Doug. 732, n.: 1 T. R. 151, *S. C.*: per *Coltman*, J., *Strother* v. *Hutchinson*, 4 Bing., N. C., 92. See *Davies* v. *Pierce*, 2 T. R. 125: *Rolse* v. *Rosewell*, 5 T. R. 540: *Hardy* v. *Bern*, 1 Id. 636: *Bishop* v. *Kaye*, 3 B. & Ald. 610.

(*p*) *Corner* v. *Shouse*, 4 M. & W. 163; 6 Dowl. 688, *S. C.*

(*q*) *Edwards* v. *Brown*, 1 C. & J. 354; 1 Tyr. 281; 1 Dowl. 282, *S. C.*: *Lickbarrow* v. *Mason*, 6 T. R. 131: *Bird* v. *Appleton*, 1 East, 111: *Dadd* v. *Crease*, 2 C. & M. 225: *Brown* v. *Clark*, 12 M. & W. 98, per *Parke*, B.

(*r*) *Edwards* v. *Brown*, *supra*.

CHAPTER XXVIII.

JUDGMENT NON OBSTANTE VEREDICTO.—REPLEADER.

Judgment non obstante Veredicto.]—If the defendant obtain a verdict upon a plea which confesses the cause of action, and avoids it by matter which is clearly upon the face of the record no answer to it, the Court will give this judgment for the plaintiff (*a*). But it is not every fact which is admitted by the pleadings upon the trial of the issue raised, that is sufficiently confessed for the purposes of this judgment (*b*). Thus if a replication aver two distinct facts, and the rejoinder traverse one which is immaterial, and which is found for the defendant, the other will not be admitted so as to warrant this judgment (*c*). If a verdict be found for the defendant What, and in what cases granted.

(*a*) *Pim* v. *Grazebrook*, 2 Com. B. 429: *Gwynne* v. *Burnell*, 6 Bing., N. S., 453; 7 Cl. & F. 572; 1 Scott, N. R., 711, *S. C.*: *Huxley* v. *Bull*, 2 Dowl. & L. 340; 8 Scott, N. S., 395, *S. C.* See the case of *R.* v. *Eastrington*, 5 Ad. & E. 765; 1 Nev. & P. 193. *S. C. Sed quære* the correctness of that decision.

(*b*) *Gwynne* v. *Burnell*, *supra*.

(*c*) *Gwynne* v. *Burnell*, 1 Scott, N. R., 789, per *Parke*, B. See *Atkinson* v. *Davies*, 11 M. & W. 236; 2 Dowl., N. S., 778, *S. C.*

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upon an immaterial issue, raised by a plea which does not of itself confess plaintiff's cause of action, yet if it be confessed or proved upon some other plea or pleas upon the same record, the plaintiffs are entitled to this judgment (*d*). Where a defendant pleaded a defence under a particular statute, which after plea and before trial was repealed, and another was enacted in its stead which did not afford the same defence, it was held, that the plaintiff was entitled to this judgment (*e*). If there be no express (*f*) confession of the cause of action, the proper course is to award a repleader, and not to give this judgment (*g*). But it seems that this judgment will be given upon one of several issues which is immaterial, and found for the defendant, if there are others which are material and decisive of the whole cause of action, and have been found for the plaintiff, although there be no confession or proof of the plaintiff's cause of action (*h*). The Court will not award this judgment where the plea is bad upon demurrer, but good after verdict (*i*). Nor can the plaintiff after a reference at *Nisi Prius*, and award, move for this judgment on an issue directed to be entered for the defendant; the power of the arbitrator being complete and final (*k*). The defendant may move for it (*l*).

The motion, argument, rule, &c., for.

By *R. H.*, 2 *W.* 4, *r.* 65, "no motion in arrest of judgment, or for judgment *non obstante veredicto*, shall be allowed after the expiration of four days from the time of trial, if there are so many days in term; nor in any case after the expiration of the term, provided the jury process be returnable in the same term." Where a cause is tried in vacation, the motion must be made within the first four days of the ensuing term; inasmuch as the above rule applies to cases in vacation as well as in term (*m*). Where a rule for entering the verdict for the defendant was obtained in the first, and made absolute in the sixth term after the trial, the Court upon making it absolute granted a rule *nisi* for this judgment, considering the case an exception from this rule (*n*). *The motion is for a rule to shew cause. In the Queen's Bench and Exchequer, the rule for the judgment is not drawn up "upon reading the record;" but in the Common Pleas it should be so drawn up.* But it seems doubtful whether the officer's omission so to draw it up can be allowed to prejudice the party (*o*). At all events, the defect is cured by the circumstance of a copy of the pleadings being annexed to the affidavit upon which the rule was moved (*o*).

The rule after argument is made absolute or discharged, as

(*d*) *Gwynne* v. *Burnell*, 1 Scott, N. R., 711: see *Pim* v. *Grazebrook*, 2 Com. B. 429.

(*e*) *Warne* v. *Beresford*, 2 M. & W. 848.

(*f*) *Atkinson* v. *Davies*, 11 M. & W. 236; 2 Dowl., N. S., 778, *S. C.*

(*g*) *Plummer* v. *Lee*, 2 M. & W. 495: *Gwynne* v. *Burnell*, 1 Scott, N. R., 711: *Lambert* v. *Taylor*, 4 B. & C. 152; 6 D. & R. 188, *S. C.*: *Fillieul* v. *Armstrong*, 7 Ad. & E. 557; 4 Nev. & P. 406, *S. C.*

(*h*) *Negelen* v. *Mitchell*, 7 M. & W. 612: *Gwynne* v. *Burnell*, 1 Scott, N. R., 711. *Goodburn* v. *Bowman*, 9 Bing. 532; 2 M. & Scott, 700. *S. C.*, overruling *Plummer* v. *Lee*, 2 M. & W. 495, *post*, 1352.

(*i*) *Easton* v. *Pratchett*, 3 Dowl. 472. See *Edwards* v. *Price*, 6 Dowl. 487.

(*k*) *Steeple* v. *Bonsall*, 4 Ad. & E. 960.

(*l*) *Gwynne* v. *Burnell*, *supra*: *Atkinson* v. *Davies*, *supra*. But see *Rand* v. *Vaughan*, 1 Bing., N. C., 769, per *Tindal*, C. J.

(*m*) See *Thomas* v. *Jones*, 4 M. & W. 28: *Dixon* v. *Stodhart*, 2 Scott, N. R., 537; and the previous cases of *Weston* v. *Foster*, 2 Bing., N. C., 701; 3 Scott, 164; 5 Dowl. 54, *S. C.*: *Brook* v. *Finch*, 6 Dowl. 313.

(*n*) *Merry* v. *Chapman*, 10 Ad. & E. 525. And see *Lumley* v. *Allday*, 1 Tyr. 217. Within what time a motion for a new trial must be made, see *ante*, 1339.

(*o*) *Beaty* v. *Warren*, 4 Scott, N. R., 725; 4 M. & G. 158, *S. C.*: *Angel* v. *Thier*, 5 M. & W. 602, per *Parke*, B.

in ordinary cases. On this motion the Court will look at the record as it stood at the time of trial, and not as it stood at the time of pleading; *ex. gr.* where there were two counts for 10*l.* each, and damages were laid at 20*l.*, and defendant pleaded payment of 10*l.*, and plaintiff entered a *nolle prosequi* as to one count before trial, and defendant obtained a verdict, the Court refused to give judgment *non obstante veredicto* (*p*). If a rule has been obtained for this judgment, and the Court are of opinion that there is no sufficient confession of a cause of action on the plea, the rule, it seems, may be remoulded, and the Court may order a repleader (*q*).

Form of, and writ of inquiry on.

The judgment is interlocutory. If the verdict be general for the defendant, and the plaintiff obtain this judgment as to all of the pleas pleaded, he may sue out a writ of inquiry to assess his damages (*r*), and this without leave of the Court (*s*). But if some of the pleas be good, the defendant will be entitled to retain his judgment as to them, and no writ of inquiry can issue, for if they go to the whole cause of action, the plaintiff will not be entitled to any damages; and if they go to a part only, a *venire de novo* must be awarded (*r*). If the damages be not material, as if the action was brought to try a right or custom, or the like, the Court will set aside the verdict, and enter a verdict for the plaintiff with nominal damages (*t*).

Costs on.

On judgment *non obstante veredicto*, neither party is entitled to the costs of the immaterial issues (*u*). Nor is either party in general entitled to the costs of the application for it if successful; but if the rule for it is discharged generally, the successful party is entitled to the costs of shewing cause against it, as costs in the cause (*x*); and the defendant has been held entitled to the costs of opposing the rule made absolute, where the judgment *non obstante veredicto* was afterwards reversed in error (*y*).

Restitution

Restitution will be awarded, and with costs, where the defendant has had execution before the motion (*z*).

When awarded.

Repleader.]—If the issue or issues raised by the pleadings are immaterial, or there has been no definite issue joined (*a*), the Court will, after trial (*b*), award a repleader, if it will be the means of effecting substantial justice between the parties, otherwise not (*c*). An immaterial issue is an issue taken upon a point which will not determine the merits of the cause: an infor-

(*p*) *Wright* v. *Acres*, 1 Nev. & P. 761.
(*q*) *Villieul* v. *Armstrong*, 7 Ad. & E. 557; 2 Nev. & P. 406, *S. C.*
(*r*) *Shephard* v. *Halls*, 2 Dowl. 453. See *Clements* v. *Lewis*, 3 B. & B. 297; 7 Moore, 200, *S. C.*
(*s*) *Shephard* v. *Halls*, *supra*: *Pim* v. *Reid*, 6 Scott, N. R., 1011.
(*t*) *Selby* v. *Robinson*, 2 T. R. 758; 6 Co. 59 b.
(*u*) *Goodburne* v. *Bowman*, 3 Moo. & Sc. 69; 9 Bing. 667; 2 Dowl. 206, *S. C.* And see *Da Costa* v. *Clarke*, 2 B. & P. 376: *Kirk* v. *Nowill*, 1 T. R. 266. As to the costs, where there are other issues, see *post*, Ch. 31.
(*x*) *Hodgkinson* v. *Wyatt*, 1 Dowl. & L. 668; 13 Law J., N. S., Q. B. 73, *S. C.*
(*y*) *Evans* v. *Collins*, 14 Law J., N. S., 257, Exch.
(*z*) *Angell* v. *Ihler*, 4 Jur. 196.
(*a*) *Spong* v. *Wright*, 2 Dowl., N. S., 545; 9 M. & W. 629, *S. C.*: *Gwynne* v. *Burnell*, 1 Scott, N. R., 711.
(*b*) A verdict does not help an immaterial issue; but an informal one is aided by the 32 H. 8, c. 30. Gilb. C. P. 147; *Gwynne* v. *Burnell*, 1 Scott, N. R., 711; *Lovelace* v. *Grimsden*, Cro. Eliz. 227; Bull. N. P. 321; *post*, 1352.
(*c*) 2 Saund. 319 b, n. 6: *Staples* v. *Heydon*, 6 Mod. 1; 2 Lord Raym. 922; 2 Salk. 579; 3 Salk. 121, *S. C.*: *Plomer* v. *Rees*, 5 Taunt. 396; 1 Marsh. 95: *Jones* v. *Powell*, 5 B. & C. 649: *Cobb* v. *Bryan*, 3 B. & P. 352: *Goodburne* v. *Bowman*, 9 Bing. 532: *Gordon* v. *Ellis*, 2 D. & L. 306.

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mal issue is where a material allegation is traversed in an improper manner (*d*). But a repleader cannot be awarded after a default at *Nisi Prius*, or after a demurrer or writ of error, but only after issue joined (*e*). Nor where the Court can give judgment upon the whole record (*f*). Therefore a repleader will not be granted, but judgment *non obstante veredicto* given, if one of the several issues be immaterial, and found for the defendant, if the others are material and decisive of the whole cause of action, and are found for the plaintiff, although there be no confession or proof of the plaintiff's cause of action (*g*). A repleader is not grantable in favour of the person who made the first fault in pleading (*h*), where the immaterial issue is found against such party (*i*). A court of error cannot award a repleader (*k*). Therefore, if the Court below give judgment for one of the parties, where they ought to have awarded a repleader, the court of error will simply reverse such judgment (*k*).

Distinction between, and judgment non obstante veredicto.

If a plea be defective, and the defendant succeed at the trial thereon, the question whether the plaintiff can have judgment *non obstante veredicto*, or whether there ought to be a repleader, depends upon whether the plea contains a confession of the plaintiff's cause of action: if the cause of action be confessed by the plea, and the matter pleaded in avoidance be insufficient, the plaintiff is entitled to judgment notwithstanding the verdict; if the plea do not confess the cause of action, there must be a repleader (*l*).

Repleader improperly granted or denied.

If a repleader be denied where it should be granted, or *vice versâ*, it is error (*m*).

Form of judgment of.

The judgment of repleader is general, namely, *quod partes replacitent;* and the parties must begin again at the first fault, which occasioned the immaterial issue (*n*). Thus, if the declaration be bad, and the plea and replication are so also, the parties must begin *de novo;* but if the replication only be bad, they must begin at the replication (*o*).

Costs on.

No costs are allowed on either side (*p*).

(*d*) *Serjeant* v. *Fairfax*, 1 Lev. 32.
(*e*) *Staples* v. *Heydon*, *supra*: *Witts* v. *Polehampton*, 3 Salk. 306.
(*f*) *Parnham* v. *Pacey*, Willes, 532-3.
(*g*) *Negden* v. *Mitchell*, 7 M. & W. 612. See cases cited, *ante*, 1350: and see upon this subject, 2 Saund. 319 b.
(*h*) *Kempe* v. *Crews*, 1 Ld. Raym. 170; *Webster* v. *Bannister*, Doug. 396: *Taylor* v. *Whitehead*, Doug. 747; 2 Saund. 319 c: but see *Tryon* v. *Carter*, 2 Str. 994. See further, *Goodburne* v. *Bowman*, 9 Bing. 532.
(*i*) *Gordon* v. *Ellis*, 2 D. & L. 308.
(*k*) *Gwynne* v. *Burnell*, 1 Scott, N. R., 711; 7 Cl. & Fin. 572; 6 Bing., N. C., 450; 1 West, 342, 8. C.
(*l*) *Pills* v. *Polehampton*, 1 Ld. Raym. 390: per *Abbott*, C. J., in *Lambert* v. *Taylor*, 4 B. & C. 152; 6 D. & R. 199, S. C.: *Plumer* v. *Lee*, 2 M. & W. 495: *Atkinson* v. *Davies*, 11 M. & W. 236; 7 Dowl., N. S., 778, S. C.: *Michael* v. *Ellis*, 13 Law J., N. S., 179, C. P.
(*m*) *Staples* v. *Heydon*, *supra*.
(*n*) *Staples* v. *Heydon*, *supra*; *Kempe* v. *Crews*, 1 Ld. Raym. 169; Com. Dig. Pleader, R., 18.
(*o*) *Staples* v. *Heydon*, *supra*.
(*p*) *Staples* v. *Heydon*, *supra*: *Lickbarrow* v. *Mason*, 6 T. R. 131: *Noble* v. *Lancaster*, Barnes, 125; *Da Costa* v. *Clarke*, 2 B. & P. 376: *Plumer* v. *Lee*, 2 M. & W. 495.

CHAPTER XXIX.

ARREST OF JUDGMENT.

In what cases.

THE Court, upon application, will arrest the judgment for any matter intrinsic appearing upon the face of the record (*a*), amounting to a defect not amendable or aided at common law or by statute, and for which a writ of error would lie. Where separate damages are assessed on each count of the declaration, and one of the counts is bad, judgment will be arrested on that count only (*b*). But as we have shewn, *ante*, 1348, if some counts or breaches in a declaration are good, and some bad, and general damages are given, the Court will not arrest the judgment, but will award a *venire de novo*. But as this cannot be awarded where general damages are assessed upon a declaration containing a *misjoinder* of counts, in such a case the judgment will be arrested (*c*). If the issues raised are immaterial, the Court will not arrest the judgment, but award a repleader (*d*). After judgment upon a demurrer, a motion cannot be made in arrest of judgment, whether the demurrer were argued (*e*) or not (*f*); but it may after judgment by default (*g*). As to the defects which are amendable or aided at common law and by statute, see the different titles in this Work and the following Chapter.

The motion, rule, &c.

The motion shall not be allowed after the expiration of four days from the time of trial, if there are so many days in term; nor in any case after the expiration of the term, provided the jury process be returnable in the same term (*h*). If the trial take place in vacation, the motion must be made within the first four days of the next term (*i*). In cases where the judge at the trial gives a certificate for speedy execution, or where the under-sheriff, upon a writ of trial, refuses to grant a stay of execution, the issuing or levying of execution does not affect the party's right to move afterwards for a new trial within the time above mentioned. Where there were several issues in law and in fact, and the issues in fact were tried first, it was held, that the defendant could not move in arrest of judgment until after the demurrers had been determined (*k*). In moving for a new trial, if there be any ground for arresting the judgment, the rule should be obtained in the alternative for a new trial, *or* for an arrest of judgment (*l*). Upon cause being shewn, the Court will first dispose of the former branch of the

(*a*) See *Newball* v. *Adams*, 1 Taunt. 235; *Mayor of Carmarthen* v. *Evans*, 10 M. & W. 274; *Frame* v. *White*, 9 Law J., 337, C. P.; 1 Scott, N. R., 604, *S. C.*

(*b*) *Haytor* v. *Moat*, 2 M. & W. 56.

(*c*) *Corner* v. *Showe*, 6 Dowl. 564, 688; 4 M. & W. 163, *S. C.*

(*d*) *Gordon* v. *Ellis*, 2 D. & L. 308; 8 Scott, N. R., 290; *ante*, 1351.

(*e*) *Edwards* v. *Blunt*, 1 Str. 425.

(*f*) *Crewel* v. *Packham*, 6 Taunt. 650; 2 Marsh. 326, *S. C.*

(*g*) *Edwards* v. *Blunt*, 1 Str. 425. See *Tenant* v. *Goldwin*, 2 Ld. Raym. 1089. It seems the motion should come on after the inquiry, if any. And see *Johnson* v. *Wilson*, Willes, 248.

(*h*) R. H. 2 W. 4, s. 65; *ante*, 1350.

(*i*) *Ante*, 1350.

(*k*) *Goodwright* v. *Hodgson*, Andr. 292.

(*l*) See *ante*, 1341.

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rule (*m*). In the Queen's Bench and Exchequer, the rule for this judgment is not drawn up "upon reading the record;" but in the Common Pleas it is otherwise (*n*).

Costs on.

If judgment be arrested, each party pays his own costs (*o*). But where the plaintiff obtained a verdict in the Exchequer, wherein judgment was arrested, which judgment was reversed by the Court of Exchequer Chamber, it was held, that the plaintiff was entitled to the costs of the motion in arrest of judgment, and that such costs must be taxed by the officer of the Exchequer (*p*).

Writ of error after.

It does not seem clear, that a writ of error will lie after the judgment has been arrested (*q*); but it would seem it will (*r*).

(*m*) *Rose* v. *Groves*, 1 D. & L. 61, *ante*, 1342.

(*n*) *Beaty* v. *Warren*, *ante*, 1350; *Angel* v. *Ibler*, 5 M. & W. 602, per *Parke*, B.

(*o*) *Cameron* v. *Reynolds*, Cowp. 407; Gilb. C. P. 272. See as to the plaintiff moving in arrest of judgment to save his costs, 1 Moore, 245: *Blyth* v. *Topham*, Cro. Jac. 158.

(*p*) *Adams* v. *Meredew*, 3 Y. & J. 419.

(*q*) See *Adams* v. *Meredew*, 3 Y. & J. 419.

(*r*) It was brought and succeeded in *Cook* v. *Oxley*, 3 T. R. 654, n.; and see 3 Moore, P.C.

CHAPTER XXX.

AMENDMENT AND JEOFAILS.

[As to amendments in particular cases, see the different Chapters throughout the work.]

What Proceedings amendable at Common Law, 1354.
What amendable by Statute, 1355.
When Amendments allowed, 1355.
How Proceedings amended, 1356.
Terms of Amendment, 1356.
What Defects aided at Common Law, 1357.
What aided by the Statutes of Jeofails, 1357.

What amendable at common law.

What Proceedings amendable at Common Law.]—It may be necessary to premise that amendments in all cases are entirely in the discretion of the Court, and are allowed only in furtherance of justice (*a*), for which purpose they will be generally allowed. At common law, the Court may amend in all cases whilst the proceedings are in paper, that is, until judgment signed, and during the term in which it is signed; for until then the proceedings are considered as only *in fieri*, and consequently subject to the control of the Court (*b*). And there is

(*a*) See *Rex* v. *Mayor, &c., of Grampound*, 7 T. R. 699.

(*b*) *Alder* v. *Chip*, 5 Burr. 756: *Cope* v. *Marshall*, Say. 225; 3 Bl. Com. 407; Tidd, 697: *Morris* v. *Evans*, 1 Dowl. 657: *Banfield* v. *Milner*, 2 Bur. 1068.

no difference in this respect between penal and other actions (*c*). But the Court have refused to allow an amendment in a penal action after much delay (*d*). Also they refused it in a case where the action was merely within the letter, and not within the spirit of the penal act (*e*). An amendment cannot be made for matter which, as it stands, is a discontinuance, without consent (*f*). After judgment is signed, or after the term in which it is signed, the pleadings, &c., cannot be amended at common law, but by virtue of the Statutes of Amendments only (*g*).

What amendable by statute.

What amendable by Statute.]—No process shall be annulled or discontinued for the misprision of the clerks in writing one syllable or letter [or word (*h*)] too much or too little; but as soon as the mistake is perceived, it shall be amended in due form (*i*). And the justices before whom the record is made or shall be depending by way of error or otherwise, may amend the same, as well after as before judgment, in the same manner as they might have done by the above statute before judgment (*k*). Neither of these statutes, however, extends to process of outlawry (*l*). So the Court may amend whatever to them seems to be the misprision of the clerks in any record, process, word, plea, warrant of attorney, writ, panel, or return, which may for the time be before them, so that no judgment shall be reversed by reason of such misprision (*m*). So, they may amend, for the misprision of the clerks, and also of other officers, such as sheriffs, coroners, &c., defects in any record, process, or return before them by way of error or otherwise, in writing a letter or syllable too much or too little (*n*). It should also be observed that the word "clerk" imports some officer of the court coming within that description; and therefore the Court refused to allow a plaintiff in replevin, who had pleaded two bad pleas, and after judgment in his favour and error brought *coram vobis*, to withdraw the same and plead *de novo* (*o*). In all these cases there must be something to amend by (*p*).

When amendments allowed.

When Amendments allowed.]—An application to amend should be made within a reasonable time, or it may not be granted (*q*). But an application of this nature does not fall within the rule respecting the setting aside proceedings for irregularity, with regard to the promptness of the applica-

(*c*) *Richards* v. *Brown*, 1 Doug. 114: *Jones* v. *Edwards*, 3 M. & W. 218: *Mace* v. *Lovett*, 5 Burr. 2633: *Bonfield* v. *Milner*, 2 Burr. 1098. See *ante*, 204, cases in which the Court has allowed the declaration to be amended in penal actions; and see *ante*, 340, 452, 455, where they have allowed the record and postea to be amended.

(*d*) *Wood* v. *Grimwood*, 10 B. & C. 689: *Goff* v. *Popplewell*, 2 T. R. 707: *Steel* v. *Sowerby*, 6 T. R. 171: *Rankin* v. *Marsh*, 8 T. R. 30.

(*e*) *Matthews* v. *Swift*, 1 Bing., N. C., 735; 1 Scott, 705; 3 Dowl. 636, S. C. It was an action against an attorney for practising without being duly enrolled.

(*f*) *Maynard* v. *Hopkins*, Say. 46.

(*g*) Co. Lit. 260: see *Rex* v. *Bishop of Llandaff*, 1 Str. 1011.

(*h*) 8 Co. 157 a.

(*i*) 14 Ed. 3, c. 5, s. 1.

(*k*) 9 H. 5, c. 4, s. 1, made perpetual by 4 H. 6, c. 3.

(*l*) 4 H. 6, c. 3.

(*m*) 8 H. 6, c. 12. See *Green* v. *Rennett*, 1 T. R. 783: *Morse* v. *James*, Willes, 125: *Ramsay* v. *Bird*, Cro. El. 256: *Cheese* v. *Scales*, 10 M. & W. 488; 2 Dowl., N. S., 438, S. C.: and see *ante*, 473.

(*n*) 8 H. 6, c. 15. See *ante*, 473.

(*o*) *Green* v. *Miller*, 2 B. & Ad. 784.

(*p*) See *Cheese* v. *Scales*, *supra*.

(*q*) *Wood* v. *Grimwood*, 10 B. & C. 689. And see different instances in this work where amendments in particular cases have been refused.

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tion (*r*). As to where an amendment will be allowed after demurrer, and before and after argument, see *ante*, 829, 834, at *Nisi Prius*, *ante*, 385; and see instances where the Courts have allowed amendments after plea in abatement, *ante*, 820, after verdict, *ante*, 451, after nonsuit, *ante*, 1343, after new trial granted, *ante*, 1343, after error brought, *ante*, 473. After error brought, those things are amendable which were amendable before error brought, so long as diminution may be alleged, and a *certiorari* awarded (*s*).

How Proceedings amended.]—Parties cannot in general amend their own proceedings; the leave of the Court or a judge must be obtained to do so (*t*).

Before judgment, the application to amend should in general be made to a judge at chambers, by summons calling upon the opposite party to shew cause why the party applying should not have leave to amend. Where the necessity for the amendment is first discovered during the trial of the cause, or immediately before it, as in the case of a variance or the like, the application is made to the judge at *Nisi Prius* (see *ante*, *Vol.* 1, 385). The Court will seldom, and from some cases it would seem that they will not in any case, interfere with the decision of a judge upon the subject (*u*); at all events, unless an application to the Court for that purpose be made promptly, it will not be entertained (*x*).

After judgment and before error brought, a judge at chambers will not, in general, entertain the application, but it should be made to the Court. *The rule is a rule nisi, which is afterwards made absolute or discharged, as in ordinary cases.*

After error brought upon a judgment of one of the superior courts, the application for leave to amend must be made to that Court, because the record always in fact remains there, a transcript only being sent to the court of error (*y*); the transcript indeed must be amended, if at all, by the court of error (*z*). After error from an inferior court to the Court of Queen's Bench, the application may be made either to the Queen's Bench, or in the inferior court (*a*).

A court of error will not review the propriety of an amendment made by the court below, in its record or process, though such amendment was made after writ of error brought (*b*).

Terms of amendment, and remedy for costs of.

Terms of Amendment.]—The Court or judge, upon granting leave to amend, may oblige the party applying to submit to such equitable terms as may be necessary to prevent the opposite party from being prejudiced by the amendment (*c*). An

(*r*) *Welsh* v. *Hall*, 9 M. & W. 14.

(*s*) 8 Co. 162 *a*: *Richards* v. *Broom*, 1 Doug. 118: Tidd, 9th ed. 714: Tidd's Sup. 129; and the cases of *Mellish* v. *Richardson*, 7 B. & C. 819; 11 Moore, 104; 3 Bing. 334, *S. C.*

(*t*) See *Biggers* v. *Sansom*, 2 Dowl. 745: *Bate* v. *Bolton*, 4 Dowl. 677: *Wright* v. *Skinner*, 5 Dowl. 99.

(*u*) *R.* v. *Archbishop of York*, 3 Nev. & M. 453: *Doe* v. *Errington*, Id. 646. And see *Atkinson* v. *Baynton*, 1 Bing., N. C., 740; Hodges, 144. *S. C.*

(*x*) *Boden* v. *Flight*, 6 Dowl. 177.

(*y*) *Rastor* v. *Redstone*, 2 Str. 837; Tidd, 714. And see *Anon.*, Cro. Jac. 429: *Granville* v. *Smith*, Id. 628: *ante*, 499.

(*z*) See *De Tastet* v. *Rastor*, 3 B. & B. 65, *ante*, 499.

(*a*) *Wood* v. *Matthews*, Poph. 102; Tidd, 9th ed., 714.

(*b*) *Scales* v. *Cheese*, 1 Dowl. & L. 667: *Mellish* v. *Richardson*, 1 Cl. & Fin. 204; 7 B. & C. 819, *S. C.*

(*c*) *Alder* v. *Chip*, 2 Burr. 786. And see 1 Salk. 47; 3 Id. 31: *Hesare* v. *Bannister*, 1 Wils. 7: *Lee* v. *Newland*, Id. 76: *Waters* v. *Bevell*, Id. 233.

amendment is in general allowed upon payment of costs (*d*), particularly if the error or mistake have arisen from the default of the party, and not from the misprision of any of the officers of the Court. If the application for the amendment be made after error brought, it is usually allowed upon payment of costs of the proceedings in error, provided the plaintiff proceed no further in his writ of error after notice of the amendment (*e*). If the party who has obtained an order to amend on payment of costs amends, but does not pay the costs, the proper course of the other party is, either to apply to the Court or a judge to stay the proceedings until the costs be paid, or, if he wish to proceed, to apply to have the order of amendment rescinded, and to set aside the amended proceedings as irregular; for the non-payment of the costs, being merely in the nature of a breach of contract, cannot be punished as a contempt, by attachment (*f*); nor, it seems, could the payment be enforced by execution under the 1 & 2 *Vict. c.* 110, *s.* 18. The party who obtains an order to amend in the usual form is at liberty to act upon it, or to abandon it, at his option; if he choose the latter, he may proceed as if the order had not been made (*g*); but if he serve it or otherwise act upon it, he is bound by its terms, and cannot get it altered or rescinded (*h*). If the order be abandoned, and the opposite party, relying that the party obtaining it would act upon it, incur costs which would not otherwise have been incurred, such costs are not costs in the cause (*i*).

What aided at common law.

What aided at Common Law.]—When there is any defect, imperfection, or omission in any pleading, whether in substance or in form, which would have been a fatal objection upon demurrer; yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give the verdict, or the jury would have given it; such defect, imperfection, or omission is cured by verdict at common law, or, in the phrase often used upon the occasion, such defect is not a jeofail after verdict (*k*).

Mistakes and defects in proceedings are also often aided by the acts of the opposite party. Thus, where a declaration is defective in point of form, the defect is frequently cured by the defendant in his plea admitting that which was omitted or defectively stated in the declaration; for by admitting it, he waives all objection to the omission or defective statement (*k*).

What aided by the Statutes.

What aided by the Statutes of Jeofails.]—After verdict, the

(*d*) A judge has power to fix the amount of costs, upon payment of which an amendment is to be allowed, and the Court will not review the exercise of his discretion: see *Tomlinson* v. *Bollard*, 12 Law J., N. S., 257, Q. B., E. T. 1843: *Wall* v. *Lyon*, 9 Bing. 411; 1 Dowl. 714, *S. C.*: *ante*, 1122.

(*e*) *Beaumont* v. *Cosin*, Barnes, 17: *Parsons* v. *Gill*, 2 Ld. Raym. 897. See *Moody* v. *Stracey*, 4 Taunt. 568; Tidd, 715.

(*f*) *Turner* v. *Gill*, 3 Dowl. 30.

(*g*) *Black* v. *Sangster*, 1 C., M., & R. 521. See *Pugh* v. *Kerr*, 5 M. & W. 164: *Pugh* v. *Kerr*, 6 M. & W. 17; 8 Dowl. 218, *S. C.*

(*h*) *Giraud* v. *Austen*, 1 Dowl., N. S., 703.

(*i*) *Pugh* v. *Kerr*, 6 M. & W. 17; 8 Dowl., 218, *S. C.*

(*k*) 1 Saund. 228, 5th ed., and cases there; and 1 Chit. Pl. 6th ed. 673 to 682.

PART V.

Statutes of Jeofails.

In civil actions.

want of a warrant of attorney, the want of an original writ or bill (*l*), or any defects in form therein, mistakes and omissions in pleadings, misjoining of issue, miscontinuance, discontinuance, misawarding of jury process, and the omission of a *capiatur* or *misericordia* in a judgment, are aided by the several statutes 32 *H.* 8, *c.* 30; 18 *Eliz. c.* 14; 24 *J.* 1, *c.* 13; and 16 & 17 *Car.* 2, *c.* 8 (*m*); and the same defects are now aided after judgment by confession, *nil dicit*, or *non sum informatus*, by stat. 4 & 5 *Anne*, *c.* 16, *s.* 2, "so as there be [an original writ or bill (*n*) and] warrants of attorney duly filed." Also, all defects in writs, original (*n*) or judicial, or bills (*n*), are aided after verdict by stat. 5 *G.* 1, *c.* 13 (*o*).

In penal proceedings.

Of these, the statute 32 *H.* 8, *c.* 30, extends to penal actions (*p*); but there is a proviso in the others that they shall not extend to criminal proceedings, nor to any writ, bill, action, or information upon any popular or penal statutes, other than such as concern the customs and subsidies of tonnage and poundage (*q*).

Actual amendment unnecessary under the Statutes of Jeofails.

Although in some of these statutes the Court is directed to amend the defect, yet an actual amendment is never made, but the benefit of the statutes is attained by the Court overlooking the exception (*r*). And for this reason, if error be brought for any defect aided by these statutes, no costs are given to the plaintiff in error, even although the amendment be made; for the Court might have given judgment on the writ of error without making the amendment, in the same manner as if the amendment had been actually made (*s*).

(*l*) The original writ or bill is now abolished by the 2 W. 4, c. 39, except in ejectment, which is founded on original writ or bill, and in actions removed from inferior courts.

(*m*) See Bull. N. P. 322, 323: *ante*, 474.

(*n*) See note (*l*), *supra*.

(*o*) This statute does not apply to jury process: *Cheese* v. *Scales*, *supra*.

(*p*) *Wynne* v. *Middleton*, 2 Str. 1227; 1 Wils. 125, *S. C.*: *Richards* v. *Brown*, 1 Doug. 115.

(*q*) See 16 & 17 C. 2, c. 8: *Rex* v. *Midas*, 1 Str. 62: *Atcheson* v. *Everist*, Cowp. 382: *Merrick* v. *Hundred of Osulston*, Hardw. 409.

(*r*) 3 Bl. Com. 407.

(*s*) *Conden* v. *Coulter*, Hardw. 314.

CHAPTER XXXI.

COSTS.

Contents of chapter.

As to costs between attorney and client, see *Vol.* 1, p. 81 to 115.

The costs of particular actions by and against particular persons, and in particular proceedings, and where proceedings do not go on to judgment, have, for the sake of convenience, been treated of under the respective titles throughout this work. We shall, in this chapter, consider the following branche of the subject between party and party, which have not elsewhere been particularly mentioned, and in the following order:—

1. *On Verdict for Plaintiff*, 1359.
2. *On Verdict for Defendant*, 1373.
3. *Where there are several Issues*, 1376.
4. *On a Judgment by Default as to Part*, 1382.
5. *Double and Treble Costs*, 1382.
6. *Taxation of Costs, and what allowed in general*, 1384.
7. *Remedies for Costs*, 1396.

1. *On Verdict for Plaintiff.*

In general.

In General.]—At common law, neither the plaintiff nor the defendant was entitled to costs. In all actions, however, in which damages were recoverable, the plaintiff, if he had a verdict, was in effect allowed his costs; for the jury always computed them in the damages. And now, by stat. Gloucester, (6 *E.* 1, *c.* 1), the *plaintiff, in all actions in which he recovers damages*, shall also recover against the defendant his costs of suit (*a*), and since the costs are allowed and awarded as parcel of the damages. The statute extends not only to cases in which damages were before recoverable (*b*), but to all cases in which single damages have been given by a subsequent statute (*c*), and also to cases where an action is given to a party grieved (*d*), but not to actions by a common informer (*e*). And in such actions, the plaintiff is not entitled to costs, unless expressly given him by statute.

This right, however, of the plaintiff to costs, has been much narrowed, in many cases, by subsequent statutes, which we will now proceed to notice.

(*a*) See *Garland* v. *Jekyll*, 2 Bing. 330; 9 Moore, 620, S. C.

(*b*) *Pilford's case*, 10 Coke, 115: *Grant* v. *Glazier*, 1 Dowl., N. S., 58.

(*c*) *Jackson* v. *Colenworth*, 1 T. R. 73.

(*d*) *Creswell* v. *Hoghton*, 7 T. R. 268: *Mayor, &c. of Plymouth* v. *Warring*, Willes, 440: *Shore* v. *Maddison*, 1 Salk. 206: *College of Physicians* v. *Harrison*, 9 B. & C. 524: *Ward* v. *Snell*, 1 H. Bl. 10; 2 Bac. Abr., Costs, E. 3; Bull. N. P. 333.

(*e*) *Shore* v. *Maddison*, 1 Salk. 206. And see *Wilkinson* v. *Allot*, Cowp. 366: *Ward* v. *Snell*, 1 H. Bl. 10; Bull. N. P. 194.

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On verdict for less than 40s.

On Verdict for less than 40*s.*]—The statute of Gloucester, giving costs to the plaintiff in all cases where he recovered damages, as above mentioned, was found to have the effect of encouraging suits for very trifling causes; and the legislature, therefore, were obliged to interfere, and have in some measure remedied the evil, by subsequent statutes; and, first—

Stat. 43 Eliz. c. 6.

By 43 *Eliz. c.* 6, *s.* 2, it is enacted, "If, upon any action personal to be brought in any of her Majesty's courts at Westminster, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judges of the same court, and so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein in the same court, shall not amount to the sum of forty shillings or above, that in every such case the judges and justices before whom any such action shall be pursued, shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretions" (*f*). The object of this enactment was to confine trifling suits to inferior courts, or rather, perhaps, to prevent the bringing of actions which, in principle, ought not to be commenced at all (*g*).

22 & 23 Car. 2, c. 9, s. 136.

It will be seen that this enactment of *Eliz.* excepts out of its provisions particular species of actions, being for any title or interest in lands, &c.; and to prevent trifling actions of this species, the statute of 22 *&* 23 *C.* 2, *c.* 9, *s.* 136, was passed, and by which it is enacted, that, "In all actions of trespass, assault and battery, and other personal actions, wherein the judge at the trial of the cause shall not find and certify under his hand, upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff in such action, in case the jury shall find the damages to be under the value of 40*s.*, shall not recover or obtain more costs of suit than the damages so found shall amount unto: and if any more costs in any such action shall be awarded, the judgment shall be void, and the defendant is hereby acquitted of and from the same, and may have his action against the plaintiff for such vexatious suit, and recover his damages and costs of such his suit in any of the said courts of record."

Act 3 & 4 Vict. c. 24, repeals part of 43 Eliz., and of 22 & 23 Car. 2.

But, from the construction put upon these enactments, the object of them, so far as regarded actions of trespass and on the case, not being attained, the stat. 3 *&* 4 *Vict. c.* 24 was passed; and by section 1 of that act, it is enacted, "that the said act of 43 *Eliz.*, so far as it relates to costs in actions of trespass, or trespass on the case, and so much of the 22 *&* 23 *C.* 2, as relates to costs in personal actions, be repealed" (*h*).

By sect. 2 it is enacted, "That if the plaintiff in any

(*f*) See Hullock, 19, 27: *Walker* v. *Robinson*, 2 Str. 1232; 1 Wils. 93, *S. C.*: *Howard* v. *Cheshire*, Say. 260: *Dand* v. *Sarton*, 3 T. R. 37.

(*g*) See per *Burrough*, J., in *Pyeburn* v *Gibson*, 8 Moore, 450; Gilb. C. P. 261.

(*h*) The 4 & 5 Vict. c. 28, repeals the 3 & 4 Vict. c. 24, as to actions in which verdicts were given before it passed, and contains a provision as to costs on such verdicts when for less than 40*s.* In a case decided before this act of 4 & 5 Vict., where the 43 Eliz. was in force at the time of the trial, and when the certificate was applied for, but the judge did not granth is certificate until after the 3 & 4 Vict. c. 24, came into operation, it was held void. *Morgan* v. *Thorne*, 7 M. & W. 400; 9 Dowl. 286, *S. C.*

action of trespass, or of trespass on the case, brought or to be brought in any of her Majesty's courts at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Common Pleas at Durham, shall recover by the verdict of a jury less damages than 40*s.*, such plaintiff shall not be entitled to recover or obtain from the defendant, in respect of such verdict, any costs whatever, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was really brought to try a right besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance in respect of which the action was brought was wilful and malicious."

Section 3 provides, "That nothing herein contained shall extend or be construed to extend to deprive any plaintiffs of costs in any action or actions brought for a trespass or trespasses over any lands, commons, wastes, closes, woods, plantations, or enclosures, or for entering into any dwellings, outbuildings, or premises in respect of which any notice not to trespass thereon or therein shall have been previously served, by or on behalf of the owner or occupier of the land trespassed over, upon or left at the last reputed or known place of abode of the defendant or defendants in such action or actions."

In what cases judge may certify under 43 Eliz. c. 6.

The above stat. 43 *Eliz. c.* 6, *s.* 2, extends to all personal actions, (except, by the subsequent stat. 3 & 4 *Vict. c.* 24, trespass and trespass on the case), and to all cases, except those expressly excepted by it. Consequently, in all actions on promises or in debt, covenant, detinue or replevin, if the verdict be for less than 40*s.*, the judge who tries the cause may certify to deprive the plaintiff of costs (*i*). It extends even to an action upon a statute giving the plaintiff "full costs of suit" (*k*); and to an action against an attorney, although the defendant could only be sued in the superior court (*l*); and to an action against any other person, though there was no inferior court in which the debt could be recovered (*m*); and to an action where one of the defendants suffers judgment by default, and the other pleads to issue (*n*). It extends also to a case where the defendant has pleaded several pleas, embodying the same defence, contrary to *R. H. T.*, 4 *W.* 4, *s.* 7 (which would otherwise entitle the plaintiff to his costs (*o*)). Of course, in cases coming within the exception in the statute, viz. for any title or interest in lands, or concerning the freehold or inheritance of any lands, the judge cannot certify under it; and in order to determine whether or not the case is within the exception, the pleadings, and if they be not conclusive, the evidence adduced at the trial, must be considered (*p*). The form of the declaration may shew that the action is not for any title or

(*i*) See *Dand* v. *Sexton*, 3 T. R. 37: *Pyeburn* v. *Gibson*, 8 Moore, 450.

(*k*) *Irvine* v. *Raddish*, 5 B. & Ald. 796; 1 D. & R. 413, *S. C.* See *Simpson* v. *Hurdis*, 2 M. & W. 85; 5 Dowl. 304, *S. C.*

(*l*) *Wright* v. *Nuttall*, 10 B. & C. 492; 5 M. & R. 454, *C. C.* And see *Pyeburn* v. *Gibson*, 8 Moore, 450.

(*m*) Id.

(*n*) *Harris* v. *Duncan*, 4 Nev. & M. 63; 2 Ad. & E. 156, *S. C.*

(*o*) *Simpson* v. *Hurdis*, 2 M. & W. 84; 5 Dowl. 304, *S. C.*

(*p*) *Smith* v. *Edwards*, 1 H. & W. 497; 4 Dowl. 621, *S. C.*

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interest in lands, or concerning the freehold or inheritance of lands, but it does not conclusively do this; and if, from the pleadings, it appears that either of these necessarily came in question, the judge cannot certify (*q*). Nor can he do so, if this appears on the evidence, properly admitted at the trial (*r*). If, on the other hand, it appears conclusively from the pleadings, that no such title or interest, &c., could come in question, then the judge may certify (*s*). And he may do so, if the pleadings do not conclusively shew this, and no evidence of it appears at the trial (*t*). The statute does not extend to an assessment of damages under a writ of inquiry (*u*); or, to a judgment by default, unless in the instance just alluded to, though it does to a case where one of two defendants suffers judgment by default, and the plaintiff proceeds to trial with the other (*x*). Nor, does it extend to a trial had before the sheriff; so that the sheriff, on a writ of trial, cannot certify under the act (*y*); nor could the Court or a judge do so (*z*). The certificate under this statute may be granted at any time after the trial, and before judgment, or costs taxed (*a*). It has been granted even after taxation (*b*). It is, in general, final, if the judge have power to certify; and the Court will not interfere with its operation (*c*), except in cases not within the statute, and in which the judge had no power to certify, and then the Court will direct the Master to tax plaintiff's costs notwithstanding the certificate. It seems that the judge who has granted the certificate, may, within a reasonable time (*d*), review and annul it; and in one case, *Patteson*, J., certified under the statute, but, in the ensuing term, new facts, which did not appear at the trial, being laid before him on affidavits, he granted an order to annul the certificate (*e*). In a later case, however, the Court of Common Pleas held, that, even assuming that the judge had power to revoke his certificate within a reasonable time, it was too late to revoke it fourteen months after the trial (*f*).

The certificate.

In what cases judge may certify under 3 & 4 Vict. c. 24.

The 3 & 4 *Vict. c.* 24, extends to all actions of "trespass," or "trespass on the case;" and, in such actions, if the verdict or assessment of damages be for less than 40*s.*, the plaintiff will not be entitled to any costs, unless the judge or presiding

(*q*) *Thomas* v. *Davies*, 3 N. & P. 567; 8 Ad. & E. 598, *S. C.*: *Purnell* v. *Young*, 6 Dowl. 347: *Pugh* v. *Roberts*, 6 Dowl., P. C. 561; 3 M. & W. 456, *S. C.* And see *Rawlings* v. *Till*, 3 M. & W. 28; 6 Dowl. 159, *S. C.*: *Bone* v. *Dawe*, 5 N. & M. 230; 3 Ad. & E. 711, *S. C.*: *Dunnage* v. *Kemble*, 3 Bing., N. S., 538: 4 Scott, 365, *S. C.*: *Scruton* v. *Taylor*, 8 Dowl. 110.

(*r*) *Wright* v. *Piggin*, 2 Y. & J. 454.

(*s*) *Smith* v. *Edwards*, 1 H. & W. 497; 4 Dowl. 621, *S. C.*: *Mills* v. *Stephens*, 6 Dowl. 593; 3 M. & W. 460, *S. C.*: *Wilson* v. *Lainan*, 3 Bing., N. S., 307; 3 Scott, 676; 5 Dowl. 339, *S. C.*: *Jones* v. *Thomas*, 9 Law J., N. S., 16, Q. B.

(*t*) See *Walker* v. *Robinson*, 1 Wils. 93: *Emmett* v. *Lyne*, 1 N. R. 255: *Wiffin* v. *Kincaid*, 2 N. R. 471: *Briggs* v. *Boswin*, 2 Bing. 333; 9 Moore, 628, *S. C.*: *Edmonson* v. *Edmonson*, 8 East, 296.

(*u*) *Claridge* v. *Smith*, 4 Dowl. 583; 1 H. & W. 667, *S. C.*

(*x*) *Harris* v. *Duncan*, 4 N. & M. 63.

(*y*) *Jones* v. *Bund*, 5 Dowl. 445; 2 M. & W. 313, *S. C.*: *Wardroper* v. *Richardson*, 1 Ad. & E. 75: *Batchelor* v. *Dudley*, 10 Law J. 72, C. P.

(*z*) *Story* v. *Hodson*, 5 Dowl. 158.

(*a*) See per *Parke*, B., in *Morgan* v. *Thorne*, 7 M. & W. 401. And see *Ashford* v. *Gore*, 3 T. R. 38, n.: *Wesley* v. *Wilcox*, 2 B. & Cres. 580: *Johnson* v. *Stanton*, Id. 691.

(*b*) *Fossil* v. *Banks*, 5 B. & Ad. 28. And see *Davis* v. *Cole*, 1 M. & W. 68, where defendant paid the costs under protest.

(*c*) *Twigg* v. *Potts*, 4 Dowl. 226: *Cox* v. *Fuzzy*, 5 Nev. & M. 466; 4 Ad. & E. 68; 1 H. & W. 483, *S. C.*

(*d*) *Semble*, before judgment, or before the first four days of the next term: so per *Tindal*, C. J., 5 Bing., N. C., 202.

(*e*) *Anderson* v. *Sherwin*, 7 C. & P. 457.

(*f*) *Whalley* v. *Williamson*, 5 Bing., N. C., 200.

officer certifies for them; or unless the case falls within the 3rd section of the act. It extends to an action for an infringement of a patent, where the judge certifies under the 5 & 6 *W.* 4, *c.* 83, *s.* 3 (*f*); or to an action for selling a preparation as plaintiff's preparation (*g*). It extends, it seems, to an action on the case for negligently exposing plough-shares on a highway, whereby plaintiff was injured (*h*); and to an action for a nuisance to plaintiff's premises, and this, although not guilty only be pleaded, and the right not put in issue (*i*). Also, it seems, to any action really brought to try a right, whether it is fitted for that purpose or not (*k*). It extends to an action for a libel (*l*), the words of the statute, "wilful and malicious," importing personal malice and ill-will to the plaintiff, as contradistinguished from the malice in law which is essential to sustain an action for libel (*m*). Whether an ejectment is within the act, has not been decided (*n*); it would seem it is not. It will be seen, that the statute (by sect. 3) excepts from its operation all cases where notice in writing not to trespass has been served upon, or left at the last reputed or known place of abode of the defendant; and where such notice has been served, the case is not within the statute, but must be governed by the 8 & 9 *W.* 3, *c.* 11, as presently noticed, and under which there must be a certificate to entitle plaintiff to full costs, if, in an action of trespass, the verdict be for less than 40*s.* (*p*) And where in trespass the defendant pleaded a right of way, and the plaintiff traversed the right and new assigned; the defendant joined issue on the right of way, and suffered judgment by default as to the new assignment, and at the trial it was proved that the plaintiff had given notice to the defendant not to trespass in the *locus in quo*, but the jury found a verdict for the defendant on the right of way: the Court held, that this was not a case within the proviso in sect. 3, and that the plaintiff was not entitled to full costs (*q*). In trespass committed after *verbal* notice, or after a notice affixed, then, indeed, the judge has power to certify under the act, that the trespass was wilful and malicious, such a case not being within the proviso (*r*). It would seem, that, in cases within that proviso, the fact of the notice in writing having been served must appear either on the face of the declaration, or there must be a suggestion entered on the record (*s*); and if the latter, it may be traversed (*t*). As to what is a recovery of less than 40*s.* damages within the meaning of the act, it has been considered that a verdict for less than that amount on an issue on a plea of payment of 5*l.* into court, as to whether plaintiff had sustained damages *ultra* the 5*l.*, will not entitle him to

What a recovery within the act.

(*f*) *Gillett* v. *Green*, 9 Dowl. 219; 7 M. & W. 347, *S. C.*

(*g*) *Barber* v. *Hollier*, 8 M. & W. 513: *Morison* v. *Salmon*, 9 Dowl. 387; 2 Scott, 454, *S. C.*

(*h*) *Marriott* v. *Stanley*, 9 Dowl. 59; 2 Scott, N. R., 60; 1 M. & Gr. 853, *S. C.* But the judge could not certify for plaintiff so as to give him costs: Ibid.

(*i*) *Shuttleworth* v. *Cocker*, 9 Dowl. 76: 2 Scott, N. R., 47: 1 M. & Gr. 829, *S. C.*

(*k*) Per *Maule*, J., in *Morison* v. *Salmon*, *supra*. And see per *Ludlow*, Serjt., arg., 8 M. & W. 397.

(*l*) *Foster* v. *Pointer*, 9 C. & P. 718; 8 M. & W. 395, *S. C.* See this case explained by the Court in *Sherwin* v. *Swindall*, 13 Law J., N. S., 237, Exch.

(*m*) Id.

(*n*) See *Doe* v. *Darry*, 9 C. & P. 496.

(*p*) *Daw* v. *Hole*, 15 Law J., N. S., 39, Q. B.

(*q*) *Bourne* v. *Alcock*, 12 Law J., N. S., 256, Q. B. And see *Pryme* v. *Browne*, 4 M. & Gr. 247.

(*r*) *Sherwin* v. *Swindall*, 13 Law J., N. S., 237, Exch.; 12 M. & W. 783, *S. C.*

(*s*) Id. See *Daw* v. *Hole*, *supra*.

(*t*) *Watson* v. *Quilter*, 11 M. & W. 760.

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costs without a certificate (*y*). The statute does not apply to judgment on demurrer, or an inquiry consequent upon it: therefore, if a plaintiff obtains a judgment on a demurrer in trespass, and obtains less than 40*s.* damages on a writ of inquiry on it, he is entitled to the costs of the cause (*y*). And a plaintiff is entitled to the costs of a judgment on demurrer in trespass, though issues in fact in the same cause have been tried, and a verdict for less than 40*s.* given, and the judge has refused to certify under the act; but he is not entitled to the costs of the issues in fact (*z*). Where an action of trespass, or on the case, is referred to arbitration by an order of reference, which gives the arbitrator the same power to certify as a judge at *Nisi Prius*, he may certify accordingly under this act, and such certificate is valid, if given on the award, and not on the back of the record (*a*). An action on the case for diverting a watercourse was, after issues joined on pleas of not guilty and denying plaintiff's right, referred by a judge's order to arbitration, by which the costs of the suit were to abide the event of the award, but no power was given to the arbitrator to certify under the act: the arbitrator having found all the issues for the plaintiff, and assessed the damages on the first issue at 6*d.*, it was held, the plaintiff was entitled to full costs (*b*). The certificate under this statute may be granted at or within a reasonable time after the trial or inquiry, notwithstanding the statute uses the terms, "that the judge shall *immediately* afterwards certify" (*c*). At the trial of a cause, a verdict having been found for the plaintiff on several pleas, and for the defendant on one plea to the whole action, the judge being asked in open court to certify, and being of opinion that the fourth plea was bad after verdict, said, "I certify, if necessary, that the right came in question," no indorsement on the record being made, and the plaintiff having obtained judgment *non obstante veredicto*; it was held, the certificate might be indorsed afterwards, what took place at the trial being an arrangement by consent of all parties, and, therefore, that the certificate ultimately given, was the same as if given on that day (*d*). If given on a writ of inquiry directed to the plaintiff, a signature by the under-sheriff, in the name of the sheriff, will be proper; it might be bad, if, in such a case, it be signed by the under-sheriff in his own name, or if it be signed by the sheriff himself (*e*). If the certificate be properly granted, and he order it to be indorsed on the record, but the indorsement is improperly made, such indorsement may be afterwards amended by him, the error being considered in the nature of a misprision or mistake of the clerk (*f*). Where the judge has it in his power to grant the certificate, and he has granted it, the Court will not afterwards review it (*g*): and the same, where an arbitrator has granted it, having power given him for that purpose (*h*). So, if, under a

The certificate.

(*y*) Taylor v. Ralfe, 13 Law J., N. S., 32, Q. B.; 2 Q. B. 537, S. C.

(*z*) Poole v. Grantham, 14 Law J., N. S., 94, C. P.; 7 M. & Gr. 1029, S. C.

(*a*) Spain v. Cundal, 9 Dowl. 745; 8 M. & W. 129, S. C.

(*b*) Griffiths v. Thomas, 15 Law J., N. S., 336, Q. B.

(*c*) Thompson v. Gibson, 9 Dowl. 717; 8 M. & W. 281, S. C. See Spain v. Cundal, 9 Dowl. 745: Gillet v. Green, Id. 219; 7 M. & W. 347, S. C.: Page v. Pearce, 9 Dowl. 815; 8 M. & W. 677, S. C.

(*d*) Jones v. Williams, 14 Law J., N. S. 76, Exch.

(*e*) Stroud v. Watts, 15 Law J., N. S. 196, C. P.

(*f*) Shuttleworth v. Cocker, ante, 1261.

(*g*) Bury v. Dunn, 1 Dowl. & L. 14: Barker v. Hollier, 2 M. & W. 32: Shuttleworth v. Cocker, ante, 1262.

(*h*) Bury v. Dunn, supra.

istake of law, the judge refuses to certify when he could, the court cannot review such decision (*i*).

Besides these enactments, there is the 8 & 9 *W.* 3, *c.* 11, *s.* 4, which enacts, "That in all actions of trespass to be commenced prosecuted in any of his Majesty's courts of record at Westminster, wherein, at the trial of the cause, it shall appear and certified by the judge under his hand, upon the back of the cord, that the trespass upon which any defendant shall be und guilty, was *wilful and malicious*, the plaintiff shall reover not only his damages, but also his full costs of suit, any rmer law to the contrary notwithstanding" (*j*). This act is ill in force, notwithstanding the 3 & 4 *Vict. c.* 24: and as we ave just seen (*k*), where a written notice not to trespass has een served on the defendant, though the case is not within he latter act, it is within this, and there must be a judge's ertificate to entitle the plaintiff to full costs, if in an action of respass the verdict be for less than 40*s*. Formerly, the judges onsidered themselves absolutely bound to certify under this ct, in all cases where a written or verbal notice not to trespass ad been given (*l*); but it is now considered discretionary ith the judge to certify or not, though, where such notice is iven, his discretion is generally exercised in plaintiff's favour (*m*). But he will not certify, if it appear that the tresass was committed for the purpose of asserting a disputed ght (*n*). The certificate in this case may be granted out of ourt at any time before final judgment (*o*).

8 & 9 Will. 3, c. 11, s. 3, in actions of trespass.

The 21 *Jac.* 1, *c.* 16, *s.* 6, enacts, "That in all actions upon he case for slanderous words, to be sued or prosecuted by any erson or persons in any of the courts of record at Westmin- ter, or in any courts whatsoever that hath power to hold plea f the same, after the end of this present session of Parliament, f the jury upon the trial of the issue in such action, or the ury that shall inquire of the damages, do find or assess the mages under 40*s*., then the plaintiff or plaintiffs in such ction shall have and recover only so much costs as the damages o given or assessed amount unto, without any further increase f the same; any law, statute, custom, or usage, to the conrary in anywise notwithstanding." This statute may, perhaps, be considered as still in force, notwithstanding the above tatute of 3 & 4 *Vict. c.* 24. It extends only to such words as re actionable of themselves (*p*). It does not, therefore, extend o actions for slander of title (*q*), or of plaintiff's wife, or to ther actions where the special damage is the very gist of the ction (*r*). Though, even in these actions, being actions on he case, the plaintiff would not get costs on a verdict for less han 40*s*., unless the judge or presiding officer certified to give hem to him, under the 3 & 4 *Vict. c.* 24. It extends to words actionable only in respect of their being spoken of the

21 Jac. 1, c. 16, as to actions for slander.

(*i*) *Harriott* v. *Stanley*, *supra*: *Bury* v. *Bunn*, *supra*.

(*j*) See *Batchelor* v. *Bigg*, 3 Wils. 325.

(*k*) *Ante*, 1363.

(*l*) *Reynold* v. *Edwards*, 6 T. R. 11.

(*m*) *Good* v. *Watkins*, 3 East, 495: per Parke, B., in *Sherwin* v. *Swindall*, 13 Law J., N.S., 268, Exch.

(*n*) *Good* v. *Watkins*, *supra*.

(*o*) *Wadley* v. *Whitby*, 2 B. & C. 580; 4 D. & R. 147, *S. C.*: and per *Parke*, B., in *Sherwin* v. *Swindall*, *supra*.

(*p*) *Collier* v. *Gaillard*, 2 W. Bl. 1062: *Surman* v. *Shellato*, 3 Burr. 1688: *Saville* v. *Jardine*, 2 H. Bl. 531: *Turner* v. *Horton*, Willes, 438; Hullock, 27, 34; Tidd, 9th ed., 962.

(*q*) *Lance* v. *Harwood*, Cro. Car. 141.

(*r*) *Brown* v. *Gibbons*, 2 Ld. Raym. 831: *Barry* v. *Parry*, Id. 1388; 2 Stra. 906, *S. C.*: *Carter* v. *Fish*, 1 Id. 645: *Kelly* v. *Partington*, 5 B. & Adol. 645.

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The certificate.

(*y*) *Taylor* v. *Rolfe*, 13 Law J., N. S., 38, Q. B.; 2 Q. B. 537, *S. C.*

(*z*) *Poole* v. *Grantham*, 14 Law J., N. S., 24, C. P.; 7 M. & Gr. 1030, *S. C.*

(*a*) *Spain* v. *Cadell*, 9 Dowl. 745; 8 M. & W. 129, *S. C.*

(*b*) *Griffiths* v. *Thomas*, 15 Law J., N. S., 336, Q. B.

(*c*) *Thompson* v. *Gibson*, 9 Dowl. 717; 8 M. & W. 281, *S. C.* See *Spain* v. *Cadell*, 9 Dowl. 745: *Gillett* v. *Green*, Id. 219; 7 M. & W. 347, *S. C.*: *Page* v. *Pearce*, 9 Dowl. 815; 8 M. & W. 677, *S. C.*

(*d*) *Jones* v. *Williams*, 14 Law J., N. S., 76, Exch.

(*e*) *Stroud* v. *Watts*, 15 Law J., N. S., 198, C. P.

(*f*) *Shuttleworth* v. *Cocker*, *ante*, 1363.

(*g*) *Bury* v. *Dunn*, 1 Dowl. & L. 141: *Barker* v. *Holtier*, 8 M. & W. 513: *Shuttleworth* v. *Cocker*, *ante*, 1363.

(*h*) *Bury* v. *Dunn*, *supra*.

mistake of law, the judge refuses to certify when he could, the Court cannot review such decision (*i*).

8 & 9 Will. 3, c. 11, s. 3, in actions of trespass.

Besides these enactments, there is the 8 & 9 *W.* 3, *c.* 11, *s.* 4, which enacts, "That in all actions of trespass to be commenced or prosecuted in any of his Majesty's courts of record at Westminster, wherein, at the trial of the cause, it shall appear and be certified by the judge under his hand, upon the back of the record, that the trespass upon which any defendant shall be found guilty, was *wilful and malicious*, the plaintiff shall recover not only his damages, but also his full costs of suit, any former law to the contrary notwithstanding" (*j*). This act is still in force, notwithstanding the 3 & 4 *Vict. c.* 24: and as we have just seen (*k*), where a written notice not to trespass has been served on the defendant, though the case is not within the latter act, it is within this, and there must be a judge's certificate to entitle the plaintiff to full costs, if in an action of trespass the verdict be for less than 40*s*. Formerly, the judges considered themselves absolutely bound to certify under this act, in all cases where a written or verbal notice not to trespass had been given (*l*); but it is now considered discretionary with the judge to certify or not, though, where such notice is given, his discretion is generally exercised in plaintiff's favour (*m*). But he will not certify, if it appear that the trespass was committed for the purpose of asserting a disputed right (*n*). The certificate in this case may be granted out of Court at any time before final judgment (*o*).

21 Jac. 1, c. 16, as to actions for slander.

The 21 *Jac.* 1, *c.* 16, *s.* 6, enacts, "That in all actions upon the case for slanderous words, to be sued or prosecuted by any person or persons in any of the courts of record at Westminster, or in any courts whatsoever that hath power to hold plea of the same, after the end of this present session of Parliament, if the jury upon the trial of the issue in such action, or the jury that shall inquire of the damages, do find or assess the damages under 40*s*., then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the damages so given or assessed amount unto, without any further increase of the same; any law, statute, custom, or usage, to the contrary in anywise notwithstanding." This statute may, perhaps, be considered as still in force, notwithstanding the above statute of 3 & 4 *Vict. c.* 24. It extends only to such words as are actionable of themselves (*p*). It does not, therefore, extend to actions for slander of title (*q*), or of plaintiff's wife, or to other actions where the special damage is the very gist of the action (*r*). Though, even in these actions, being actions on the case, the plaintiff would not get costs on a verdict for less than 40*s*., unless the judge or presiding officer certified to give them to him, under the 3 & 4 *Vict. c.* 24. It extends to words actionable only in respect of their being spoken of the

(*i*) *Marriott* v. *Stanley*, *supra*: *Bury* v. *Dunn*, *supra*.
(*j*) See *Batchelor* v. *Bigg*, 3 Wils. 325.
(*k*) *Ante*, 1363.
(*l*) *Reynold* v. *Edwards*, 6 T. R. 11.
(*m*) *Good* v. *Watkins*, 3 East, 495: per *Parke*, B., in *Sherwin* v. *Swindall*, 13 Law J., N. S., 240, Exch.
(*n*) *Good* v. *Watkins*, *supra*.
(*o*) *Woolley* v. *Whitby*, 2 B. & C. 560; 4 D. & R. 147, *S. C.*: and per *Parke*, B., in *Sherwin* v. *Swindall*, *supra*.
(*p*) *Collier* v. *Gallizard*, 2 W. Bl. 1062: *Surman* v. *Shelleto*, 3 Burr. 1688: *Saville* v. *Jardine*, 2 H. Bl. 531: *Turner* v. *Horton*, Willes, 438; Hullock, 27, 34; Tidd, 9th ed., 962.
(*q*) *Lawe* v. *Harwood*, Cro. Car. 141.
(*r*) *Brown* v. *Gibbons*, 2 Ld. Raym. 831: *Barry* v. *Perry*, Id. 1388; 2 Stra. 906, *S. C.*: *Carter* v. *Fish*, 1 Id. 645: *Kelly* v. *Partington*, 5 B. & Adol. 645.

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plaintiff in his trade, or the like (*s*), even though the defendant pleads a justification (*t*). It applies to writs of inquiry as well as a trial where the damage is under 40*s.* (*u*) The statute, however, only restrains the *court* from awarding more costs than damages; but the jury not being restrained thereby, may give what costs they please (*x*). The statute does not apply where the verdict is substantially for the defendant (*y*).

Court of Requests Acts.

There are various acts of Parliament establishing *Courts of Requests* for the recovery of small sums under 40*s.*, and sometimes above that amount, throughout the kingdom; some prohibiting parties from bringing actions in any other court, others depriving the plaintiff of his costs, and others making him pay defendant's costs if he sue in any other court. The general principles applicable to the construction of these statutes, and the practice as to entering suggestions under them, will be found in the next Chapter.

On verdict for less than 20*l.*

9 & 10 Vict. c. 95.

On Verdict for less than 20*l.*]—By the 9 *&* 10 *Vict.* c. 95, (for the more easy recovery of small debts and demands), section 128 enacts, "That all actions and proceedings which before the passing of this act might have been brought in any of her Majesty's superior courts of record, where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought, or where any officer of the county court shall be a party, (except in respect of any claim to any goods and chattels taken in execution of the process of the court, or the proceeds or value thereof), may be brought and determined in any such superior court, at the election of the party suing or proceeding, as if this act had not been passed." And section 129, enacts, "That if any action shall be commenced after the passing of this act in any of her Majesty's superior courts of record, for any cause other than those lastly herein-before specified, for which a plaint might have been entered in any court holden under this act, and a verdict shall be found for the plaintiff for a sum less than 20*l.*, if the said action is founded on contract, or less than 5*l.*, if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs; and if a verdict shall not be found for the plaintiff the defendant shall be entitled to his costs as between attorney and client, unless in either case the judge who shall try the cause shall certify on the back of the record that the action was fit to be brought in such superior court."

Where defendant has been held to bail for too much.

43 Geo. 3, c. 46, s. 3.

Where Defendant has been held to Bail for too much.]—It is enacted by the 43 *G.* 3, *c.* 46, *s.* 3, "that in all actions to be brought in England or Ireland, from and after the said first day of June, in the said year of our Lord one thousand eight hundred and three, wherein the defendant or defendants shall be arrested and held to special bail, and wherein the plaintiff

(*s*) *Cromfell* v. *Pierson*, 1 Dowl. 406: *Goodall* v. *Enaell*, 2 C., M. & R. 249; 3 Dowl. 743, *S. C.*

(*t*) *Halford* v. *Smith*, 4 East, 567.

(*u*) *Lampen* v. *Hatch*, 2 Stra. 934.

(*x*) *Brown* v. *Gibbons*, 1 Salk. 207.

(*y*) *Skinner* v. *Sheppee*, 6 Bing., N. C., 131.

or plaintiffs shall not recover the amount of the sum for which the defendant or defendants in such action shall have been so arrested and held to special bail, such defendant or defendants shall be entitled to costs of suit, to be taxed according to the custom of the court in which such action shall have been brought; provided that it shall be made appear to the satisfaction of the court in which such action is brought, upon motion to be made in court for that purpose, and upon hearing the parties by affidavit, that the plaintiff or plaintiffs in such action had not any reasonable or probable cause for causing the defendant or defendants to be arrested and held to special bail in such amount as aforesaid, and provided such court shall thereupon, by a rule or order of the same court, direct that such costs shall be allowed to the defendant or defendants; and the plaintiff or plaintiffs shall, upon such rule or order being made as aforesaid, be disabled from taking out any execution for the sum recovered in any such action, unless the same shall exceed, and then in such sum only as the same shall exceed, the amount of the taxed costs of the defendant or defendants in such action; and in case the sum recovered in any such action shall be less than the amount of the costs of the defendant or defendants to be taxed as aforesaid, that then the defendant or defendants shall be entitled, after deducting the sum of money recovered by the plaintiff or plaintiffs in such action from the amount of his or their costs so to be taxed as aforesaid, to take out execution for such costs, in like manner as a defendant or defendants may now by law have execution for costs in other cases." If, for instance, two persons be mutually indebted to each other, and one of them hold the other to bail for the whole amount of the debtor side of the account, instead of for the balance merely, the Court will allow the defendant his costs under this act (*a*). So, where the plaintiff caused the defendant to be arrested for 1,123*l.*, when he had means of knowing that only 715*l.* was due, the defendant was allowed his costs, though the accounts were somewhat complex (*b*). And the same, where the defendant was arrested for 86*l.*, and the plaintiff recovered 15*l.* only, and it appeared that the cause of action was for unliquidated damages, for which the defendant ought not to have been arrested (*c*). And where an attorney held his client to bail for 500*l.*, but his bill on a reference for taxation was taxed at 299*l.*, the Court referred it to the Master to say, whether there was reasonable and probable cause for holding the defendant to bail for 500*l.*, and on the Master's reporting in the negative, they allowed the defendant his costs (*d*). So, where a defendant was holden to bail for board and lodging, charged at the rate of 2*l.* per week, and at the trial it was proved that the plaintiff had expressly agreed to charge at the rate of 1*l.* per week only, and there was a verdict accordingly, the Court allowed the defendant his

Cases within the act.

(*a*) *Dronefield* v. *Archer*, 5 B. & Ald. 513; 1 D. & R. 67, *S. C.*: and see *Austin* v. *Debnam*, 4 D. & R. 653; 3 B. & C. 139, *S. C.*: *Ashton* v. *Neuli*, 2 Dowl. 727; 3 Moo. & Scott, 114, *S. C.* (in which case the defendant had refused to furnish plaintiff with an account of his set-off): *Sims* v. *Jaquest*, 4 Moo. & Sc. 380; 2 Dowl. 800, *S. C.*

(*b*) *Foster* v. *Weston*, 6 Bing. 327.

(*c*) *Bear* v. *Binkus*, 4 Nev. & M. 846.

(*d*) *Robinson* v. *Elsam*, 5 B. & Ad. 661. See case of publican improperly supplying drink, *Eris* v. *Wynne*, 2 Dowl. 23.

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43 G. 3, c. 46, s. 2.

costs under this act, although the plaintiff denied by his affidavit that he had made any such agreement as that proved at the trial (*e*). So, where on a motion for costs under the act, (the plaintiff having arrested defendant for 35*l.* and recovered only 19*l.*), affidavits were put in for the plaintiff, sworn by himself and others, contradicting the evidence given at the trial for the defendant, and impeaching the credit and competency of his principal witness; no motion had been made by the plaintiff for a new trial, or to increase the damages: it was held, that the verdict was *primâ facie* evidence of the want of cause for arresting; and that the Court could not try, upon affidavit, whether or not such verdict was well founded (*f*). And where the plaintiff had sold goods to the defendant, to be paid for, half in ready money, and half by bill at three months; and the defendant having refused to pay the half in ready money, the plaintiff arrested him for the full price of the goods, it was held that he had no reasonable or probable cause for so doing, and that the defendant was entitled to his costs under the above statute (*g*). And the same where a builder was employed in altering the defendant's house, and, during the progress of the work, the defendant countermanded the employment, and, on the refusal of the defendant to appoint a valuer, the builder completed the work, and arrested for the whole amount, but recovered only for the work done previously to the countermand (*h*). And the same, where the defendant objected to receive the goods sold to him by the plaintiff because they were badly manufactured, and the plaintiff agreed to take them back, but after they were returned he sent them again to the defendant, and then arrested him for the amount, the plaintiff having recovered less than the sum for which he had arrested (*i*). And where defendant was arrested for a sum in respect of the greater portion of which the plaintiff knew at the time that the defendant had obtained a discharge under the Insolvent Debtors' Act, the Court allowed the defendant his costs under the above act (*k*). And where the defendant was arrested for 20*l.* 2*s.* 1*d.* for goods sold, and defendant pleaded his infancy, to which plaintiff replied, necessaries: at the trial the plaintiff succeeded in proving the delivery of certain articles only in his particulars, and got a verdict for 10*l.* only: on an affidavit of the defendant that he never owed the plaintiff 20*l.*, the Court gave him his costs under the act, notwithstanding the plaintiff swore that all the articles in the particulars were delivered to the defendant (*l*). And a party is not warranted in arresting another for a debt of which he has not, *at the time of making the arrest*, some evidence besides his own personal knowledge of its existence; and, therefore, a plaintiff arresting a defendant for a large sum of money, and having, at the time of arrest, evidence only as to a small portion of the amount, was held liable to costs under the act, although at the time of the trial some evidence of a subse-

(*e*) *Glenville* v. *Hutchins*, 1 B. & C. 91. And see *Anon.*, 2 Smith, 261.

(*f*) *Tipton* v. *Gardner*, 4 Ad. & Ell. 317. See *Twiss* v. *Osborn*, 4 Dowl. 107.

(*g*) *Day* v. *Picton*, 10 B. & C. 120; 5 M. & R. 31, *S. C.* See *Gomperts* v. *Denton*, 1 Dowl. 623.

(*h*) *Russell* v. *Atkinson*, 2 Nev. & M. 65.

(*i*) *Linley* v. *Bates*, 2 Tyr. 752; 2 C. & J. 660, *S. C.*

(*k*) *Lord Huntingtower* v. *Healey*, 7 D. & R. 369.

(*l*) *Ballantine* v. *Taylor*, 1 Nev. & P. 219; 5 Ad. & Ell. 782, *S. C.*

quent acknowledgment by the defendant was given (*m*). It is not necessary, to bring a case within the act, to prove malice; the absence of reasonable or probable cause is sufficient (*n*). It applies even to an action by an executor as such (*o*); but the case must be a strong one to induce the Court to interfere (*p*).

Cases not within the 43 Geo. 3, c. 46, s. 3.

On the other hand, the Court will not, in general, allow the defendant his costs under this act, unless the sum for which the defendant was held to bail was materially larger than that found to be due (*q*). Nor, where the plaintiff is defeated by a defence not going to the merits, and which he had no means of knowing at the time, or which the defendant has induced him to believe that he will not set up:—thus, where the defendant being arrested for 500*l.*, set up her coverture as her defence, and plaintiff recovered only 38*l.* for money advanced after the death of her husband; upon an application by defendant for costs under the above act, the plaintiff having deposed that he was ignorant of the coverture, and not being contradicted, the Court refused the application (*r*). And the same where the defendant, by his admissions of the debt and promises, deceived and deluded the plaintiff into a belief that he did not mean to set up the Statute of Limitations as a defence, but afterwards pleaded that statute (*s*). In an action by the indorsee against the maker of a note for 100*l.*, the defendant pleaded, that, by agreement between him and the payee, the note was not to be enforced, except on certain terms, which the payee had not complied with, and that the plaintiff had received the note without consideration; the plaintiff entered a *nolle prosequi* as to all except 49*l.*, for which he had given value to the payee, and had a verdict for that sum; it did not appear that the plaintiff was cognizant of the agreement, and the Court refused to allow the defendant his costs (*t*). And, it seems, that the Court will not allow them, where the evidence is conflicting as to the amount due; thus, where the arrest was for 20*l.*, and, at the trial, the evidence of the witnesses for the plaintiff and for the defendant, as to the value of the goods, for the price of which the action was brought, was conflicting, and the jury struck a balance between their estimates, and found a verdict for 8*l.*, the plaintiff swearing that there was an agreement for the higher rate, which he was unable to prove at the trial, the Court refused to allow the defendant his costs (*u*). Nor will the Court allow them, where there is a reasonable doubt in law as to the plaintiff's right to recover part of his demand (*x*). They refused them in a case where the plaintiff

(*m*) *Griffiths* v. *Pointon*, 2 Nev. & M. 675. See *White* v. *Prickett*, *infra*, n. (*s*): *Robinson* v. *Whitehead*, 6 Dowl. 292.

(*n*) *Donlan* v. *Brett*, 10 B. & C. 117; 4 M. & R. 29, *S. C.*: *Hall* v. *Fergus*, 1 Dowl. 686: *Earis* v. *Wynne*, 1 C. & M. 532.

(*o*) *Fisley* v. *Read*, 5 B. & A. 515, n.

(*p*) See per *Heath*, J., in *Foulkes* v. *Neighbour*, 1 Marsh. 21.

(*q*) Per *Tindal*, C. J., *Sherwood* v. *Taylor*, 6 Bing. 281; 3 Moo. & P. 641, *S. C.* See *Roper* v. *Sheenby*, 2 Dowl. 14; 1 C. & M. 496, *S. C.*

(*r*) *Spooner* v. *Dank*, 7 Bing. 772; 5 Moo. & P. 701; 1 Dowl. 232, *S. C.* And see *Roper* v. *Sheenby*, 1 C. & M. 496; 2 Dowl. 14, nom. *Roper* v. *Sheenby*, *S. C.*

(*s*) *White* v. *Prickett*, 4 Bing., N. C., 237; 6 Dowl. 445, *S. C.*

(*t*) *Edwards* v. *Jones*, 2 M. & W. 414; 5 Dowl. 564, *S. C.*

(*u*) *Shotwell* v. *Barlow*, 1 Gale, 107; 3 Dowl. 709, *S. C.* And see *Clare* v. *Cooke*, 4 Bing., N. C., 269: *Mantill* v. *Southall*, 2 Bing., N. C., 74: *Day* v. *Clark*, 5 Bing., N. C., 117; 7 Dowl. 147, *S. C.*

(*x*) *Stovin* v. *Taylor*, 1 Dowl. 697; 1 Nev. & M. 250, *S. C.*: *James* v. *Francis*, 5 Price, 1.

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omitted a count in the declaration, applicable to a part of his demand, and was thereby prevented from recovering the amount for which the defendant was arrested (*y*).

Plaintiff must "recover" a less amount than that for which he arrested defendant.

The statute applies only to cases where the plaintiff "*recovers*" a less sum than that for which he arrested, by *judgment* (*z*). Therefore, in debt on bond conditioned for the payment of money by instalments, the defendant was holden to bail for the full sum secured, but the verdict, being for such of the instalments only as were due, was for a less sum; it was held, that, as the judgment was entered up for the penalty, the case was not within the act (*a*). If, upon a compromise between the parties, the plaintiff take a less sum than that for which he arrested, the defendant will not be allowed his costs (*b*). Nor will he be allowed them, if he pay a less sum into court than that for which he was arrested, and the plaintiff takes it out of court and discontinues the action (*c*). Or, if the matter be referred to arbitration before verdict, and the arbitrator award the plaintiff a less sum than that for which he had holden the defendant to bail, the Court will not, in such a case, allow the defendant his costs under the statute (*c*). So, where the defendant, who was arrested for 327*l.*, had tendered 250*l.*, but did not pay it into court, and an arbitrator, to whom the cause was referred, awarded the plaintiff only 250*l.*, the Court held that this was not a case within the statute (*d*). But, if the arbitrator has power to order, and does order, a judgment to be entered up (*e*), or if the cause be referred at *Nisi Prius*, and a verdict be taken subject to the award (*f*), (even if the cause and all matters in difference be referred, provided the arbitrator make a separate adjudication as to the action (*g*)), the Court may allow the defendant his costs; unless, indeed, where the cause and all matters in difference are referred, and the costs are, by the terms of the reference, to abide the event of the award (*h*). Where an arbitrator, to whom a cause has been referred by order of *Nisi Prius*, takes no notice in his award of a power given him by the order to award the defendant his costs on the ground of an excessive arrest, but disposes of the general costs of the cause, the Court will not interfere to give the defendant his costs (*i*).

Where cause referred to arbitration.

(*y*) *Preedy* v. *M'Farlane*, 1 C., M. & R. 819; 3 Dowl. 468, *S. C.*

(*z*) *Brooks* v. *Rigby*, 2 Ad. & El. 21: *Rowe* v. *Rhodes*, 2 Dowl. 384; 2 C. & M. 379, *S. C.*: *Porter* v. *Pittmann*, 2 D. & R. 266: *Davey* v. *Renton*, 4 D. & R. 187; 2 B. & C. 711, *S. C.*: *Roufsroy* v. *Alefton*, 13 East, 90: *Butler* v. *Brown*, 1 B. & B. 66; 3 Moore, 327, *S. C.* It would be otherwise if plaintiff replied damages *ultra*, and proceeded to trial, and got a verdict for less than the amount: see *Taylor* v. *Rolfe*, 13 Law J., N. S., 38, Q. B; 2 Q. B. 537, *S. C.*

(*a*) *Talbot* v. *Hodson*, 7 Taunt. 251. See *Cammack* v. *Gregory*, 10 East, 525.

(*b*) *Linthwaite* v. *Bellings*, 2 Smith, 667.

(*c*) *Keene* v. *Deeble*, 5 D. & R. 383; 3 B. & C. 491, *S. C.*: *Payne* v. *Acton*, 1 B. & B. 278; 3 Moore, 605, *S. C.*

(*d*) *Sherwood* v. *Taylor*, 6 Bing. 239; 3 Moo. & P. 641, *S. C.*: *Holden* v. *Reid*, 4 Nev. & M. 405; 1 H. & W. 3, *S. C.*

(*e*) Per *Littledale*, J., *Holden* v. *Reid*, 4 Nev. & M. 405.

(*f*) *Jones* v. *John*, 5 Dowl. 130; 2 H. & W. 119, *S. C.* See *Turner* v. *Priest*, 5 Bing. 191: *Silversides* v. *Beasley*, 1 Moore, 92.

(*g*) *Jones* v. *John*, *supra*.

(*h*) *Thompson* v. *Atkinson*, 6 B. & C. 195. See where the accounts were complicated, and the Court refused costs under the statute, *Turner* v. *Prince*, 5 Bing. 191; 2 Moo. & P. 305, *S. C.* And see *Handley* v. *Levi*, 8 B. & C. 637; 3 M. & R. 37, *S. C.*: *Thompson* v. *Atkinson*, 6 B. & C. 193; 9 D. & Ry. 347, *S. C.*; *Griffith* v. *Thomas*, 15 Law J., N. S., 336, Q. B.

(*i*) *Greenwood* v. *Johnson*, 3 Dowl. 666.

The statute does not extend to cases where the defendant has not been actually arrested or put under personal restraint, as well as held to special bail (*l*): nor to cases where the defendant is discharged after the arrest in any other way than by putting in bail (*m*).

Defendant must have been actually arrested and held to bail.

The act does not extend to actions originally brought in an inferior court, (as the Palace Court, &c.), and removed into the courts at Westminster (*n*).

Actions removed from inferior courts.

The application under the act must be made to the *Court*, and not to a judge. Where the verdict or inquiry is had in vacation, it may be necessary to apply to a judge to stay the signing of judgment until the first five days of the ensuing term, in order to enable the defendant to apply to the Court. It can only be made in the court in which the action was commenced (*n*). It must be made before the costs are taxed (*o*). The whole onus of establishing that the arrest was without reasonable or probable cause, rests upon the defendant (*p*). The application must be supported by affidavits, shewing such want of reasonable or probable cause, also the fact of the arrest and holding to bail, and of the amount for which the arrest was made, and of the sum recovered by the judgment. The statement of the accounts, however, may not be absolutely requisite, as the Court may refer to the judge's notes (*q*). The Court, will not, it seems, hear affidavits by the plaintiff, alleging that the witnesses at the trial were perjured, and contradicting the facts which the jury have found (*r*).

The application and form, &c. of it.

Debt on a Judgment.]—By stat. 43 *G.* 3, *c.* 46, *s.* 4, it is enacted, "that in all actions which shall be brought in England or Ireland, from and after the said first day of June, in the said year of our Lord 1803, upon any judgment recovered, or which shall be recovered, in any court in England or Ireland, the plaintiff or plaintiffs in such action on the judgment shall not recover or be entitled to any costs of suit, unless the court in which such action on the judgment shall be brought, or some judge of the same court, shall otherwise order." This statute extends only to actions brought upon judgments obtained by plaintiffs, and not to such as are brought upon judgments of nonsuit, or the like (*s*). In such actions the plaintiff will not in general be allowed his costs, if he might have issued execution, or realised all he would be entitled to recover in the action in any other way (*t*). Where the plaintiff brought an action of debt on a judgment of a borough court, to which the defendant pleaded *nul tiel* record, and the plaintiff produced

In debt on a judgment.

(*l*) *Bates* v. *Pilling*, 2 Dowl. 367; 2 C. & M. 374, *S. C.*: *Amor* v. *Blofield*, 1 Dowl. 277; 2 Moo. & Sc. 156; 9 Bing. 91, *S. C.*: *James* v. *Askew*, 3 Nev. & P. 495; 8 A. & E. 351, *S. C.*: *Robinson* v. *Powell*, 5 M. & W. 479. As to what constitutes an arrest, see Vol. 1, 613, 614: *Reynolds* v. *Matthews*, 7 Dowl. 586.

(*m*) *Bennett* v. *Burton*, 9 Dowl. 492. And see *Edwards* v. *Jones*, 2 M. & Wels. 414; 5 Dowl. 585; 7 Car. & P. 633, *S. C.*: *Amor* v. *Blofield*, *supra*: *Wilson* v. *Broughton*, 2 Dowl. 631: *Preedy* v. *Macfarlane*, 1 C., M. & R. 819; 3 Dowl. 456, *S. C.*

(*n*) *Costello* v. *Coriett*, 4 Bing. 474; 1 Moo. & P. 315, *S. C.*: *Handley* v. *Levey*, 8 R. & C. 637; 3 M. & R. 37, *S. C.*: *James* v. *Dawson*, 1 Dowl. 341: *Connell* v. *Watson*, 2 Dowl. 139.

(*o*) *Rennie* v. *Forston*, 8 Dowl. 396.

(*p*) *White* v. *Prickett*, 6 Dowl. 445.

(*q*) *Van Neevel* v. *Hunter*, 3 Ad. & Ell. 243.

(*r*) *Tipton* v. *Gardiner*, 4 Ad. & Ell. 317: *Turp* v. *Osborne*, 4 Dowl. 107, *ante*, 1368.

(*s*) *Bennet* v. *Neale*, 14 East, 343.

(*t*) *Wood* v. *Silleto*, 1 Chit. Rep. 473. See *Mann* v. *Nicholls*, 14 M. & W. 119, which was an action on a judgment for a debt under 20*l.*

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the record in court and moved for the costs under the above act, the Court refused them, saying, that the plaintiff ought not to have brought the action, but ought to have removed the judgment and sued out execution (*u*). Where a defendant had been superseded through the neglect of the plaintiff, the Court refused to allow the plaintiff the costs of an action on the judgment, although the defendant caused expense and delay by pleading a false plea of *nul tiel* record (*x*). On the other hand, where the plaintiff brought an action on a judgment, to which defendant pleaded *nul tiel* record, the Court granted the plaintiff a rule *nisi* for the costs of the action, it appearing it had been rendered necessary by the lapse of time permitted to take place in the original action in consequence of the application by the defendant for delay (*y*). And where a defendant against whom judgment had been obtained sued out a writ of error, and to an action on the judgment pleaded a sham plea of *nul tiel* record, the Court allowed the plaintiff his costs of the action (*z*). The application under the act must be made to the Court *in banc*, or to a judge at chambers, and not at *Nisi Prius* (*a*). It is a rule *nisi* only in the first instance (*b*).

In an action on a statute.

In an Action on a Statute.]—In actions on statutes by parties aggrieved, the plaintiff, if he have a verdict, is entitled to costs, as in other cases, though the statute on which the action is founded be subsequent to the statute of Gloucester (*c*). But, in actions by an informer, where the action itself creates the right, the plaintiff is not entitled to costs unless expressly given to him by statute (*c*). But he is entitled to them where the right is vested before the action was brought; as in the case of the College of Physicians suing as such for penalties against an unqualified practitioner (*d*).

In debt for not setting out tithes.

In Debt for not setting out Tithes.]—Before the 8 & 9 *W.* 3, *c.* 11, in an action on the statute of 2 & 3 *Edw.* 6, *for not setting out tithes*, the plaintiff was not in any case entitled to costs of suit (*e*). But sect. 3 of that act enacts, that in all actions of debt for not setting forth of tithes, wherein the single value or damage found by the jury shall not exceed the sum of twenty nobles, (*i. e.* 6*l.* 13*s.* 4*d.*), the plaintiff obtaining judgment, or any award of execution after plea pleaded, or demurrer joined therein, shall recover his costs of suit. Now, however, by the 5 & 6 *W.* 4, *c.* 74, no action can be brought for the not setting out of tithes under the yearly value of 10*l.* (*f*); so that in any maintainable action for not setting out tithes, the plaintiff is not entitled to costs. The enactment is confined to cases where the plaintiff obtains judgment after a plea or demurrer, and does not apply to a case where a defendant suffers judg-

(*u*) *Harmer* v. *White*, 13 Law J., N. S., 110, Exch.; 12 M. & W. 519, *S. C.*
(*x*) *Hall* v. *Pierce*, 5 Dowl. 603.
(*y*) *Fraser* v. *Moses*, 1 Dowl., N. S., 705; 4 Scott, N. R., 749, *S. C.* See 13 Law J., N. S., 110, n., Exch.
(*z*) *Samuel* v. *Barker*, 5 Taunt. 264. The defendant in this case evidently had acted vexatiously and for delay.
(*a*) *Jones* v. *Lake*, 8 C. & P. 395, per *Parke*, B.
(*b*) *Fraser* v. *Moses*, 1 Dowl., N. S., 705.
(*c*) *Ante*, 1359.
(*d*) *College of Physicians* v. *Harrison*, 9 B. & C. 854.
(*e*) *Day* v. *Pocknell*, Moo. 915; 1 B. & Y. 154, *S. C.*; *Dagg* v. *Pemberton*, Cro. Jac. 70; 1 E. & Y. 163, *S. C.*
(*f*) *Peyton* v. *Watson*, 11 Law J., N.S. 271, Q. B.

ment by default (*g*). By the common law, or by the statute of 23 *H.* 8, *c.* 15, a *defendant* in an action of debt upon the statute was not entitled to costs in any case: but by the 8 & 9 *W.* 3, *c.* 11, *s.* 3, "if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same in like manner as aforesaid." CHAP. XXXV.

In Action for Infringement of Patent.]—The 5 & 6 *W.* 4, *c.* 83, *s.* 3, enacts, "that if any action at law or any suit in equity for an account shall be brought in respect of any alleged infringement of such letters patent heretofore or hereafter granted, or any *scire facias* to repeal such letters patent, and if a verdict shall pass for the patentee or his assigns, or if a final decree or decretal order shall be made for him or them upon the merits of the suit, it shall be lawful for the judge before whom such action shall be tried, to certify on the record, or the judge who shall make such decree or order, to give a certificate under his hand, that the validity of the patent came in question before him, which record or certificate being given in evidence in any other suit or action whatever touching such patent, if a verdict shall pass, or decree or decretal order be made, in favour of such patentee or his assigns, he or they shall receive treble costs in such suit or action, to be taxed at three times the taxed costs, unless the judge making such second or other decree or order, or trying such second or other action, shall certify that he ought not to have such treble costs." And the 6th section enacts, "that in any action brought for infringing the right granted by any letters patent, in taxing the costs thereof, regard shall be had to the part of such case which has been proved at the trial, which shall be certified by the judge before whom the same shall be had, and the costs of each part of the case shall be given according as either party has succeeded or failed therein, regard being had to the notice of objections, as well as the counts in the declaration, and without regard to the general result of the trial." Notwithstanding this last section, where the substance of six objections out of seven had been found for the plaintiff, but the defendant obtained a verdict on one issue which covered the entire cause of action, it was held that the plaintiff was entitled to six-sevenths of the costs of copying, transcribing, &c., those objections, and the costs of the issues found for him, but that the defendant was entitled to the costs of the issues found for him, and the general costs of the cause (*h*). In action for infringement of patent.

2. *On Verdict for Defendant.*

At common law, the defendant was not entitled to costs, and he was wholly without remedy for any expenses he had been put to, if he had a verdict, or the plaintiff were nonsuited, the amercement to which the plaintiff was subjected in such a case, *pro falso clamore suo*, going entirely to the crown. But now, Generally.

(*g*) See 2 Eagle on Tithes, 331: *Barnard* v. *Moss*, 1 H. Bla. 107; 2 E. & Y. 337, *S. C.*; *Bale* v. *Hodgetts*, 7 Moore, 669; 3 E. & Y. 1069, *S. C.*

(*h*) *Losehe* v. *Hague*, 7 Dowl. 495.

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by stats. 23 *H.* 8, *c.* 15, and 4 *Jac.* 1, *c.* 3, in all cases in which a plaintiff would be entitled to costs if he recovered, the defendant shall have his costs if a verdict be found for him (*i*). Also, by stat. 18 *Eliz. c.* 5, in actions upon penal statutes by common informers, the defendant is entitled to his costs if the plaintiff willingly delay the suit, or discontinues or becomes nonsuit, or has a verdict or judgment against him (*k*), though the plaintiff would not be entitled even if he succeeded.

Where several defendants, and some acquitted.

Notwithstanding the above statute of James I., though one of several defendants obtained a verdict, he was not entitled to costs if the plaintiff had a verdict against the others, until the 8 & 9 *W.* 3, *c.* 11, by which, if in trespass, assault, false imprisonment, or ejectment, there were several defendants, and one of them was acquitted, the defendant so acquitted might recover his costs, in the like manner as if a verdict had been given against the plaintiff, unless the judge immediately after the trial, in open court, certified upon the record that there was a reasonable cause (*l*) for making such person a defendant. This statute, however, was confined to the particular actions mentioned in it, and did not extend to replevin (*m*), or to an action on the case for a tort (*n*), or trover (*o*), or to debt on bond against executors, where one of them was acquitted on the plea of *plene administravit præter* (*p*). Also, in cases within the statute, if the defendants had pleaded jointly, only 40*s.* costs were allowed to the defendant acquitted (*q*). But by the 3 & 4 *W.* 4, *c.* 42, *s.* 32, "where several persons shall be made defendants in *any personal action*, and any one or more of them shall have a *nolle prosequi* entered as to him or them, or upon the trial of such action shall have a *verdict* pass for him or them, every such person shall have judgment for, and recover, his *reasonable* costs, unless, in the case of a trial, the judge before whom such cause shall be tried shall certify upon the record, under his hand, that there was a reasonable cause for making such person a defendant in such action." It has been decided under this act, that where there are several defendants who defend jointly, and one of them gets a verdict, he will be entitled to an aliquot portion of the joint costs of the defence, unless the Master is satisfied that some smaller portion should be allowed by reason of any special circumstances: thus, if there be two defendants, he will be entitled to half the costs, or if there be three, he will be entitled to a third; although formerly only 40*s.* used to be allowed him (*r*). And where a verdict is found for the plaintiff on some of the issues against some of the defendants, and against him on all the other issues, the plaintiff is entitled to the balance only of the costs after deduction of

(*i*) See *Greetham* v. *Hundred of Theale*, 3 Burr. 1723; 2 Bac. Abr., Costs, D.: Hullock, 121, 134.

(*k*) Hullock, 214, 220. See *Kirkham* v. *Wheeley*, 1 Salk. 30: *Wilkinson* v. *Allott*, Cowp. 366: *Garland* v. *Burton*, 2 Str. 1103.

(*l*) As to what is a reasonable cause, see *Aaron* v. *Alexander*, 3 Camp. 35: *Furneaux* v. *Fotheriay*, 4 Id. 136: *Humphrey* v. *Wedehouse*, 1 Bing., N. S., 506.

(*m*) *Mariner* v. *Barrett*, 3 Burr. 1984: *Ingle* v. *Wordsworth*, 1 W. Bl. 355.

(*n*) *Dibben* v. *Cooke*, 2 Str. 1006.

(*o*) *Poole* v. *Boulton*, Barnes, 139.

(*p*) *Norfolk* (*Duke of*) v. *Anthony*, Tidd, 966. And see *Murray* v. *Nicholls*, 4 M. & P. 220.

(*q*) *Hughes* v. *Chitty*, 2 M. & Sel. 172.

(*r*) *Griffiths* v. *Jones*, 4 Dowl. 159: *Sterling* v. *Cozens*, 2 C., M. & R. 445: 3 Dowl. 782: 1 Gale, 150, *S. C.*: *Bartholomew* v. *Stephens*, 5 M. & W. 396: *Norman* v. *Clementson*, 4 M. & Gr. 943: 1 Dowl., N. S., 718, *S. C.* And see *Gougenheim* v. *Lane*, 4 Dowl. 482: 1 M. & W. 136, *S. C.*: *Allenby* v. *Proudlock*, 5 Nev. & M. 636: 4 A. & E. 326, *S. C.*

all the costs of all the defendants (*s*). Where there are several defendants who plead different pleas, and *bonâ fide* sever in their defences, and a verdict is found for them, they will each be entitled to make out and have taxed a separate bill for his costs: and where two defendants in trespass severed in pleading, but pleaded the same pleas, all going to the whole action, and one succeeded upon all the issues, the other upon one only, each defendant was considered entitled to his separate costs of the issues in which he succeeded; but the defendants having appeared by separate attornies and counsel, the attornies being members of the same firm, and the briefs and evidence substantially the same, the Master, considering that the defence was really joint, taxed the costs as if the parties had appeared by the same attorney: it was admitted by the Court, that the taxation of the costs in that respect could not be disturbed (*t*). Where several defendants obtain a verdict generally, their costs must be taxed at the same time, though they defend separately (*u*). Notwithstanding a judge certifies under this act in an action against officers of the metropolitan police, for matters done in execution of the 10 *G.* 4, *c.* 44, *s.* 41, the officers are entitled to their costs as between attorney and client (*x*). Although the acquitted defendant is thus entitled, in the absence of a judge's certificate against it, to have a judgment for his costs, he may, by leave of the Court or a judge, have these costs deducted from the costs the plaintiff has obtained against the other defendants against whom plaintiff has got a verdict (*y*).

Where some defendants go to trial, and others suffer judgment, &c.

In actions *ex delicto* against several defendants, where some only of them plead and the others suffer judgment by default, and those who plead obtain a verdict at the trial, they are entitled to their costs under the above statute of 4 *J.* 1, *c.* 3, although the plaintiff will have his judgment for damages and costs against the others who suffered judgment by default (*z*). And the same in actions *ex contractu*, except that in this case the plaintiff will not have judgment either for damages or costs against the defendants who suffered judgment by default (*a*); unless the plea on which the other defendants get a verdict, be merely a personal discharge to the parties pleading it (*b*), for such mere personal discharge could not be any bar to the action against the others.

By and to what defendants payable.

Where there are several defendants who obtain judgment in the action, the plaintiff may pay costs to which of them he pleases; and when they fail, each defendant is liable for the whole costs; but if, after satisfaction from any one, the plaintiff takes out execution against another, such defendant may apply to the Court (*c*). Where the plaintiffs brought four actions

(*s*) *Sterling* v. *Cozens*, *supra*; *Gambrell* v. *Earl of Falmouth*, *infra*.

(*t*) *Gambrell* v. *Earl of Falmouth*, 5 Ad. & El. 403; 6 Nev. & M. 859, *S. C.* See *Nanny* v. *Kenrick*, 2 Dowl. 334: *George* v. *Easton*, 1 Scott, 518; 1 Bing., N. C., 513, *S. C.*; *Lees* v. *Kendall*, 1 H. & W. 316; 3 Ad. & El. 707, *S. C.*

(*u*) *Smith* v. *Campbell*, 6 Bing. 637.

(*x*) *Humphrey* v. *Woodhouse*, 1 Scott, 395; 3 Dowl. 416; 1 Bing., N. C., 506, *S. C.*

(*y*) *Norman* v. *Climerson*, 4 M. & Gr. 243.

(*z*) *Price* v. *Harris*, 10 Bing. 557; 4 Moo. & Sc. 474; 2 Dowl. 804, *S. C.*; *per cur. Morgan* v. *Edwards*, 6 Taunt. 396; 2 Marsh. 201, *S. C.*

(*a*) *Shrubb* v. *Barrett*, 2 H. Bl. 28: *Morgan* v. *Edwards*, *supra*; Hullock, 143.

(*b*) *Noke* v. *Ingham*, 1 Wils. 89: *Baylis* v. *Dinsley*, 2 Chit. Rep. 153.

(*c*) *Wilson* v. *Foote*, Bull. N. P. 335.

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against two insurance companies for a loss by fire, and a verdict was found for the former against each company on two of the causes only, the Court held that costs were to be apportioned equally, although three causes only were set down for trial at the same sittings, there being a demurrer pending in the other (*d*). One defendant, who had given a general release to the plaintiff after the costs of nonsuit had been taxed, was ordered to pay to the other defendants their shares (*e*). In an action against several defendants, where one makes a successful application in the cause, and costs are ordered to be paid upon it, the payment of them should be to him only and not to the others (*f*).

3. *Where there are several Issues.*

Who entitled to general costs of cause.

If there are several issues, and one is found for the plaintiff and the other for the defendant, if that found for the plaintiff be the substantial issue in the cause, and upon which he will be entitled to recover his debt or damages, or any part of them, he will be entitled to the *postea* and to the general costs of the cause. If, on the other hand, the defence raised upon the issue found for the defendant furnishes substantially a defence to the whole action, then the defendant will be entitled to the *postea* and the *general costs* of the cause (*g*). Thus, in an action for libel, where there was a plea of not guilty, and plea of justification, and there was a verdict for the defendant on the general issue, and for the plaintiff on the special pleas, the defendant was held entitled to the general costs of the cause (*h*). To trespass for false imprisonment, where defendant pleaded not guilty, and a plea of justification under a *ca. sa.*, and the plaintiff replied the breaking open an outer door, on which issue was joined and a verdict was found for defendant on the plea of not guilty, and for the plaintiff on the other issue, it was held defendant was entitled to the general costs of the cause (*i*). So he was held entitled to them where the plaintiff had a verdict for 73*l.* on *non assumpsit*, and the defendant had a verdict on issues joined on three special pleas, which covered sums amounting altogether to a sum exceeding that sum (*k*). So he will be entitled to them if there be but one plea upon which issue is joined, if the plea raises divisible and distinct issues, and one of which, substantially a defence to the whole action, is found for the defendant: as where in trespass defendant pleaded a right of way to bring water and goods from a river, and a verdict was found for him as to the right to bring water, and for the plaintiff as to the right to bring goods, it was held that the defendant was entitled to the general costs of the cause (*l*).

(*d*) *Severn* v. *Olive*, and *Severn* v. *Slade*, 6 Moore, 235.

(*e*) *Darlow* v. *Collinson*, Bull. N. P. 336.

(*f*) *Shoulder* v. *Stokes*, 13 Law J., N. S., 230, Q. B.

(*g*) See *Hart* v. *Cutbush*, 2 Dowl. 488, per *Parke, J.*: *Frankum* v. *Lord Falmouth*, 4 Dowl. 64: *Bird* v. *Higginson*, 5 Ad. & E. 23: 6 Nev. & M. 791, *S. C.*; *Empson* v. *Fairfax*, 8 Ad. & E. 326: *Rugg* v. *Wells*, 6 Taunt. 129: *Cross* v. *Johnson*, 9 B. & Cres. 613: *Staley* v. *Long*, 5 Dowl. 616: *Nisbet* v. *Blake*, 11 East, 263.

(*h*) *Spencer* v. *Hamerton*, 4 Ad. & E. 413: 6 Nev. & M. 22: *Hart* v. *Cutbush*, 2 Dowl. 488.

(*i*) *Newton* v. *Hatford*, 14 Law J., N. S., 145, C. P.: 1 Com. B. 141, *S. C.*

(*k*) *Roberts* or *Robert* v. *Phillips*, 5 Dowl. 473; 2 M. & W. 49, *S. C.*

(*l*) *Knight* v. *Moore*, 3 Bing., N. S., 534; 5 Dowl. 467, *S. C.* See *Prudhomme* v. *Fraser*, 2 Ad. & E. 645: *Doe* v. *Errington*, 4 Dowl. 602, and cases, *post*, 1381.

The costs of the issues.

Before considering the quantum of costs to be allowed where there are several issues, and some found for the plaintiff and others for the defendant, it will be proper to consider which party is entitled to the costs of the respective issues, and this may be determined by the statute of *Anne* and certain rules of court, which we will now notice.

Stat. 4 & 5 Anne, c. 16. Where defendant succeeds on a plea going to the whole action.

By the 4 & 5 *Anne*, *c.* 16, *ss.* 4, 5, any defendant or plaintiff in replevin, may, with leave of the Court, plead as many several matters as he shall think necessary for his defence, provided "that if any such matter shall, upon demurrer joined, be judged insufficient, costs shall be given at the discretion of the Court (*m*); or if a verdict shall be found upon any issue in the said cause for the plaintiff or defendant in replevin, costs shall also be given in like manner, unless the judge who tried the said issue shall certify that the said defendant or plaintiff in replevin had a probable cause to plead such matter which upon the said issue shall be found against him" (*n*). Where the defendant pleads several pleas in bar, each going to the whole declaration, if he succeed upon any one sufficient plea, he must have judgment upon the whole declaration, although the plaintiff succeed upon the other pleas, because by his plea he has shewn, that the plaintiff had no sufficient cause of action against him; and in such a case, as we have just seen, he is entitled to the *postea*, and the costs of the cause. But by virtue of the statute, if the plaintiff also succeed, either upon demurrer or by verdict, upon any of the other pleas, he shall have his costs of the issue or issues upon which he has so succeeded, to be deducted from the defendant's costs, unless the judge certify that the defendant had probable cause for pleading those pleas upon which the plaintiff succeeded (*o*); and the same as to a defendant or avowant in replevin (*p*). Thus, in trespass, where defendant pleads not guilty, and son assault demesne, and has a verdict on the latter plea only, he is not entitled to the costs of the former (*q*). So, in slander, where defendant pleads not guilty and a justification, and succeeds on not guilty only, the plaintiff is entitled to his costs on the other issue, notwithstanding 21 *J.* 1, *c.* 16, *s.* 6 (*r*). But if the issues on special pleas be found for the plaintiff, and the judge certifies under the statute, that the defendant had probable cause for pleading such pleas, the Master (on taxation) will be justified in refusing to allow the plaintiff the costs of these issues, and this notwithstanding the rule of *H. T.* 4 *W.* 4, *s.* 5, *post*, 1380 (*s*). The statute does not operate so as to give full costs to the plaintiff in the case of double pleading, where the damages are under 40*s.*, and the judge certifies under the stat. 43 *Eliz. c.* 6, before mentioned (*t*), even although all the issues be found for him (*u*). And in an action of trespass or on the case, where the plaintiff recovers less than 40*s.* damages, if the judge refuses to certify under the 3 & 4 *Vict. c.* 24, the plain-

(*m*) See *Doherty* v. *Page*, 2 T. R. 391.
(*n*) See Vol. 1, 248; Bull. N. P. 334; Hullock, 99 to 119.
(*o*) *Doherty* v. *Page*, 2 T. R. 391: *Jones* v. *Davies*, Barnes, 141: *Bennett* v. *Coster*, 1 B. & B. 465; Hullock, 100, 108.
(*p*) *Dodd* v. *Joddrell*, 2 T. R. 235: *Bright* v. *Jackson*, Barnes, 144: *Stone* v. *Forsyth*, 2 Dougl. 709, n.
(*q*) *Mullins* v. *Scott*, 5 Bing., N. C., 493.
(*r*) *Skinner* v. *Shoppy*, C. P., M. 1839, 3 Jur. 1127. See also *Bird* v. *Higginson*, 5 Ad. & E. 91.
(*s*) *Fry* v. *Monkton*, 9 Dowl. 967.
(*t*) *Heard* v. *Cheshire*, Say. 260.
(*u*) *Richmond* v. *Johnson*, 7 East, 583.

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tiff will not be entitled to any costs under this statute, or otherwise, upon any of the issues found for him (*x*). The certificate mentioned in the statute of Anne may be given out of court. The power to grant is not affected by the rule of *H. T.*, 4 *W.* 4, *r.* 7, presently noticed; and if the judge so certifies the case is taken out of the general rule, and the plaintiff is not entitled to the costs of the issues (*y*). It may be added, that the plaintiff does not, it seems, lose his right to these costs by not having them taxed at the same time as defendant has his costs taxed, and this notwithstanding that rule: and where the defendant taxed his costs on the issue found for him, which operated as a defence to the whole action, and the plaintiff paid them, and nearly a year after the plaintiff applied to the Master to tax the costs of the issues found for him, but the Master declined to tax them, the Court refused to set aside a judge's order directing such taxation to be made (*z*).

R. H., 2 W. 4, depriving plaintiff of costs of issues on which he fails, and giving defendant costs of issues on which he succeeds.

By the rule of *H.*, 2 *W.* 4, *r.* 74, "no costs shall be allowed on taxation to a plaintiff upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs." This rule was made for the benefit of defendants, and puts an end to the former unjust practice, in some cases, of allowing the plaintiff his costs, and, in others, of disallowing the defendant's costs on issues on which the defendant succeeded (*a*). Since this rule, the defendant will have allowed him the costs of all the issues found for him; and notwithstanding the rule only uses the word "deduct," if it should happen that the defendant's costs exceed those to which the plaintiff is entitled, the defendant in that case will have judgment and execution for the amount of the excess (*b*). As to what amount will be allowed, see *post*, 1381. In accordance with this rule, where the general issue was pleaded to a declaration containing several counts, and the defendant succeeded under it as to some of those counts, he was held entitled to the costs occasioned by them; for the general issue to the whole declaration, containing several counts, tenders a distinct issue to each of the counts (*c*). So, where the declaration in an action for an illegal seizure and sale of plaintiff's goods under a warrant of distress contained nine counts, two of which went to the whole value of the property, while the remainder went to the injury to the goods, and the verdict was for the plaintiff on the two first counts, and for the defendants on the others, which became immaterial when the plaintiff recovered for the entire value of the property, it was held that the defendant was entitled to deduct the costs of those issues from the plaintiff's

(*x*) *Newton* v. *Rowe*, 14 Law J., N. S., 132, C. P.; 1 Com. B. 187, *S. C.* It was the case of a libel and several pleas, the issues on which were all found for the plaintiff.

(*y*) *Robinson* v. *Messenger*, 3 Nev. & P. 583; 8 Ad. & E. 606, *S. C.* And see *Fry* v. *Monkton*, 9 Dowl. 967.

(*z*) *Watson* v. *Boyes*, 14 Law J., N. S., 116, Exch.

(*a*) See *Butcher* v. *Green*, 2 Doug. 677. *Postan* v. *Stanaway*, 5 East, 261; *Parson* v. *Lee*, 2 B. & P. 333; 4 B. & Ald. 43, 700; *Rex* v. *Commissioners of the Thames*, 3 B. & B. 117; 6 Moore, 394, *S. C.*: *Langdon* v. *Bourne*, 1 B. & Cres. 276: *Cross* v. *Johnson*, 9 B. & Cres. 278: *Astley* v. *Young*, 2 Burr. 1232.

(*b*) *Twigg* v. *Potts*, 4 Dowl. 286: *Milner* v. *Graham*, 2 Dowl. 422.

(*c*) *Cox* v. *Thomason*, 1 Dowl. 575; 2 C. & J. 496, *S. C.* And see *Knight* v. *Brown*, 1 Dowl. 733; 2 Moo. & Scott, 797; 9 Bing. 643, *S. C.*; *Ward* v. *Pell*, 1 C. & M. 845; 2 Dowl. 76, *S. C.*

costs (*d*). So where, in case for a libel, on the general issue the jury found for the plaintiff, and also found as a fact, that a great part of the declaration did not apply specifically to the plaintiff, though there were innuendos by which it was endeavoured to connect him with the matters complained of; it was held that the defendant was entitled to the costs of that part (*e*). So, in ejectment, where there was but one count, and the lessor of the plaintiff recovered judgment for part only of the lands claimed, it was held that the defendant was entitled to have his costs, as to the part found for him (*f*). And the same, where there were several demises, and the jury found for the plaintiff on some, and for the defendant on others (*g*). So, in covenant, if there be several breaches assigned, the defendant will be entitled to the costs of the issues found for him (*h*). And the same, where to trespass for breaking and entering the plaintiff's house, and converting his goods, the defendant, among other pleas, pleaded that the house and goods were not plaintiff's, and the jury found for the plaintiff as to the entering the house and taking one parcel, and for the defendant as to the other parcel (*i*); and the same in trover, where defendant succeeds as to some of the goods (*k*). But where, in an action against owners of a ship for negligently stowing, &c. certain casks, the defendants traversed the breach of contract, and the jury found for the plaintiff as to one cask, and for the defendant as to the residue, it was held that the issue was not divisible, so as to entitle the defendant to costs of the portion found for him (*l*). Where, in replevin, the defendant pleaded that the goods belonged to himself and others, as assignees under a commission of bankruptcy, and also avowed for taking goods as a distress for rent in arrear; a verdict having been found for the plaintiff on the issue joined on the plea, and for the defendant on the avowry, the Court refused to allow the defendant costs on the issue found for the plaintiff (*m*). In the case of a reference to arbitration, though before issue joined, the above rule must be observed on the taxation of costs (*n*). Neither party will be entitled to the costs of issues from the trial of which the jury have been discharged (*o*). And where a verdict is found in favour of the defendant, and judgment is afterwards entered for plaintiff *non obstante veredicto*, neither party is entitled to the costs of the immaterial issues (*p*). So, where the plea on which he has obtained a verdict, on being brought before the Court upon a special case, is found to be bad, he will

(*d*) *Newton* v. *Harland*, 5 Dowl. 644.

(*e*) *Prudhomme* v. *Fraser*, 1 Hart. & W. 5; 4 Nev. & M. 512; 2 Ad. & E. 645, *S. C.* And see *Doe Smith* v. *Payne*, 1 H. & W. 10.

(*f*) *Doe* v. *Errington*, 4 Dowl. 602; 1 H. & W. 502, *S. C.*

(*g*) *Doe* v. *Webber*, 4 Nev. & M. 381; 1 H. & W. 10, *S. C.* And see *Doe Bowman* v. *Lewis*, 13 M. & W. 241.

(*h*) *Daubus* v. *Rickman*, 4 Dowl. 129.

(*i*) *Routledge* v. *Abbott*, 8 Ad. & E. 592. See form of *postea*, Ibid.

(*k*) *Williams* v. *Great Western Railway*, 3 M. & W. 856. And see *Phytian* v. *White*, 1 M. & W. 260: *Bird* v. *Prowrice*, 6 M. & W. 754: *Delisser* v. *Thorne*, 1 Q. B. 333: *Knight* v. *Weore*, 3 Bing. N. S. 534.

(*l*) *Anderson* v. *Chapman*, 5 M. & W. 483.

(*m*) *Vallance* v. *Evans*, 1 C. & M. 856; 3 Tyr. 865; 2 Dowl. 118, *S. C.*

(*n*) See *Daubus* v. *Rickman*, 4 Dowl. 129; 1 Scott, 564; 1 Hodges, 75, *S. C.*; *Allenby* v. *Proudlock*, 5 Nev. & M. 636; 4 Ad. & E. 326, *S. C.*

(*o*) *Vallance* v. *Adams* or *Evans*, 2 Dowl. 118; 1 C. & M. 856; 3 Tyr. 865, *S. C.*

(*p*) *Goodburne* v. *Bowman*, 3 Moo. & Scott, 69; 9 Bing. 667; 2 Dowl. 206, *S. C.* And see *Da Costa* v. *Clarke*, 2 B. & P. 376: *Kirk* v. *Nowill*, 1 T. R. 266, *ante*, 1351

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not be entitled to costs upon that issue (*q*); but if it be found good, he will be entitled to the costs of the special case, &c., together with the costs of the issue (*r*). The rule does not apply to a plaintiff suing *in formâ pauperis* (*s*). If a defendant seek to enter a suggestion to deprive the plaintiff of costs, on the ground that the action ought to have been brought in a court of requests, he cannot at the same time have the costs of issues which have been found in his favour taxed for him in the superior court (*t*).

Where several counts or pleas, and no distinct matter of complaint or defence.

Where there are several counts or pleas, and the party fails to establish a distinct subject-matter of complaint or defence, we have seen (*ante, Vol.* 1, 209) that, by the rule of all the courts of *H. T.*, 4 *W.* 4, *r.* 5, "several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each; nor shall several pleas, or avowries, or cognizances, be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each." And to enforce this rule, it is also ordered by another rule (*Id.*, *r.* 7, *ante, Vol.* 1, 202), that, "upon the trial, where there is more than one count, plea, avowry, or cognizance upon the record, and the party pleading fails to establish a distinct subject-matter of complaint in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance, a verdict and judgment shall pass against him upon each count, plea, avowry, or cognizance, which he shall have so failed to establish; and he shall be liable to the other party for all the costs occasioned by such count, plea, avowry, or cognizance, including those of the evidence, as well as those of the pleadings. And in all cases in which an application to a judge has been made under the preceding rule (*r.* 6, *ante, Vol.* 1, 200), and any count, plea, avowry, or cognizance, allowed as therein mentioned, upon the ground that some distinct subject-matter of complaint was *bonâ fide* intended to be established at the trial in respect of each count so allowed, or some distinct ground of answer or defence in respect of such plea, avowry, or cognizance so allowed, if the Court or judge before whom the trial is had shall be of opinion that no such subject-matter of complaint was *bonâ fide* intended to be established in respect of each count so allowed, or no such distinct ground of answer or defence in respect of each plea, avowry, or cognizance so allowed, and shall so certify before final judgment, such party so pleading shall not recover any costs upon the issue or issues upon which he succeeds, arising out of any count, plea, avowry, or cognizance, with respect to which the judge shall so certify." The certificate under this rule must be granted by the judge who tried the cause (*u*). Where to a declaration for a libel, the defendant pleaded the general issue and two special pleas, and at the trial the jury found all the issues for the plaintiff, and 1*s.* damages, and the judge certified, under the stat. 43 *Eliz. c.* 6, *s.* 2, the Court held, that the plaintiff was not entitled to the costs of the issues

(*q*) *Cartwright* v. *Cook*, 1 Dowl. 529.
(*r*) *Goebell* v. *Archer*, 1 Har. & W. 559; 2 Ad. & E. 500; 4 Nev. & M. 495, *S. C.*
(*s*) *Gougenheim* v. *Lane*, 4 Dowl. 493; 1 M. & W. 136; 1 Tyr. & G. 216; 1 Gale, 343, *S. C.*; *ante*, 1128.
(*t*) *Jenks* v. *Taylor*, 1 M. & W. 576.
(*u*) *Jackson* v. *Galloway*, 6 Law J., N. S., 29, C. P. And see *Walter* v. *Sherwin*, 12 Law J., N. S., 33, Exch.; *ante*, 1117, 1362.

found for him, notwithstanding the above rule of *H.*, 4 *W.* 4, s. 7 (*u*).

What costs allowed where some issues found for plaintiff and some for defendant.

As to the amount of the costs allowed on taxation in these cases, supposing that there are several issues, and one be found for the plaintiff and the other found for the defendant, if that found for the plaintiff be the *substantial issue* in the cause, and upon which he will be entitled to recover his debt or damages, or any part of them, he shall have the *postea* and the general costs of the cause, with the exception of the costs of such parts of the pleadings, briefs, and counsel's fees (*x*), and of such of the witnesses and other expenses (*y*) as are applicable only to the issue or issues on which the defendant has succeeded, which costs the defendant will be entitled to have deducted from the plaintiff's costs. And it is further to be observed, as to the costs of the witnesses, that where a plaintiff succeeds on one of several issues, and the defendant succeeds on the others, but the defendant's witnesses are brought to prove the issue found against him, as well as the issues found for him, the plaintiff will be entitled to the costs of all his witnesses upon the issues found for him, and the defendant to none of his (*z*). And where the defendant pleaded the general issue, and also traversed a part of the declaration, which he need not to have done, as it was covered by the general issue; and the jury found for the plaintiff on the second issue, but for the defendant on the first, and the Master allowed the plaintiff the costs of all his witnesses to prove the second issue, but refused to allow the defendant for his witnesses who failed in respect of that issue, but who were witnesses also upon the first issue; the Court held that the Master had done rightly, as it was the defendant's own fault, in raising that second issue, which was in substance involved in the first (*a*). And as a general rule it may be taken that the defendant is not entitled to the expense of his own witnesses in these cases, unless their evidence related *exclusively* to the issues found for him (*b*). The converse of the same rule as to the taxation of the plaintiff's costs, where he succeeds in these cases, would be applicable to the taxation of costs, if the defendant substantially succeeds; in such case, he would be entitled to the general costs of the cause (*c*), and to the costs of the witnesses called in support of the issue on which he has substantially succeeded, although they may also have given evidence on the other issues (*d*); and from those would be deducted the costs of such parts of the pleadings, briefs, counsel's fees, and of such of the witnesses and other expenses as are applicable only to the issues on

(*u*) *Simpson* v. *Hurdis*, 2 M. & W. 84; 5 Dowl. 304, *S. C.*

(*x*) *Hazlewood* v. *Back*, 9 M. & W. 1: *Hart* v. *Cuthbush*, 2 Dowl. 456: *Spencer* v. *Hamerton*, 4 A. & E. 413; 6 Nev. & M. 23, *S. C.*

(*y*) See *Eades* v. *Everett*, 3 Dowl. 667: *Richards* v. *Cohen*, 1 Dowl. 533. And see *Knight* v. *Woore*, 3 Bing. N. C. 535; 5 Dowl. 487, *S. C.*: *Doe Smith* v. *Webber*, 4 Nev. & M. 381; 2 Ad. & El. 448; 1 H. & W. 10, *S. C.*: *Ratcliffe* v. *Hall*, 1 Gale, 140: *Eyre* v. *Thorpe*, 6 Dowl. 762.

(*z*) *Richards* v. *Cohen*, 1 Dowl. 533: *Lardner* v. *Dick*, 2 Id. 333; 2 C. & M. 369, *S. C.*: *Hart* v. *Cuthbush*, *Bird* v. *Higginson*, *Spencer* v. *Hamerton*, *Roberts* v. *Phillips*, *ante*, 1376.

(*a*) *Daniel* v. *Barry*, 12 Law J. 113, Q. B.: *Nicholson* v. *Dyson*, 11 M. & W. 548, *semble*, overruling *Eades* v. *Everett*, Dowl. 667.

(*b*) *Crowther* v. *Elwell*, 4 M. & W. 1

(*c*) *Ante*, 1376.

(*d*) *Knight* v. *Woore*, 3 Bing. N. C. 534; 5 Dowl. 487, *S. C.*: *Robert* v. *Phillips*, 5 Dowl. 473. And see *Rugg* v. *Wells*, 8 Taunt. 129: *Cross* v. *Johnson*, 9 B. & C. 613: *Violan* v. *Blake*, 11 East, 963.

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which the plaintiff has succeeded (*e*). It may be added, that, in general, the question as to whether particular costs, incurred in relation to the trial of the cause, are referable to one issue or another, is a question of fact for the decision of the Master alone, and the Court will not interfere with it (*f*).

4. *On a Judgment by Default as to part.*

On a judgment by default.

We have already considered the plaintiff's right to costs in the case of a judgment by default to the whole action, *ante*, 881. Also, his right to them in the case of a judgment by default by one of several defendants, *ante*, 1375. If there be two counts in distinct causes of action, and the defendant lets judgment go by default as to one, and obtains a verdict on the other, the plaintiff is entitled to costs on the former, and the defendant on the latter (*g*). Where in trespass the plaintiff pleaded "not guilty" and justifications under a right of way, issue was joined on the plea of "not guilty," the right of way was traversed and issue joined thereon, and the plaintiff new assigned, and defendant suffered judgment by default thereon; a verdict was found for plaintiff on the issue of "not guilty," with 1*s.* damages on the new assignment; and a verdict was found for defendant on one of the justifications; it was held, that the plaintiff was entitled to the general costs in the cause (*h*). Had defendant withdrawn his plea of "not guilty" to the trespass newly assigned, then the defendant would have obtained the general costs of the cause, and the plaintiff only the costs of a common inquiry (*i*). Where, in case by a reversioner, the defendant pleaded not guilty and a justification, the plaintiff new assigned excess, and the defendant thereupon withdrew his plea of not guilty, and paid 10*s.* into court on the new assignment, which the plaintiff accepted in satisfaction; the Court held that the plaintiff was entitled to the costs of the writ and of the new assignment only, the defendant to all the other costs prior to the new assignment (*j*).

5. *Double and Treble Costs.*

In what cases.

Only single costs were allowed by the statute of Gloucester, but double and treble costs have since that act, in many cases, been expressly given by statute. Also, where a statute gives double or treble damages, where damages were recoverable at common law, the plaintiff shall also have double or treble costs, the costs in law being parcel of the damages (*k*); but not

(*e*) *Hart* v. *Cutbush*, *Spencer* v. *Hamerton*, *Haslewood* v. *Back*, *supra*. And see *Wilson* v. *River Dun Company*, 7 Dowl. 369.

(*f*) *Doe Smith* v. *Webber*, 4 Nev. & M. 381; 2 Ad. & El. 448; 1 H. & W. 10, *S. C.*

(*g*) *Day* v. *Hanks*, 3 T. R. 654: *Anon.*, 3 T. R. 467. See per *Gaselee*, J., 10 Bing. 560.

(*h*) *Vickers* v. *Gallimore*, 5 Bing. 196; 2 M. & P. 359, *S. C.* And see *Broadbent* v. *Shaw*, 2 B. & Ad. 940: *Howes* v. *Thames Commissioners*, 3 B. & B. 117: *Langdon* v. *Bourne*, 1 B. & Cres. 278: *Martin* v. *Valiance*, 1 East, 350.

(*i*) *Cross* v. *Johnson*, 9 B. & Cres. 613: *Forester* v. *Dale*, 1 Dowl. 412. And see *Ruddock* v. *Smith*, 1 Dowl. 467, where plaintiff entered a *nol. pros.* as to part.

(*j*) *Griffiths* v. *Jones*, 1 M. & W. 731: *Burn* v. *Bateman*, 10 Law J., N. S., 467, Exch.

(*k*) 2 Bac. Abr., Costs, C.; Bull. N. P. 334. See *Deacon* v. *Morris*, 2 B. & Ald. 393.

where damages were not recoverable at common law, and are given by statute (*l*). Where a statute gives double costs to defendants, in case the plaintiff fails, the defendants who obtain a verdict, are entitled to their double or treble costs, though the plaintiff obtains a verdict against the others (*m*). But the right to these costs is materially affected by the recent stat. of 5 & 6 *Vict. c.* 97, *s.* 6, by which it is enacted, "That so much of any clause, enactment, or provision, in any act or acts, commonly called public local and personal, or local and personal, or in any act or acts of a local or personal nature, whereby it is enacted or provided that either double or treble costs, or any other than the usual costs between party and party, shall or may be recovered, shall be and the same are hereby repealed: provided always, that in lieu thereof the usual costs between party and party shall and may be recovered, and no more." And section 2 enacts, "That so much of any clause, enactment, or provision in any public act or acts, not local or personal, whereby it is enacted or provided that either double or treble costs, or any other than the usual costs between party and party, shall or may be recovered, shall be and the same are hereby repealed: provided always, that instead of such costs the party or parties heretofore entitled under such last-mentioned act to such double, treble, or other costs, shall receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and about any action, suit, or other legal proceeding, as shall be taxed by the proper officer in that behalf, subject to be reviewed in like manner and by the same authority as any other taxation of costs by such officer."

5 & 6 Vict. c. 97, s. 6.

The mode of estimating the amount of *double* costs before the above statute of Victoria was thus: first to allow the prevailing party the single costs, including the expenses of witnesses, counsel's fees, &c., and then allow him one half of the amount of the single costs, without making any deduction on account of counsel's fees, &c. (*n*). *Treble* costs consisted of the single costs, half of the single costs, and half of that half (*o*). Where there are several issues, some found for the plaintiff, and some for the defendant, and the defendant was entitled to treble costs, the proper mode of estimating them was, first to ascertain the defendant's single costs, then treble them, and then deduct the plaintiff's single costs from the amount so trebled (*p*). But it was only the ordinary costs of the cause that were thus doubled or trebled; and, therefore, where the plaintiff changed the venue to *X.*, on undertaking to pay the defendant's extra costs of trying at *X.*, and the defendant obtained a verdict, and was entitled by statute to double costs, it was held that the extra costs of trying at *X.*, should not be doubled (*q*). Where, in an action upon a statute which gave double costs, a new trial was granted, and nothing being said on the subject of costs, the party who succeeded on both trials

How estimated.

(*l*) *Okely* v. *Salter*, Noy, 137; *Butterton* v. *Furber*, 1 B. & B. 517; 4 Moore, 296, *S. C.*: *Cherrington* v. *Meatheringham*, 5 Dowl. 313.

(*m*) *Hall* v. *Smith*, 2 Bing. 267; 9 Moore, 477, *S. C.*

(*n*) *Staniland* v. *Ludlam*, 4 B. & C. 889; 7 D. & R. 484, *S. C.*

(*o*) Hullock, 484. See *Phillips* v. *Bacon*, 1 Chit. Rep. 137, n.: *Buckle* v. *Bowes*, 6 D. & R. 1; 4 B. & C. 154, *S. C.*

(*p*) *Wilson* v. *River Dun Company*, 5 M. & W. 89; 7 Dowl. 309, *S. C.*

(*q*) *Thomas* v. *Saunders*, 3 Nev. & M. 572. And see *Kemp* v. *Richardson*, 2 Moore, 238.

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was held entitled to double costs of both (*r*). Where the declaration contained several counts, and the defendants obtained a general verdict, it was held that they were not entitled to treble costs on the counts which complained of acts prohibited by the statute which entitled them to treble costs in case of success (*s*). No case has yet been decided as to a taxation of costs, under the above statute of Victoria.

Suggestion for, when necessary.

Unless the statute require it, no suggestion on the roll is, in general, requisite to entitle the party to these costs (*t*). But where he could not, but for the statute, be entitled to costs at all, as in the case of a verdict for the plaintiff, for a debt recoverable in a court of requests, and the Court of Requests Act gives the defendant costs, or the like, in such cases a suggestion may be necessary (*u*). If necessary, leave of the Court or a judge should be obtained, to enter a suggestion on the roll, shewing such a case that will entitle the party to these costs (*v*). Where a rule *nisi* was obtained to enter a suggestion for double costs, and it appeared on shewing cause that the double costs had been previously tendered, the rule was discharged with costs (*x*).

Certificate for, when granted, &c.

Where a statute requires a judge's certificate to entitle the party to double or treble costs, such certificate need not, in general, be given immediately after the trial of the cause (*y*). Of course, the Master cannot in such case tax the double or treble costs until the certificate is obtained. It has been decided by the Court of Common Pleas, confirming the previous authorities, that a magistrate sued for an act done in his judicial character must, in order to obtain double costs under 7 *Jac.* 1, *c.* 5, obtain the certificate of the judge before whom the cause is tried (*z*).

Repeal of act giving double &c. costs pending suit.

Where a statute giving double or treble costs is repealed during the pendency of a suit, the right to receive them is thereby destroyed, unless expressly saved (*a*).

6. *Taxation of Costs, and what Costs allowed* (*b*).

Taxation of costs.

The taxation of an attorney's bill of costs as between him and his client, has been fully considered in the first Volume (*pp.* 91 *to* 101), and the subject of taxation of costs, in particular instances, has been incidentally noticed in many parts of the Work. We will now consider the practice of taxation, as between party and party in general.

By whom.

By whom taxed.]—By the 1 *Vict. c.* 30, *s.* 3, the Masters of the respective courts of law are authorised and required to tax all costs in matters of a civil nature in any of the courts, or in

(*r*) *Lander* v. *Thomas*, 1 C. & J. 54.
(*s*) *Wilson* v. *River Dun Company*, *supra*.
(*t*) *Forman* v. *Dawes*, 11 M. & W. 730; 1 D. & L. 299, *S. C.* And see *Maberley* v. *Titterton*, *infra*.
(*u*) See *post*, 1299.
(*v*) *Maberley* v. *Titterton*, 7 M. & W. 540: *Wells* v. *Ody*, 3 Dowl. 799; 2 C., M., & R. 128, *S. C.*
(*x*) *Peabrook* v. *Holt*, 1 M. & W. 205; 4 Dowl. 700, *S. C.*
(*y*) *Norman* v. *Danger*, 3 Y. & J. 282. And see *ante*, 1118.
(*z*) *Penny* v. *Slade*, 7 Dowl. 440; 5 Bing. N. C. 469, *S. C.*: *ante*, 1118.
(*a*) *Warne* v. *Beresford*, 6 Dowl. 187: *Cherrington* v. *Montheringham*, 8 Dowl. 464. See *R.* v. *Monagan*, 3 Nev. & P. 502; 8 Ad. & El. 496, *S. C.*
(*b*) As to the meaning of the term "taxed costs," see *Parfitt* v. *Thompson*, 13 M. & W. 393.

the Exchequer Chamber, indiscriminately, although the costs may not have arisen in respect of business done in the court to which such Masters may belong; and the judges are authorised to make rules on the subject.

Notice of taxation.

Notice of Taxation, Affidavit of Increase, &c.]—By rule of *T. T.*, 1 *W.* 4, *r.* 12, it is ordered, "that, *before taxation of costs, one day's notice shall be given to the opposite party*" (*c*). But this rule only applies to cases in which a notice of taxation is necessary (*d*): and such notice is not necessary upon a *cognovit*, where it is given in a sum certain for the amount of debt and costs; for, as to the costs of the action, they are already fixed at a certain sum (*e*), and as to the costs of signing judgment, a fixed sum is always marked without taxation (*f*). And by the *R. H.*, 4 *W.* 4, *r.* 17, "*notice of taxing costs* shall not be necessary in any case where the defendant has not appeared in *person*, or by *his attorney* or *guardian*." And it is not necessary where the plaintiff has entered an appearance for the defendant (*g*). Nor, in such a case, is it necessary to deliver a copy of the bill of costs or affidavit of increase in the Exchequer, notwithstanding the rule of that Court *M. T.* 1830, *s.* 12 (*h*). But notice of taxation is necessary where the defendant has done that which is equivalent to appearing (*i*). A service of this notice at any time before nine o'clock at night for a taxation on the next day would suffice (*k*). If the opposite party, however, wishes a longer notice, he may, it seems, gain it by obtaining from the Master *a rule to be present at the taxation, and serving a copy of it on the attorney of the prevailing party before the time for signing judgment has expired;* the latter must then give *twenty-four hours'* previous notice of taxing costs; and if the costs are taxed without such notice, the taxation would be irregular, and the attorney liable to an attachment; but if this rule to be present is not served until the time for signing judgment has expired, he is not obliged to give more than the above one day's notice, which, as we have just seen, may be given at any time before nine at night for the next day (*l*). The notice in term time may be to tax at Westminster, if the Master requires it (*m*). This notice, or the first appointment made by the Master, is *peremptory*, and he will proceed *ex parte* thereon, unless sufficient cause is shewn for the postponement (*n*). Any reasonable costs incurred in serving the notice will be allowed (*o*). As regards the consequences of omitting to give this notice when requisite, it seems that the omission will not afford a ground for setting aside the judgment and execution; and that all the Court or a judge will do, will be to refer it to the Master to re-tax the costs; and if, upon the taxation, there be any reduction of the amount, they will make

(*c*) See the form, Chit. Forms, 619.
(*d*) *Griffiths* v. *Liversedge*, 2 Dowl. 143.
(*e*) It would be different if they were not. (See per *Patteson*, J., 2 Dowl. 143).
(*f*) *Griffiths* v. *Liversedge*, 2 Dowl. 143: *Clothier* v. *Eve*, 3 Moo. & Sc. 216: *Clarke* v. *Jones*, 3 Dowl. 277.
(*g*) *Bolton* v. *Manning*, 5 Dowl. 769: *Burch* v. *Pointer*, 3 M. & W. 310; 6 Dowl. 387, *S. C.*
(*h*) *Burch* v. *Poynter*, 6 Dowl. 387; 3 M. & W. 310, *S. C.*
(*i*) *Lloyd* v. *Kent*, 5 Dowl. 125.
(*k*) *Edmunds* v. *Coates*, 4 M. & W. 96.
(*l*) 1 Sellon, 504; Tidd, 989: *Edmunds* v. *Coates*, 4 M. & W. 66.
(*m*) *Blake* v. *Warren*, 6 M. & W. 151.
(*n*) R. H., 32 G. 3; 2 W. 4, r. 99.
(*o*) *Thorp* v. *Verdy*, 2 C. & J. 498.

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the party whose costs are taxed, pay the costs of the rule; or, if nothing be taxed off, they will not allow costs on either side (*p*). If the attorney for the opposite party attend the taxation, he thereby waives all irregularity as to notice (*q*).

Affidavit of increase.

The Master will tax the costs upon a view of the proceedings, but if there be extra expenses incurred, which do not appear upon the face of the proceedings; such as witnesses' expenses, fees to counsel, attendances, court fees, &c., *an affidavit must be made of these extra costs*, otherwise the Master will not be warranted in allowing them (*r*). *Such affidavit should be left at the Master's Office one clear day before the day appointed for taxation* (*s*).

Delivery of copy of bill of costs, &c. in Exch.

In the Exchequer, by rule *M. T.* 1830 (*t*), in taxing costs upon rules, orders, town *posteas*, and inquisitions, *a copy of the bill of costs and affidavit of increase* shall be given to the opposite attorney one day previous to the taxation; and in the cases of *posteas* and inquisitions, in country causes, the notice shall be given two days, and a copy and affidavit delivered two days previous to the taxation. This rule is imperative, and must be complied with, unless the opposite party waives his right under it by attending the taxation or otherwise (*u*). It does not, however, extend to cases where the defendant has not appeared, or when he appears himself, and not by attorney (*x*), or to the taxation of costs upon a demurrer. Even in cases within the rule, the omission to comply with it is not a ground for setting aside the judgment, but merely for a rule or order to review the taxation (*y*), and for payment of the costs of the application, if any deductions be made; if not, each party pays his own costs (*z*). The copy of the affidavit must in every respect be correct; and a copy, with the words "sworn," &c., instead of copying the jurat at length, would be bad (*a*).

Heading of bill.

By the directions of the judges to taxing-officers, made in Hilary Vacation 1834, it is required, that, at the head of every bill of costs taken to the taxing-officer to be taxed, it shall be stated whether the sum recovered, accepted, or agreed to be paid, exceeds the sum of twenty pounds or not, in the following form :—

Debt above 20*l.*
Debt 20*l.* or under.

One appointment only necessary.

By *R. G., H.*, 2 *W.* 4, *s.* 92, "one appointment only shall be deemed necessary for proceeding in the taxation of costs, or of an attorney's bill." Where a regular judgment of *nonpros* was set aside upon payment of costs, and the defendant's attorney refused to attend a peremptory appointment to tax, it was held that the Master might tax them at the nominal sum of

(*p*) *Lloyd* v. *Kent*, 5 Dowl. 128: *Bolton* v. *Manning*, 5 Dowl. 769. See *Wheldale* v. *Eastern Counties Railway Company*, 13 Law J., N. S., 259; 13 M. & W. 9, *S. C.*

(*q*) *Wilkins* v. *Perkins*, 2 M. & W. 315; 5 Dowl. 461, *S. C.*

(*r*) See the forms, Chit. Forms, 620.

(*s*) Chap. Prac. 156.

(*t*) 1 C. & J. 279; 1 Tyr. 161. See *Todd* v. *Fellingham*, 9 Law J., N. S., 184, Exch.

(*u*) *Wilkins* v. *Perkins*, 2 M. & W. 315; 5 Dowl. 461, *S. C.* Perhaps that part of this rule which requires a *two* days' notice of taxation upon *country posteas* and inquisitions is virtually rescinded by the subsequent rule of all the courts of T. T., 1 W. 4, r. 12. (See *Parry* v. *Turner*, 2 C. & J. 80: *Routledge* v. *Giles*, Id. 163).

(*x*) *Burch* v. *Pointer*, 3 M. & W. 316.

(*y*) *Taylor* v. *Murray*, 6 Dowl. 80: *Wheldale* v. *Eastern Counties Railway Company*, 13 M. & W. 9; 13 Law J., N. S., 259, Exch., *S. C.*

(*z*) See *Lloyd* v. *Kent*, 5 Dowl. 128.

(*a*) *Wheldale* v. *Eastern Counties Railway Company*, *supra*.

3*s.* 4*d.*; on tender of which, the plaintiff was entitled to treat the judgment as set aside, and to proceed to trial (*b*). CHAP. XXXI.

What Costs allowed, &c.]—Neither the statute of Gloucester, giving costs to the plaintiff, nor the statutes of 23 *H.* 8, *c.* 15, and 4 *Jac.* 1, *c.* 3, mention what the amount of the costs shall be; and, in general, the amount is left to the discretion of the Court, which is generally exercised through one of the Masters (*c*). What costs allowed.

In taxing costs between party and party, the Master will allow the costs of all regular and necessary proceedings in the cause, and he will also allow all such incidental costs as are or are directed to be costs in the cause (*d*). Of course, he will not allow the costs of unnecessary proceedings (*e*). Therefore, in an action where there were several issues in fact, and a demurrer to a rejoinder, the defendant had leave to amend upon payment of costs; and upon taxation of the costs, the demurrer books and briefs were charged for as containing all the issues in fact, as well as the issue at law; the Master however disallowed the charges as far as related to the issues in fact; and the Court held that he had done rightly (*f*). The costs of all interlocutory proceedings, not otherwise provided for, are generally costs in the cause (*g*). In general.

An attorney is entitled to his costs for writing a letter to the defendant, demanding the debt before writ issued (*h*). The usual practice is to allow for one letter only: even where the defendant had requested that time should be given, and every accommodation was shewn by the plaintiff's attorney, and in the correspondence, before writ issued, plaintiff's attorney had written fifteen letters, and had received fourteen from the defendant, for thirteen of which he had paid postage, he was held entitled to the costs of only one (*i*). The plaintiff is entitled to the allowance of a sum, sworn to have been paid by him for the postage of foreign letters as being solely applicable to the cause; but he is entitled to the expenses of the production and translation of such letters only as are applicable to such parts of the counts as relate to the verdict (*k*). Letters.

The Master has been held to be justified in allowing the costs of two writs issued in one action against the defendant into two counties, where it was doubtful in which county he was to be found (*l*), it not appearing that they were concurrent writs. But now, although several writs may be issued on one *præcipe*, it is probable that the plaintiff would be held entitled to the costs of one only (*m*). Writs.

The costs of all necessary pleadings will, of course, be allowed to the party who succeeds on them. The practice where Pleadings.

(*b*) *Christie* v. *Thompson*, 1 Dowl. N. C. 592.

(*c*) See Appendix, as to the amount of costs and fees regulated by rule of court.

(*d*) See *Gougenheim* v. *Lane*, 4 Dowl. 483: *Spencer* v. *Hamerton*, 4 Ad. & E. 413.

(*e*) *Jones* v. *Roberts*, 2 Dowl. 374: *Hearn* v. *Battersby*, 3 Dowl. 213: *Lewis* v. *Woolrych*, 3 Dowl. 692: *Ward* v. *Bell*, 2 Dowl. 76.

(*f*) *Jones* v. *Roberts*, 2 Dowl. 374.

(*g*) *Pugh* v. *Karr*, 8 Dowl. 218; 6 M. & W. 17, *S. C.* See further as to costs of rules and orders, *post*, 1388.

(*h*) *Morrison* v. *Summers*, 1 Dowl. 325; 1 B. & Ad. 559, *S. C.*

(*i*) *Capell* v. *Staines*, 5 Dowl. 770; 2 M. & W. 850. See *Kirton* v. *Braithwaite*, 1 Id. 310.

(*k*) *Lopez* v. *De Tastet*, 7 Moore, 120; 3 B. & B. 292, *S. C.*

(*l*) *Morris* v. *Hunt*, 1 Chit. 544.

(*m*) See *Angus* v. *Coppard*, 6 Dowl. 137; 3 M. & W. 57, *S. C.*

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there are several counts, or several pleas, has been already noticed (*ante*, 1380 *to* 1382). Where an attorney charged for a declaration as containing more folios than it really contained, and the Master allowed the charge, the Court ordered the taxation to be reviewed (*n*).

Rules or orders.

The party who substantially (*o*) succeeds on a rule or judge's order, which forms part of the regular proceedings in the cause, no mention of costs being made, will be entitled, if he also succeeds in the cause, to have the costs of the rule or order allowed him as costs in the cause (*p*). Thus, the costs of an unsuccessful application for a new trial, are costs in the cause (*q*). But the successful party will not be so entitled to the costs of a rule merely collateral to the action; for instance, a rule to discharge defendant out of custody on the ground of coverture, or arrest in a wrong name (*r*). If a rule or order be discharged, or made absolute expressly "without costs," the costs of the rule or order cannot afterwards be deemed costs in the cause; or if discharged or made absolute "with costs," although the costs in that case are costs in the cause, yet, as the law gives a separate remedy for them by attachment, that remedy in practice is always resorted to, instead of waiting the event of the cause, and then including those costs in the judgment. If a rule or order be made absolute, or dismissed on the terms that the costs of it, or the application, are to be "costs in the cause," the costs will be taxed for the successful party. Where a rule or order is granted on payment of costs, and the party, instead of paying the costs, chooses to abandon the rule or order, these costs are not costs in the cause (*s*). If an attorney shew cause on his own behalf against a rule, his client not appearing, the costs of the attorney will not be costs in the cause (*t*). Where the defendant obtains a rule to deliver up the bill on which the action is brought, or the like, on payment of costs, this does not make him liable to the costs of previous rules which have been decided against him, but without mention of costs (*u*).

Amendment.

Where an amendment is allowed during the course of a cause on payment of costs, this means only the costs substantially occasioned by the amendment. Therefore, where a plaintiff, after plea pleaded, obtained leave to amend his declaration on payment of costs, by increasing the amount of damages, and defendant afterwards paid money into court, whereby one of his pleas became unavailable, the Court held, that he was not entitled to the costs of such plea, since they were caused by his own act, and not by the amendment (*x*).

Attachment.

The costs of an attachment include all costs fairly incidental to the suing out the attachment, and amongst them they have been held to include the costs of an inquiry, directed by the Court for the benefit of the defendant, in order to enable him to obtain his discharge (*y*).

(*n*) *Morris* v. *Hunt*, 1 Chit. 644.

(*o*) A party who partly succeeds and partly fails in a rule in the cause does not so. *M'Andrew* v. *Adams*, 3 Dowl. 120.

(*p*) See *Goodall* v. *Ray*, 4 Dowl. 1; 1 H. & W. 233, *S. C.*: *Mummery* v. *Campbell*, 2 Dowl. 798: *Pugh* v. *Kerr*, *infra*.

(*q*) *Eyre* v. *Thorpe*, 6 Dowl. 768: *Dennett* v. *Towne*, 1 Q. B. 333.

(*r*) *Mummery* v. *Campbell*, 2 Dowl. 798.

(*s*) *Pugh* v. *Kerr*, 3 Dowl. 218; 6 M. & W. 17; 9 Law J., N. S., 255, Exch., *S. C.*

(*t*) *Southey* v. *Terry*, 2 Dowl. 522.

(*u*) *Hennah* v. *Wittle*, 5 Bing. N. C. 386.

(*x*) *Gould* v. *Oliver*, 5 Bing., N. C., 115.

(*y*) *Tyler* v. *Campbell*, 5 Bing., N. C., 192.

Costs of trial.

Attendance of attorney.

As to the costs of the trial:—where a London agent has been appointed to attend the trial of a cause, it is a matter within the discretion of the Master, and with which, it seems, the Court will not interfere, whether the costs of a journey to London by the country attorney, to attend the trial or a reference of the cause, shall be allowed (*z*). The usual fee for necessary (*a*) attendance at the trial will be allowed, though the attorney be a party to the cause (*b*). And, where a member of the same firm as the attorney who conducted the cause attended as a witness, the Court held that his expenses were properly allowed (*c*). As to costs of several attornies where several defendants, see *ante*, 1375. Where the Master having allowed the expenses of the plaintiff's attorney's attendance at the trial as a witness for the plaintiff, to support an issue upon which he was successful, he not attending as attorney, but the cause being conducted by a competent clerk; the Court refused to interfere (*d*). But where, in an action brought on an agreement to pay commission on the amount of certain goods sold, the defendant had subpœnaed his own attorney, who was the attesting witness, in order to explain the meaning of the expression, "all charges and expenses," which was used in it, and on taxing the defendant's costs incurred by the plaintiff's not proceeding to trial, the Master refused to allow the expenses of bringing up the witness, on the ground that no certificate of counsel had been produced to him that the witness was necessary; the Court refused to order a review of the taxation (*e*).

Fees to counsel.

With regard to fees to counsel, the Master exercises a discretion, regulated, to a certain degree, by the nature and magnitude of the cause. In cases of difficulty, in which points of law may arise, it is fit that the leading counsel should have the assistance of other gentlemen, to suggest what may be necessary in the course of discussion. In cases of that description, the allowance of counsel should not be regulated in the same manner as in an ordinary case, where no difficulty is likely to arise; accordingly, a plaintiff has been allowed for fees to three counsel in a case of difficulty (*f*). And where, in a case of difficulty, the Master allowed for one counsel only, the Court ordered his taxation to be reviewed (*g*). And the same where, in taxing defendant's costs on a new trial, in an action to recover 1,000*l.*, where strict cross-examination was necessary, the Master disallowed the costs of a second brief and fees, on the ground that it did not appear that defendant had any witnesses to call (*h*). Where there have been two trials, and the successful party is entitled to the costs of the second trial only, the Master may allow for fees to counsel on the second trial, with reference to the amount of those given on the first (*i*). Where several pleas are pleaded, and one of them,

(*z*) *Parsloe* v. *Fay*, 2 Dowl. 181: *Archer* v. *Marsh*, 7 Dowl. 541. See, however, *Madison* v. *Bacon*, 5 Bing., N. C., 246.

(*a*) *Lesser* v. *Whalley*, 2 Dowl. 20.

(*b*) *Jarvis* v. *Dacres*, 4 Dowl. 764.

(*c*) *Butler* v. *Hobson*, 5 Bing., N.C., 128.

(*d*) *Butler* v. *Hobson*, 5 Scott, 294; 5 Bing., N. C., 128; 7 Dowl. 15. And see *Madison* v. *Bacon*, 5 Bing., N. C., 246: *Archer* v. *Marsh*, Id. 541.

(*e*) *Marshall* v. *Parsons*, 4 Jur. 1017, Exch.

(*f*) *Morris* v. *Hunt*, 1 Chit. 544.

(*g*) *Grindall* v. *Goodman*, 5 Dowl. 378.

(*h*) *Maddison* v. *Bacon*, 5 Bing., N. C., 246.

(*i*) *Wilkinson* v. *Malin*, 2 Dowl. 65. See *Lord* v. *Wardle*, 6 Dowl. 178.

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which amounts to an answer to the whole cause of action is found for the defendant and others for the plaintiff, the latter is entitled to the costs of the issues found for him, including a portion of the briefs and counsel's fees (*i*). As to the costs of brief and fee to counsel on a writ of trial before the sheriff, see *Vol.* 1, 410.

Counsel's clerks.

By the directions given by the judges to taxing-officers in Hilary Term, 1834, the fees to be allowed to counsel's clerks are not to exceed as under, viz.:—

	s.	*d.*
Upon a fee under ten guineas	2	6
Ten guineas and under twenty guineas	5	0
Twenty guineas and upwards	10	0
Senior counsel's clerks on consultation	7	6
The other counsel's clerks, each	2	6
Attending as a witness at trials to prove documents	10	0

Briefs.

Where, in actions on a policy of insurance against several, the attorney had only made out a full brief in one case, and short statements in the others, but the Master allowed for the full briefs in all, the Court made a rule for him to review his taxation (*j*). As to allowing for a portion of the brief only, see *supra*, and *ante*, 1381.

Witnesses and evidence, &c.

The expenses of evidence and of witnesses generally form a very serious item in the costs of the cause, and the discretion of the Masters as to these costs is almost unlimited. If the witness live within the bills of mortality, and be required to attend at Westminster or in London, a shilling only is usually given to him (*k*), and the Master will allow only that sum on the taxation of costs. But if he live at a greater distance, or if required to attend at the assizes, then the Master will allow his reasonable expenses of going and returning (not exceeding at the rate of 1*s.* per mile, unless under special circumstances) (*l*); and also during his necessary stay at the place of trial, calculated according to his situation in life, and the distance of his residence from the place of trial (*m*), provided they have been actually paid by him (*n*). And the Master (who is in general the sole judge of what witnesses, what expenses, or for what loss of time witnesses should be allowed (*o*)), in taxing costs, will allow these expenses, even where foreign witnesses are brought from abroad, and return to their country after the trial (*p*), or even although the witness were also subpœnaed and paid by the other party (*q*), and although not called at the trial, if he thinks their attendance was reasonably

(*i*) *Haslewood* v. *Back*, 9 M. & W. 1, *ante*, 1381.

(*j*) *Martineau* v. *Barnes*, 1 Tidd, 666.

(*k*) Vol. 1, 338.

(*l*) See the directions to taxing-officers, in 1834.

(*m*) See Vol. 1, 339.

(*n*) *Trent* v. *Harrison*, 14 Law J., N. S., 210, Q. B. And see *Collins* v. *Godefroy*, 1 B. & Ad. 950: *Lopes* v. *De Tastet*, 3 B. & B. 292; 7 Moore, 120, *S. C.*: *Radcliff* v. *Hall*, 3 Dowl. 802.

(*o*) *Skelton* v. *Steward*, 1 Dowl. 411: *Doe Smith* v. *Webber*, 4 Nev. & M. 381; 2 Ad. & E. 448; 1 H. & W. 10, *S. C.* A plaintiff is bound to have his witness in attendance from the commencement of the assizes, and may, therefore, have the costs of their attendance previous to the trial. (*Cosgrave* v. *Evans*, 2 Dowl. 443: *Platt* v. *Greene*, 3 Dowl. 216: *Thomas* v. *Saunders*, 3 Nev. & M. 572).

(*p*) *Thellusson* v. *Staples*, 2 Doug. 432. See *Hagedorn* v. *Allnutt*, 3 Taunt. 379: *Cotton* v. *Witt*, 4 Id. 55: *Schimmel* v. *Lousada*, Id. 695: *Sturdy* v. *Andrews*, Id. 687: *Tremain* v. *Barrett*, 6 Taunt. 88; 1 Marsh. 463, *S. C.*

(*q*) *Benson* v. *Schneider*, 7 Taunt. 337; 1 Moore, 21, 76, *S. C.*

supposed to be necessary (*s*). Where a seafaring man remained in this country in order to give evidence, the Master may be justified in allowing for his maintenance from the service of the subpœna until the trial (*t*): and this although the party for whom such costs are allowed might have had him examined on interrogatories (*u*); unless indeed the evidence was plainly such that it might be equally available on such interrogatories as on his examination at the trial (*v*). Although the evidence of particular witnesses be not in strictness admissible, yet if there were reasonable ground for believing it to be admissible, the Master will allow the expenses of them (*w*), even though they were not examined at the trial (*x*). But the Master will not allow the expenses of witnesses whose testimony is clearly inadmissible (*y*), or whose testimony would not have supported any issue in the cause (*z*). And where there is a plea in bar to the declaration which is found for the defendant, he will not be entitled to the expenses of witnesses subpœnaed for reducing the damages (*a*). So, where a party objected to the evidence of witnesses, on the ground of their not being competent, and they were accordingly rejected, it was holden that he was not entitled to the costs of witnesses who had been in attendance for him to rebut such evidence (*b*). Nor will the Master allow for any contingent losses the witness may suffer by obeying the subpœna (*c*), unless the witness be of such a profession, that, from the nature of his avocations, he cannot find a substitute; in which case the Master will allow a reasonable compensation for his loss of time (*d*). Thus, he will allow payment for loss of time to physicians, surgeons, and attornies (*e*), or officers of the different courts (*f*); but not, in general, to any other professional or scientific men (*g*), or to merchants (*h*), masters of vessels (*i*), brokers (*k*), or the like. As to the allowance for the attendance of an attorney for the parties, see *ante*, 1389. The Master, however, may allow for the loss of time of a foreign witness, if in a situation to require it, and this in addition to the expenses of his conveyance to and back from this country, and his maintenance here according to his station in life (*l*); and this

(*s*) *Morrison* v. *Harmer*, 5 Scott, 410: *Miller* v. *Thompson*, 4 Man. & G. 260: *Paddock* v. *Forrester*, 2 Dowl., N. S., 125, C. P.: *Start* v. *Platel*, 8 Scott, 397: *Adamson* v. *Noel*, 2 Chit. 200: *Bagnall* v. *Underwood*, 11 Price, 511.

(*t*) *Berry* v. *Pratt*, 2 D. & R. 494; 1 B. & C. 276, *S. C.*; *Lonergan* v. *Royal Exchange Assurance Company*, 7 Bing. 725; 1 Dowl. 223, *S. C.* And see *Mount* v. *Larkins*, 8 Bing. 195; 1 M. & Scott, 357; 1 Dowl. 262, *S. C.*; *Tamperly* v. *Scott*, 1 M. & Scott, 601; 8 Bing. 392, *S. C.*; *Stewart* v. *Steele*, 5 Scott, N. R., 517: *White* v. *Brazier*, 3 Dowl. 499.

(*u*) *Evans* v. *Watson*, 15 Law J., N. S., 266, C. P.

(*v*) See Id.

(*w*) *Rushworth* v. *Wilson*, 1 B. & C. 267: *Mutchinson* v. *Allcock*, 1 D. & R. 165. And see *Andrews* v. *Thornton*, 8 Bing. 431: *Curling* v. *Fitzgerald*, 9 Dowl. 394; 2 Man. & G. 349, nom. *Curling* v. *Evans*.

(*x*) *Bagnall* v. *Underwood*, 11 Price, 511: *Adamson* v. *Noel*, 2 Chit. 200: *Benson* v. *Schneider*, 7 Taunt. 337: *Webb* v. *Tripp*, 11 Law J., N. S., 154, Q. B.: *Miller* v. *Thompson*, Id. 294, C. P.: *Paddock* v. *Forrester*, 2 Dowl., N. S., 125.

(*y*) *Fisher* v. *Barrell*, 1 Dowl., N. S., 565.

(*z*) *Jones* v. *Tobin*, 4 Bing., N. S., 123.

(*a*) *Hodgkinson* v. *Wyatt*, 13 Law J., N. S., 73, Q. B.

(*b*) *Fisher* v. *Berryll*, 11 Law J., N. S., 130, Q. B.

(*c*) *Moor* v. *Adam*, 5 M. & Sel. 156. And see *Willis* v. *Peckham*, 1 B. & B. 515; 4 Moore, 300, *S. C.*

(*d*) MS., M. 1814.

(*e*) Per *Tindal*, C. J., *Park*, J., and *Gazelee*, J., *Lonergan* v. *Royal Exchange Assurance Company*, *supra*, n. (*t*); and *per Cur.*, *Moore* v. *Adam*, 5 M. & Sel. 156.

(*f*) *Pentall* v. *Sidney*, 10 Ad. & E. 163: *Bastard* v. *Smith*, Id. 213.

(*g*) *Severn* v. *Olive*, 3 B. & B. 72; 6 Moore, 235, *S. C.*

(*h*) *Moor* v. *Adam*, 5 M. & Sel. 156.

(*i*) *White* v. *Brazier*, 3 Dowl. 499.

(*k*) *Lopes* v. *De Tastet*, 3 B. & B. 292; 7 Moore, 120, *S. C.*

(*l*) *Lonergan* v. *Royal Exchange Assurance Company*, *supra*, n. (*t*): *Tremaine* v. *Barrett*, 6 Taunt. 88: *Schimmel* v. *Lousada*, 4 Id. 695.

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the defendant's costs, if any, are to be taxed upon the usual scale. Provided also, that in cases triable before the sheriff or judge of an inferior court, where the judge shall refuse to make an order for such trial, the judge shall, if he shall think fit, direct, at the time of such refusal, on what scale the costs of each party shall be taxed; and in default of such direction, the costs of both parties shall be taxed on the usual scale." [Then follows a scale of the charges to be allowed, which see *post*, Appendix.] "The foregoing charges *are intended as examples*." "The Masters will exercise their discretion in allowing for attendances, having regard to the expense saved, or favour granted to the party, and to all the circumstances of the case; bearing in mind, that, for attendances, the allowances are not to be more than half what are allowed when costs are taxed upon the usual scale. In other cases not hereby provided for, the Masters will conform to the rate of charges hereinbefore inserted, or as near thereto as circumstances will allow."

What cases within them.

These directions extend to a case where the amount recovered is reduced to or below 20*l.*, by a set-off (*g*), or by a tender (*h*); also, by its express words, to the case of a payment into court under 20*l.*, and accepted by plaintiff in satisfaction. But not to a case where the plaintiff recovers by verdict a sum beyond another sum paid into court, the two sums together amounting to 20*l.* (*i*); or to a case where defendant pays money on account after the action brought, which, together with the sum recovered by the judgment, exceeds 20*l.* (*k*). By the express words of the directions, they extend to a case where a sum not exceeding 20*l.*, without costs, is agreed to be paid on the settlement of the action; and they also extend to a case where proceedings are stayed upon payment of a less sum than 20*l.* into court (*l*), unless the order for the stay expressly provide for a taxation on the higher scale (*m*). In a case before the promulgation of the above directions in Easter Term, 1844, and whilst the prior directions of Hilary Vacation, 1836, were in force, where an action was brought against the sheriff for a sum under 20*l.*, and the plaintiff wished to have it tried before the coroner upon a writ of trial, but the defendant refused; afterwards, and after notice of trial, the defendant applied to withdraw his plea, on payment of debt and costs: it was holden that the plaintiff was entitled to costs on the lower scale only (*n*). A recovery of a judgment under 20*l.* entered up under an award (*o*), or a Master's allocatur (*p*), is within the above directions. Where cross actions, and all matters in difference, were referred to an arbitrator by a judge's order, which directed that the costs of one of the actions, and of the reference, should abide the event, and that the costs of the other should be in the discretion of the arbitrator; no power was given to enter up judgment, or

(*g*) See *Parker* v. *Searle*, 6 Dowl. 234: *Savage* v. *Lepscombe*, 5 Dowl. 385, *Patteson*, J., dis.

(*h*) *Dixon* v. *Walker*, 7 M. & W. 214.

(*i*) *Masters* v. *Tickler*, 2 H. & W. 81.

(*k*) *Fewster* v. *Baggett*, 9 M. & W. 90.

(*l*) *Cook* v. *Hurst*, 5 M. & W. 161: *Horn* v. *Pocock*, 2 Dowl. N. S., 448; 12 Law J., N. S., 274, Q. B.: *Keppel* v. *Shillcox*, 12 Law J., N. S., 333, Q. B., where the Court refused to rescind an order for taxation on the lower scale, merely on the ground that the cause was a fit one to be tried before a judge.

(*m*) *Horn* v. *Pocock*, *supra*.

(*n*) *Levy* v. *Magnay*, 2 Dowl., N. C., 519; 12 Law J., 345, Exch., *S. C.* And see *Elliman* v. *Williams*, 13 Law J., N. S., 219, Q. B.

(*o*) *Masters* v. *Tickler*, 2 H. & W. 81: *Walker* v. *Smith*, 3 M. & W. 138.

(*p*) *Parker* v. *Searle*, 6 Dowl. 234.

to give any certificate; the arbitrator having awarded 17*l.* 3*s.* to the plaintiff in one of the actions, and that each party should bear his own costs of the other action, it was held that the Master ought to have taxed the costs on the reduced scale, although the unsuccessful party had resisted effectually a summons to try his action before the sheriff, on the ground that he claimed more than 20*l.* (*q*) The directions do not extend to actions for unliquidated damages (*r*), or, by the express words of them, to actions not triable before the sheriff. The scale in schedule 3 extends to country as well as town causes (*s*).

Certificate to entitle plaintiff to costs on higher scale.

It is not necessary for the judge who certifies under the proviso in the above directions, to enable a plaintiff to obtain full costs, to hear the cause throughout (*t*); the cause need only be brought on for trial before him. There is no specific time in which the certificate must be given (*u*). If the judge before whom the cause was tried dies, without making his certificate, the plaintiff is without remedy for the costs on the higher scale (*x*). Where a cause, within the meaning of the directions, is referred to arbitration, care should be taken to give the arbitrator power of certifying that it was a proper one to be tried before a judge, otherwise no certificate can be obtained to entitle plaintiff to costs on the higher scale (*y*).

Reviewing the taxation.

Reviewing the Taxation.]—The Court or a judge will not, in general, before the taxation of costs, make an order as to the principle on which they are to be taxed, if objection be taken to that course (*z*); but they will sometimes, after the taxation is made (*a*), *order it to be reviewed* by the Master, upon application by the party dissatisfied therewith, where it has been made upon a wrong principle. Several instances of this have been given in the preceding pages. In general, however, the Master is the sole judge as to what costs shall be allowed for the getting up of evidence, and for the expenses of witnesses and matters relating to them, and as to the mode of taxing costs; and the discretion used by him in taxation will not be brought into review before the Court, as a matter of course; and they will not in general interfere, unless they see clearly that he has come to a wrong conclusion (*b*). The Court will also frequently refuse to interfere where the objection to the taxation was not taken before the Master (*c*). The application to review the taxation must be supported by an affidavit pointing out specifically the objections to it (*d*). No objections can be gone into on the application, unless they are specified in the affidavit or rule (*e*). The affidavit should not enter into

(*q*) *Elleman* v. *Williams*, 13 Law J., N. S., 219, Q. B. And see *Walker* v. *Smith*, *infra*: *Griffiths* v. *Thomas*, 15 Law J., N. S., 336, Q. B.

(*r*) *Ante*, 1393.

(*s*) *Gibbs* v. *Whatley*, 13 Law J., N. S., 15, Q. B.

(*t*) *Nokes* v. *Fraser*, 3 Dowl. 339: *Burchell* v. *Clark*, 9 Leg. Obs. 330.

(*u*) *Ivey* v. *Young*, 5 Dowl. 450: *Bragg* v. *Hawks*, 3 Bing., N. S., 880; 6 Dowl. 67, *S. C.* And see *ante*, 1362, 1364.

(*x*) *Southwell* v. *Bird*, 7 Dowl. 557.

(*y*) *Hallen* v. *Smith*, 7 Dowl. 394; 5 M. & W. 159, *S. C.*, nom. *Wallen* v. *Smith*, And see *Elleman* v. *Williams*, *supra*.

(*z*) *Head* v. *Baldry*, 8 Ad. & E. 605.

(*a*) *Seltman* v. *Boorn*, 8 M. & W. 582: *Cleaver* v. *Harryreave*, 2 Dowl. 699.

(*b*) See *Rennie* v. *Mills*, 5 Bing., N. C., 249; 8 Law J., N. S., 148, C. P.: *Doe* v. *Webber*, 4 Nev. & M. 381.

(*c*) See *Parsons* v. *Ritchie*, 6 Scott, 299; 4 Bing., N. S., 306, *S. C.*

(*d*) *Daniel* v. *Bishop*, M'Clel. 61; 13 Price, 129, *S. C.*: *Williams* v. *Hunt*, 1 Chit. Rep. 321.

(*e*) *Alsen* v. *Furnival*, 2 Dowl. 42.

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the merits of the case. It should shew that the Master has made his *allocatur* (*f*). Affidavits used before him on the taxation cannot be read on shewing cause against a rule for reviewing it, unless they are referred to in the rule; and notice that they will be used is not sufficient (*g*). The costs of a rule to review are not given where the mistake is with the Master (*h*). If the application be to review the taxation on a bill of exceptions, or other proceeding in error, it should be made in the court of error (*i*).

7. *The Remedies for Costs.*

Remedies for costs.

The remedy for costs for which judgment has been obtained is by execution in the ordinary way, or else by action on the judgment, excepting, indeed, in an ejectment, which are recoverable in the mode pointed out *ante*, 955. In some cases, where a party in the course of the cause undertakes, in writing, to pay costs, the Court or a judge may order them to be paid (*k*), and then there would be a remedy by attachment, or execution on the order. In general, the Court have no power (except in ejectment, and as to which see *ante*, 956,) to order a person who is not a party to an action to pay the costs of it, although he be the real party interested in the event of it (*l*).

The remedy for costs payable by rule of court is by attachment, as to which see *post*, *Pt.* 8, or by execution under the provisions of 1 & 2 *Vict. c.* 110, *s.* 18, as to which see *post*, 1428. It may be added, that if one of several defendants obtain an order for the payment of costs, the payment should be made to him only and not to others (*n*).

As to setting off costs against costs, see *Vol.* 1, 625.

As to when security for costs may be compelled to be given, see *ante*, 1230.

As to an attorney's remedy for costs against his client, see *ante*, *Vol.* 1, 102 *to* 110.

(*f*) *Cleaver* v. *Hargreave*, *Sallman* v. *Brown*, *supra*.
(*g*) *Cliffe* v. *Prosser*, 2 Dowl. 21.
(*h*) *Ward* v. *Bell*, 2 Dowl. 76: *Parsons* v. *Pitcher*, 6 Dowl. 600.
(*i*) *Francis* v. *Doe* d. *Harvey*, 5 M. & W. 272.
(*k*) See *Turdrew* v. *Brook*, 5 B. & Ad. 880. *Riley* v. *Burn*, 2 B. & Ad. 779.
(*l*) *Haywood* v. *Gifford et al.*, 6 Dowl. 699; 4 M. & W. 194, *S. C.*: *Richards* v. *Frankum*, 9 Law J., N. S., 231, Exch.: *Doe* v. *Smith*, 8 Dowl. 517: *Evans* v. *Rees*, 2 Q. B. 334; 1 Dowl., N. S., 336, *S. C.*
(*m*) *Showler* v. *Steakes*, 10 Law J., N. S., 230, Q. B.
(*n*) *Abernethy* v. *Paton*, 5 Bing., N. C., 276.

CHAPTER XXXII.

ENTRY OF SUGGESTIONS UPON THE ROLL.

When necessary in general.

WHEREVER, by the provision of an act of Parliament, or otherwise, the judgment upon the record is to be such as would not be ordinarily warranted by the previous proceedings on the record, the proper course is, in some cases, to issue a *scire facias*, and, in others, to enter a suggestion on the roll; so that the party to be affected by it may, in the former proceeding, appear and plead to it, and in the latter proceeding, demur, if he thinks the facts suggested are insufficient in point of law, or in some cases plead if he means to deny them, as presently noticed, 1404 (*a*). The uniform course, if new parties are introduced, is by *scire facias:* suggestion is applicable only to collateral facts affecting the same parties, as for example, change of name, change of a nominal plaintiff or defendant as in the case of a public officer of a joint stock banking company (*b*), allowance or disallowance of costs under acts of Parliament, and similar matters (*c*). We shall proceed to notice in this Chapter the proceeding by suggestion in the case of death of the parties, and as to costs. As to suggestions in the awarding of the *venire*, see *Vol.* 1, 284. As to suggestions in debt on bond, see *ante*, 901, 904. As to a suggestion in the nature of an avowry after judgment on demurrer or *non pros* in replevin, see *ante*, 998, 1000. As to a suggestion of an election of a creditor to prove in the case of a bankruptcy, see *ante*, 1106. As to the proceeding by *scire facias* in general, see *ante*, 1009.

Of the death of parties. Before final judgment.

Of the Death of Parties.]—By the 8 & 9 *W.* 3, *c.* 11, *s.* 7, where there are two or more plaintiffs or defendants, and one or more of them die, if the cause of action survive to or against the survivors (*d*), the action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed at the suit of or against the survivors. The death, in this case, if it occur before issue joined, is suggested at the commencement of the next pleading, and of course appears upon the face of the issue when made up. But if it happen after issue joined, it should be suggested upon the *Nisi Prius* record (*e*). Even after motion to set aside proceedings for irregularity, because one of two plaintiffs died before interlocutory judgment, and the suit proceeded to execution in the names of both, the

Amendment as to.

(*a*) See *Bartlett* v. *Pentland*, 1 B. & Adol. 704: *Maberley* v. *Titterton*, 7 M. & W. 540; 9 Dowl. 234, *S. C.*: *Bosanquet* v. *Ramsford*, 11 Ad. & E. 523. As to its being necessary to proceed by *sci. fa.* against a member of a banking copartnership upon a judgment obtained against the public registered officer of it, before issuing execution against him, see *ante*, 1041.

(*b*) *Webb* v. *Taylor*, 13 Law J., N. S., 24, Q. B.: 1 Dowl. & L. 676, *S. C.*, where a rule was granted to allow the suggestion to be entered.

(*c*) See per *Parke*, B., in *Bosanquet* v. *Ramsford*, 11 A. & E. 523.

(*d*) See *Checchi* v. *Powell*, 6 B. & Cres. 253, where, in an action by husband and wife for money lent before marriage, the death of the wife was held to abate the action.

(*e*) *Rex* v. *Cohen*, 1 Stark. 511. According to *Farr* v. *Dean*, 1 Burr. 353, it seems sufficient to suggest it on the issue roll, but now there is no such roll. See *Hodges* v. *Diley*, 7 Dowl. 444; and see Vol. 1, 295.

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less specially named therein (*f*); but their personal representatives are (*g*). Barristers are (*h*). So are assignees of a bankrupt (*i*).

How court of conscience acts must be taken advantage of.

Where the statute prescribes a particular mode of proceeding, to enable the defendant to avail himself of it, he must follow that mode, and the Court will not permit him to follow any other (*k*). If the statute contains a *prohibitory clause*, declaring

By plea.

that no action shall be brought elsewhere for the causes of action recoverable by it, the proper mode of objection to the action is by plea and not by suggestion; and this, although the statute is silent as to the remedy, and gives no form of plea (*l*). And where the act provides that in cases within the jurisdiction of the court, where, upon the trial, the debt, &c. shall be found not to amount to 40*s*., no judgment should be entered on the verdict, and if it is entered shall be void, and the defendant shall have costs; the defendant cannot take advantage of the act by suggestion, but is bound to plead it in bar (*m*). A plea of the court of requests act will be bad *non obstante veredicto*, if the statute be repealed in the course of the suit (*n*). In some cases the

By nonsuit.

plaintiff may be nonsuited at the trial where the debt ought to have been sued for in the court of requests, though the defendant has not pleaded it as a defence. Thus, where an act enacted, "that if it should appear to the judge before any action might be tried, that the court baron had jurisdiction, then unless the judge should certify, &c., the plaintiff should not recover, but be nonsuited." it was held that the statute need not be pleaded, and that the judge, upon proof of the facts, was bound to non-

By suggestion.

suit (*o*). On the other hand, where the statute contains no such *prohibitory* clause, it cannot be pleaded; the mode of taking advantage of it in that case is, by the defendant moving, upon affidavit, as presently mentioned, for leave to enter a suggestion

By either.

upon the record (*p*). Sometimes the statute gives the defendant either of the above modes of taking advantage of it, by plea or by suggestion, and in that case he may have recourse to such

By staying proceedings upon payment of debt.

one of them as seems best to him (*q*). Where the statute merely disentitles the plaintiff to costs in general terms, without directing any particular mode of proceeding by plea or suggestion, he may move the Court or a judge to stay the proceedings, upon payment of the debt, without costs (*r*) after verdict, or after the execution of a writ of inquiry upon judgment by default, (where that is within the act), but not

(*f*) Vol. 1, 60.

(*g*) *Bishop* v. *Marsh*, 8 Scott, 128.

(*h*) *Wettenhall* v. *Wakefield*, 10 Bing. 385; 3 Moo. & Sc. 805; 2 Dowl. 759, *S. C.*

(*i*) *Keay* v. *Rigg*, 1 B. & P. 11: *Ward* v. *Abrahams*, 1 B. & Ald. 367.

(*k*) *Taylor* v. *Blair*, 3 T. R. 452; 1 East, 352, *S. C.* And see *Anslee* v. *Lilly*, 1 M. & Ry. 564: *Clark* v. *Hamlet*, 1 H. & W. 177: *West* v. *Turner*, 1 Nev. & P. 617.

(*l*) *Reynolds* v. *Tuimon*, 2 Q. B. 644: *Parker* v. *Elding*, 1 East, 352: *Barney* v. *Tubbs*, 2 H. Bl. 350: *Jackman* v. *Cother*, 5 M. & W. 147; Tidd, 9th ed. 960. It seems that the plea need not be to the *jurisdiction* of the Court: see *West* v. *Turner*, per *Denman*, C. J., 1 Nev. & P. 617. See the principle in *Moore* v. *Dent*, 1 M. & Rob. 462: *Dafries* v. *Snell*, 4 Dowl. 680. See as to the form of the plea, *Burroughs* v. *Hodgson*, 9 A. & E. 69: 7 Dowl. 805, *S. C.*

(*m*) *Jackman* v. *Cother*, 5 M. & W. 147.

(*n*) *Warne* v. *Beresford*, 6 Dowl. 157.

(*o*) *Hilliard* v. *Webster*, 7 Scott, N. R. 903; 6 M. & G. 963, *S. C.*

(*p*) *Barney* v. *Tubbs*, 2 H. Bl. 332: *Fitzpatrick* v. *Pickering*, 2 Wils. 68: *Watchers* v. *Cook*, 2 M. & Sel. 348. See *Harris* v. *Lloyd*, 4 M. & Sel. 171: *Scaingleburst* v. *Altham*, 3 T. R. 139: *Snudall* v. *Bennett*, 3 Dowl. 294: *Maberley* v. *Tittersen*, 7 M. & W. 540.

(*q*) *Capes* v. *Jones*, 15 Law J., N. S. 209, C. P.

(*r*) *Dunster* v. *Day*, 2 East, 239: *Corfforth* v. *Lancock*, 1 M. & R. 321. And see *Baildon* v. *Pitter*, 3 B. & Ald. 216: 1 Chit. Rep. 636, n.: *Bartholomew* v. *Carter*, 5 Scott, N. R., 496.

&c., but did not point out any particular mode for recovering them, and it did not appear on the face of the record that he was entitled to the benefit of the act (*p*), the course to be adopted by him for the purpose of recovering them, was to apply to the Court upon an affidavit of the facts, for leave to enter a suggestion on the roll (*q*); but that, if the act giving the double or treble costs pointed out a particular mode in which they should be recovered, then no suggestion was necessary (*r*). But it now appears to be settled, that, unless the statute giving the double or treble costs requires it, or unless but for the statute the defendant would not be entitled to costs at all, it is unnecessary, to entitle a defendant to such costs, that a suggestion should be entered (*s*). See *ante*, 1383, as to the provisions giving double and treble costs being abolished, and other costs being given in lieu thereof.

Under Court of Conscience acts.

If an action be brought in one of the courts at Westminster for a cause of action which might have been sued for in the court of requests or court of conscience of any city, borough, or town, there is usually a clause in the statute creating the jurisdiction of the inferior court, by which it is provided, that if the plaintiff in the superior court recover any sum within the limits of the cognizance of the inferior court, he shall not be entitled to costs; or, if the defendant have a verdict, he shall be entitled to double costs (*t*). We shall not attempt, in a work of this description, to enumerate the provisions of this nature in all the statutes which establish courts of conscience; all that is here intended is, to state some general principles which the courts seem to have established upon the subject, and which are applicable to all these courts of conscience, unless expressly controlled by the words of the statute creating their jurisdiction, or by necessary implication. All these statutes have one common object, and should all, as far as possible, receive a uniform construction (*u*).

To what cases these acts in general extend.

The courts of conscience are, in general, restrained to debts or other demands certain, capable of being ascertained by mere computation (*x*). Consequently, in all other cases; as, for instance, in an action on the case for negligence in driving a carriage (*y*), or in a special action of *assumpsit* for the breach of an agreement (*z*), or in other actions for unliquidated damages, though the plaintiff recover less than the sum fixed by the statute (*a*), the defendant cannot plead the statute, nor will the Court allow him to enter a suggestion upon the record,

(*p*) Doug. 308, n.; and see an anonymous case, Lofft, 373.

(*q*) 1 Str. 49, 50: *Barton* v. *Miles*, Hardw. 125; Ca. Pr. C. B. 16; Say. Rep. 214; 3 Wils. 442: *Collins* v. *Poney*, 9 East, 322: *Harper* v. *Carr*, 7 T. R. 448; 1 Doug. 307, *S. C.*: *Devenish* v. *Martins*, 2 Str. 974: *Atkins* v. *Bounsell*, 3 East, 92: *Bate* v. *Hodgate*, 1 Bing. 182: *Wells* v. *Ody*, 3 Dowl. 799; 2 C., M., & R. 185, *S. C.* And see *Penney* v. *Slade*, 7 Scott, 494.

(*r*) 2 Vent. 45: *Harper* v. *Carr*, *ubi supra*. But see Doug. 308, n.

(*s*) *Moberley* v. *Titterton*, 7 M. & W. 540; 9 Dowl. 234, *S. C.*: *Forman* v. *Davies*, 1 Dowl. & L. 299; 11 M. & W. 730, where verdict was found for defendant, the plaintiff not proving notice of action. And see *Finlay* v. *Seaton*, 1 Taunt. 210.

(*t*) See the forms of suggestions, &c., Chit. Forms, 628—631.

(*u*) *Shaddick* v. *Bennett*, 7 D. & R. 232.

(*x*) *Jonas* v. *Greening*, 5 T. R. 529: *Fornin* v. *Oswell*, 1 M. & Sel. 393. See *Foot* v. *Coare*, 2 B. & P. 588: *Parker* v. *Vaughan*, Id. 29: *Sandby* v. *Miller*, 5 East, 194: *Rex* v. *Commissioners of London Court of Requests*, 7 East, 292: *Holden* v. *Newman*, 13 East, 161: *M'Cobham* v. *Carr*, 1 B. & P. 223; 1 Doug. 245.

(*y*) *Lawson* v. *Moggridge*, 1 Taunt. 396. See *Melton* v. *Garment*, 2 N. R. 84: *Foot* v. *Coare*, 2 B. & P. 588.

(*z*) *Jonas* v. *Greening*, 5 T. R. 529. See *Fornin* v. *Oswell*, 1 M. & Sel. 393.

(*a*) *Wright* v. *Skinner*, 2 C., M., & R. 746: *Roberts* v. *Humby*, 3 M. & W. 120: *Collins* v. *Groom*, 4 Scott, N. R., 574.

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however trifling the damages may be (*b*). Some of the statutes prohibit claims for rent being sued for in the courts of requests, and such prohibition even extends to a suit for use and occupation of furnished lodgings (*c*), and even to a suit against a receiver who had received rent (*d*). Some of these statutes require, in order to enable a party to sue in courts of requests, that the cause of action (*e*) shall arise, and the defendant or plaintiff, or both, reside within the jurisdiction (*f*); but this depends entirely upon the wording of the statute in each particular case, and sometimes it may be otherwise (*g*). It would seem, that where the act of Parliament makes no express provision as to the residence of the parties, as a general rule the plaintiff need not, but the defendant must, be resident within the jurisdiction (*h*). It is in general the amount of debt or damages found by the jury, and not as laid in the declaration, which is to determine whether it might have been sued for in the inferior court or not (*i*). Where, in debt, the debt and damages found by the jury exceeded the amount which could be recovered in the inferior court, it was held that the case was not within the act (*k*). Where an action was brought for 5*l.* 12*s.*, and the defendant paid into court the sum of 4*l.* 18*s.* 6*d.*, which the plaintiff took out in full satisfaction of his demand, and entered a *nolle prosequi* as to the residue; it was held, that the acceptance by the plaintiff of the smaller sum was not of itself sufficient evidence that no more was due, so as to entitle the defendant to enter a suggestion under a court of requests act, giving jurisdiction over debts to the amount of 5*l.* (*l*) The fact of the cause being tried on a writ of trial does not affect the question (*m*). The

(*b*) See *Drew* v. *Fletcher*, 1 B. & C. 283.

(*c*) *Kidd* v. *Mason*, 3 Dowl. 96: *Woolley* v. *Cloutman*, Doug. 232, 234. See *Anon.* v. *Dallimore*, 3 D. & R. 51.

(*d*) *Drew* v. *Fletcher*, 1 B. & Cres. 283.

(*e*) As to what is the cause of action, see the judgment of *Tindal*, C. J., in *Thorn* v. *Chinnock*, 1 Scott, N. R., 140. If it be requisite that the cause of action should have arisen within the jurisdiction, every part of it must have arisen there: Id. 138.

(*f*) *Welsh* v. *Troyte*, 2 H. Bl. 29: *Tubb* v. *Woodward*, 6 T. R. 175: *Smith* v. *O'Kelly*, 1 B. & P. 76: *Dillamore* v. *Capon*, 1 Bing. 368; 8 Moore, 429, *S. C.*: *Bailey* v. *Chitty*, 5 Dowl. 307; 2 M. & W. 28, *S. C.*: *Robinson* v. *Searson*, 7 Scott, N. R., 583; 1 Dowl. & L. 756, where one of two defendants was residing within the jurisdiction, but the other not. None of the statutes extend to contracts made at sea: *M'Collam* v. *Carr*, 1 B. & P. 223.

(*g*) See *Busby* v. *Fearon*, 8 T. R. 235: *Barney* v. *Tubb*, 2 H. Bla. 362: *Jonas* v. *Greening*, 5 T. R. 529: *Rex* v. *Dunser*, 6 T. R. 242: *Harwood* v. *Lester*, 3 B. & P. 617: *Baildon* v. *Pitter*, 3 B. & Ald. 210: *Reeves* v. *Stroud*, 1 Dowl. 399. Under the Middlesex Court of Requests Act, the plaintiff need not be resident within the jurisdiction (*Pritchard* v. *M'Gill*, 2 M. & W. 380); but the defendant must, and the whole cause of action must have arisen within it. (*Wells* v. *Langridge*, 5 Dowl. 509: *Thorne* v. *Chinnock*, 1 Scott, N. R., 138: *Francis* v. *Ball*, B. C., M. 1839; 3 Jur. 1077). That act does not apply to cases where the cause of action arises within the city and liberty of Westminster. (*Todd* v. *Emly*, 11 M. & W. 610; 2 Dowl., N. S., 1045, *S. C.*) It seems that the affidavit in support of the application for a suggestion need not state that the cause of action arose within the jurisdiction, it rests with the plaintiff to shew this. (*Bishop* v. *Marsh*, 8 Scott, 128: *Thorn* v. *Chinnock*, 1 Sc., N. R., 138). As to what is seeking a livelihood, &c., within the meaning of the now repealed London Court of Conscience Act (39 & 40 G. 3, c. 104), see *Double* v. *Gibbs*, 1 Dowl. 563; 1 C. & M. 246, *S. C.*, and cases there cited: *Rice* v. *Legh*, 2 Id. 105.

(*h*) See *Pritchard* v. *M'Gill*, 2 M. & W. 380.

(*i*) *Cross* v. *Collins*, 5 Bing., N. C., 194; 7 Scott, 113, nom. *Collins* v. *Cross*: *Barnes* v. *Winkler*, 2 C. & P. 345: *Baddley* v. *Oliver*, 1 Dowl. 598; 1 C. & M. 219, *S. C.* and cases there cited in notes; *Moore* v. *Jones*, 2 Dowl. 38: *Younger* v. *Wilsby*, 6 Taunt. 542: *Weston* v. *Donnely*, Say. 273: *Drew* v. *Coles*, 1 Dowl. 580: *Baildon* v. *Pitter*, 3 B. & Ald. 210: *Braham* v. *Browne*, 2 C. & J. 327. And see *Shaddick* v. *Bennett*, 7 D. & R. 229; 4 B. & C. 769, *S. C.*: *Fairbrass* v. *Pettit*, 1 Dowl. & L. 622; 12 M. & W. 453, *S. C.*: *Allen* v. *Turner*, 2 Dowl., N. S., 21.

(*k*) *Broadhurst* v. *Groundsell*, 1 Dowl. & L. 229.

(*l*) *Jorden* v. *Berwick*, 9 M. & W. 3; 1 Dowl., N. S., 102, *S. C.*: *Turrant* v. *Morgan*, 2 C., M., & R. 252; 3 Dowl. 702, *S. C.*

(*m*) *Bishop* v. *Marsh*, 8 Scott, 128; 6 N. C. 12; 8 Dowl. 1, *S. C.*: *Thorn* v. *Chinnock*, 1 Scott, N. R., 136; 8 Dowl. 895, *S. C.*: *Forbes* v. *Symmonds*, 2 Scott N. R.,

statutes in general extend to cases where the debt, originally above the limited amount, is reduced under it by a payment in part (*n*), or by the Statute of Limitations (*o*), or by infancy, or bankruptcy (*p*), or other defence set up to the action (*q*). The statutes also, in general, extend to cases where the sum is reduced below the limited amount by a payment into court, and the plaintiff replies damages *ultra*, and does not recover to that amount (*r*); but not so, as we have just seen, if the plaintiff takes it out in satisfaction of the action. They do not in general extend to cases where the debt is reduced below the limited amount by a set-off (*t*), or tender (*u*). Merely pleading a tender, however, does not preclude the defendant from the benefit of the statute, when the *original* debt is under the limited amount (*x*). Frequently, the act expressly excepts a demand originally exceeding the limited amount (*y*). Under the 6 & 7 *W.* 4, *c.* 120, *s.* 22, (the Blackheath Act), which excepts a debt for "any sum being the balance of an account originally exceeding *5l.*," it has been held, that the jurisdiction extends to cases where the debtor side of the account amounts to above *5l.*, and the balance has been reduced by occasional payments below that sum, if it appear that so much as *5l.* was not at any time due (*z*). Where a defendant suffered judgment by default, it was held that he was not entitled to enter a suggestion under the Middlesex court of requests act, to entitle him to double costs (*a*). An action brought to try a right is not in general within these acts (*b*). It seems doubtful whether the 19th section of 23 *G.* 2, *c.* 33 (the Middlesex Court of Requests Act,) applies to a verdict on a plea collateral to the merits of the action, as a plea *puis darrein continuance* of a release to a joint contractor with the defendants (*c*), or the like.

Executors and administrators, as defendants, are not in general within any of these statutes (*d*), but as plaintiffs they are (*e*). Nor are attornies, either as plaintiffs or defendants, un- Executors, attornies, &c. when within act.

198; 9 Dowl. 37, *S. C.*: *Capes* v. *Jones*, 15 Law J., N. S., 209, C. P. And see *Wells* v. *Langridge*, 5 Dowl. 509: *Turner* v. *Bernard*, 5 Dowl. 170.

(*n*) *Walker* v. *Watson*, 8 Bing. 414; 1 Moo. & Sc. 674, *S. C.*: *Clark* v. *Askew*, 8 East, 28: *Horn* v. *Hughes*, Id. 347: *Fountain* v. *Young*, 1 Taunt. 60. See *Porter* v. *Philpot*, 14 East, 344: *M'Collam* v. *Carr*, 1 B. & P. 223: *Harsant* v. *Larkin*, 3 B. & P. 257: 7 Moore, 68, *S. C.*: *Abbey* v. *Lill*, 5 Bing. 299; 2 Moo. & P. 534, *S. C.*

(*o*) *Lord Huntingtower* v. *Healy*, 7 D. & R. 369: *Rotheray* v. *Munnings*, 1 B. & Adol. 18 a.

(*p*) *Stilwell* v. *Bracher*, 1 Dowl. & L. 231.

(*q*) *Bateman* v. *Smith*, 14 East, 301. And see *Bailey* v. *Chitty*, 2 M. & W. 28: *Moreau* v. *Hicks*, 2 A. & E. 782.

(*r*) *Barnard* v. *Turner*, 1 M. & W. 580; 5 Dowl. 170, *S. C.*

(*t*) *Pitts* v. *Carpenter*, 2 Str. 1191: *Gross* v. *Fisher*, 3 Wils. 48: *Jenkinson* v. *Morton*, 1 M. & W. 300; 1 T. & G. 676; 5 Dowl. 74, *S. C.* And see *Gobel* v. *Birt*, 2 Chit. 304: *Cottle* v. *Langman*, 9 Moore, 625: *Bailey* v. *Chitty*, 2 M. & Wels. 28; 5 Dowl. 207, *S. C.*: *Jones* v. *Harris*, 1 Dowl. 374.

(*u*) *Heaward* v. *Hopkins*, 2 Doug. 448: *Waistell* v. *Atkinson*, 3 Bing. 289; 11 Moore, 14, *S. C.*: *Downes* v. *Ray*, 1 H. & W. 649.

(*x*) *Jordan* v. *Strong*, 5 M. & Sel. 196.

(*y*) *Moreau* v. *Hicks*, 1 Harr. & W. 87; 2 A. & E. 782; 4 N. & M. 563, *S.C.* (decided under the now repealed Blackheath Act). And see *Green* v. *Bolton*, 4 Bing., N. C., 306; 6 Dowl. 436, *S. C.* (decided on the Tower Hamlets Court of Requests Act): *Elsley* v. *Kirby*, 9 M. & W. 638; 1 Dowl., N. S., 946, *S. C.*: and *Fountain* v. *Young*, 1 Taunt. 60 (decided on the then Southwark Court of Requests Act).

(*z*) *Pope* v. *Banyard*, 6 Dowl. 671.

(*a*) *Waller* v. *Deane*, 8 Scott, N. R., 769; 7 M. & Gr. 936. *S. C.*

(*b*) *Todd* v. *Emly*, *ante*, 1400, n. (*g*).

(*c*) *Todd* v. *Emly*, *supra*.

(*d*) *Alsbury* v. *Burrowes*, 1 Doug. 263. See *Wase* v. *Wybard*, Id. 246: *Webb* v. *Brown*, 5 T. R. 536.

(*e*) *Wase* v. *Wybard*, 1 Doug. 246: *Bishop* v. *Marsh*, 8 Scott, 128: *Stilwell* v. *Bracher*, 1 Dowl. & L. 231. In some cases they might apply to the Court to restrain the defendant from recovering costs against them: see *S. C.* and 3 & 4 W. 4, c. 42, s. 31, *ante*, 1074.

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less specially named therein (*f*); but their personal representatives are (*g*). Barristers are (*h*). So are assignees of a bankrupt (*i*).

How court of conscience acts must be taken advantage of.

By plea.

Where the statute prescribes a particular mode of proceeding, to enable the defendant to avail himself of it, he must follow that mode, and the Court will not permit him to follow any other (*k*). If the statute contains a *prohibitory clause*, declaring that no action shall be brought elsewhere for the causes of action recoverable by it, the proper mode of objection to the action is by plea and not by suggestion; and this, although the statute is silent as to the remedy, and gives no form of plea (*l*). And where the act provides that in cases within the jurisdiction of the court, where, upon the trial, the debt, &c. shall be found not to amount to 40*s*., no judgment should be entered on the verdict, and if it is entered shall be void, and the defendant shall have costs; the defendant cannot take advantage of the act by suggestion, but is bound to plead it in bar (*m*). A plea of the court of requests act will be bad *non obstante veredicto*, if the statute be repealed in the course of the suit (*n*). In some cases the plaintiff may be nonsuited at the trial where the debt ought to have been sued for in the court of requests, though the defendant has not pleaded it as a defence. Thus, where an act enacted, "that if it should appear to the judge before any action might be tried, that the court baron had jurisdiction, then unless the judge should certify, &c., the plaintiff should not recover, but be nonsuited," it was held that the statute need not be pleaded, and that the judge, upon proof of the facts, was bound to nonsuit (*o*). On the other hand, where the statute contains no such *prohibitory* clause, it cannot be pleaded; the mode of taking advantage of it in that case is, by the defendant moving, upon affidavit, as presently mentioned, for leave to enter a suggestion upon the record (*p*). Sometimes the statute gives the defendant either of the above modes of taking advantage of it, by plea or by suggestion, and in that case he may have recourse to such one of them as seems best to him (*q*). Where the statute merely disentitles the plaintiff to costs in general terms, without directing any particular mode of proceeding by plea or suggestion, he may move the Court or a judge to stay the proceedings, upon payment of the debt, without costs (*r*) after verdict, or after the execution of a writ of inquiry upon judgment by default, (where that is within the act), but not

By nonsuit.

By suggestion.

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(*f*) Vol. 1, 60.

(*g*) *Bishop* v. *Marsh*, 8 Scott, 128.

(*h*) *Wettenhall* v. *Wakefield*, 10 Bing. 385; 3 Moo. & Sc. 805; 2 Dowl. 739, *S. C.*

(*i*) *Keay* v. *Rigg*, 1 B. & P. 11: *Ward* v. *Abrahams*, 1 B. & Ald. 367.

(*k*) *Taylor* v. *Blair*, 3 T. R. 452; 1 East, 352, *S. C.* And see *Anslee* v. *Lilley*, 1 M. & Ry. 564: *Clark* v. *Hamlet*, 1 H. & W. 177: *West* v. *Turner*, 1 Nev. & P. 617.

(*l*) *Reynolds* v. *Talmon*, 2 Q. B. 644: *Parker* v. *Elding*, 1 East, 352: *Barney* v. *Tubbs*, 2 H. Bl. 350: *Jackman* v. *Cother*, 5 M. & W. 147; Tidd, 9th ed. 966. It seems that the plea need not be to the *jurisdiction* of the Court: see *West* v. *Turner*, per *Denman*, C. J., 1 Nev. & P. 617. See the principle in *Moore* v. *Dent*, 1 M. & Rob. 462: *Dafries* v. *Snell*, 4 Dowl. 680. See as to the form of the plea, *Burroughs* v. *Hodgson*, 9 A. & E. 497.

(*m*) *Jackman* v. *Cother*, 5 M. & W. 147; 7 Dowl. 805, *S. C.*

(*n*) *Warne* v. *Beresford*, 6 Dowl. 157.

(*o*) *Hilliard* v. *Webster*, 7 Scott, N. R. 903; 6 M. & G. 963, *S. C.*

(*p*) *Barney* v. *Tubbs*, 2 H. Bl. 332: *Fitzpatrick* v. *Pickering*, 2 Wils. 68: *Watchorn* v. *Cook*, 2 M. & Sel. 348. See *Harris* v. *Lloyd*, 4 M. & Sel. 171: *Swinglehurst* v. *Altham*, 3 T. R. 139: *Sandall* v. *Bennet*, 3 Dowl. 294: *Maberley* v. *Titterton*, 7 M. & W. 540.

(*q*) *Capes* v. *Jones*, 15 Law J., N. S., 209, C. P.

(*r*) *Dumster* v. *Day*, 8 East, 220: *Corfurth* v. *Lowcock*, 1 M. & R. 321. And see *Baildon* v. *Pitter*, 3 B. & Ald. 216: 1 Chit. Rep. 636, n.: *Bartholomew* v. *Carter*, 5 Scott, N. R., 496.

before (*s*). Though the plaintiff, by his indorsement on the writ, claims an amount recoverable in a court of requests, still the Court will not, it seems, on payment of the sum, relieve the defendant from costs before trial, but will leave him to plead the act or apply to enter a suggestion, as the case may be (*t*).

The motion, and proceedings to enter suggestion for costs.

The motion for leave to enter the suggestion, is for a rule to shew cause why the plaintiff should not bring the record into court and carry in the roll, if he has not already done so, and that the defendant enter a suggestion thereon, pursuant to the statute in question, and that all proceedings be stayed in the meantime. The application must not be made before verdict (*u*). It should in general be made within the time allowed for moving for a new trial (*x*); but it may, it seems, be made at any time after verdict, and before final judgment is actually signed (*y*), but not afterwards (*z*), except where judgment goes by default (*a*). But where a judge at the assizes, in pursuance of the 1 *W.* 4, *c.* 7, orders that the plaintiff shall have execution within a limited time, and judgment is thereupon entered and execution issued, the defendant may apply within the first four days of the next term to the court to enter the suggestion; a judge at the assizes has no power to order such entry (*b*). And in an action tried before the sheriff, it seems that the defendant has the same time to enter the suggestion as he has to move for a new trial (*c*), and may move for that purpose though final judgment has been signed, and execution issued (*d*); and in such a case it is not necessary that there should be a previous order to stay the proceedings (*e*). So, where judgment by default is signed in vacation and execution issued, the defendant may, nevertheless, apply to the Court in the following term to have such suggestion entered on the terms of his paying the plaintiff's costs since the judgment (*f*); which terms would, it seems, be imposed in other similar cases: and the only mode of avoiding them is, before they are incurred, to obtain a judge's order to stay the proceedings till the lapse of some days, usually the first four days in the next term. Where the judgment was signed on the last day of the term, the Court entertained the application at the beginning of the following term, the costs not then being taxed (*g*). The motion cannot be made on the last day of term (*h*). The affidavit must clearly bring the case within the act (*i*). Under the Middlesex County Court Act, it should expressly state that the defendant was liable to be sum-

Time for making it.

Affidavit in support of.

(*s*) See *Meredith* v. *Drew*, 1 Dowl. 252: *Cullifford* v. *Dycha*, 2 Chit. Rep. 395.

(*t*) *King* v. *Myers*, 5 Dowl. 687.

(*u*) *Meredith* v. *Drew*, 8 Bing. 142; 1 M. & Scott, 225; 1 Dowl. 252, *S. C.*

(*x*) *Garratt* v. *Babington*, 1 Dowl. & L. 820. And see *Hipperley* v. *Laing*, 4 B. & Cres. 863; 7 D. & Ry. 265, *S. C.*

(*y*) *Harding* v. *Howard*, 9 Jur. 733: *Cross* v. *Collings*, 5 Bing., N. S., 194: *Robinson* v. *Pearson*, 6 M. & W. 690; 1 Dowl. & L. 950, *S. C.*

(*z*) *Calvert* v. *Everard*, 5 M. & Scott, 510: *Unwin* v. *King*, 2 Dowl. 593; 2 H. Bl. 352: *Watchorn* v. *Cook*, 2 M. & Sel. 348.

(*a*) *Burbidge* v. *Marvin*, 12 M. & W. 8: see *infra*. Under the Middlesex Act, a suggestion cannot be entered after a judgment by default; see *Waller* v. *Dean*, 8 Scott, N. R., 760.

(*b*) *Baddley* v. *Oliver*, 1 Dowl. 598; 1 C. & M. 219, *S. C.*

(*c*) *Garratt* v. *Babington*, 1 Dowl. & L. 820.

(*d*) *Bond* v. *Bailey*, 3 Dowl. 808; 2 C., M., & R. 246, *S. C.* And see *Shaw* v. *Oates*, 4 Dowl. 790: *Kidd* v. *Mason*, 3 Dowl. 85: *Croad* v. *Harris*, 4 Dowl. 616; 1 H. & W. 657, *S. C.*: *Bernard* v. *Burner*, 1 M. & W. 580; 5 Dowl. 170, *S. C.*

(*e*) *Johnson* v. *Veal*, 7 Dowl. 487; 5 M. & W. 276, *S. C.*

(*f*) *Heale* v. *Earle*, 2 M. & Wels. 383.

(*g*) *Godson* v. *Lloyd*, 4 Dowl. 157; 1 Gale, 244, *S. C.*

(*h*) *Anon.*, 4 M. & G. 906.

(*i*) *Newton* v. *Peacock*, 1 Dowl. 677.

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moned to the court of requests (*k*). Where the act applies to a defendant residing within the jurisdiction, the affidavit ought to shew that the defendant was residing there at the time of action brought (*l*). And where the act requires it, it should state that the cause of action arose within the jurisdiction. But, in a case under the Middlesex Court of Requests Act, the Court of Common Pleas held that the affidavit was sufficient without this statement, and that it rested on the plaintiff to make out the contrary, if he could (*m*). It is not in general necessary to shew that the case is not within a *proviso* in another section of the act, excepting certain cases from the operation of it (*n*). The copy of the writ of summons, annexed to, and referred to by, the affidavit, and indorsed for 4*l.* 2*s.* 5*d.* debt, is sufficient evidence of the action being for a debt not exceeding 5*l.* (*o*)

Record need not be produced.

The record need not, it seems, be produced in court, for the purpose of making the application (*p*).

Proceedings after rule nisi.

The rule is a rule nisi, which being obtained, draw it up with one of the Masters, and serve a copy upon the plaintiff's attorney or agent, in the usual way; and then proceed to make the rule absolute upon affidavit of service. It is no answer to the application, that it is made against good faith, or that the plaintiff has been misled by the conduct of the defendant (*q*). *As soon as it is made absolute, get the suggestion drawn by counsel or pleader (r): indorse it upon the Nisi Prius record, and get one of the Masters to enter it upon the roll. If the roll has not been carried in, and the plaintiff refuses to carry it in, and the plaintiff will not produce the roll for the purpose of having the suggestion entered, then apply to the Court by motion, or to a judge on summons, to compel him to deliver it up to you, in order to enable you to enter the suggestion on it.* It affords no answer to such an application, that the plaintiff's attorney has absconded with it, or the like (*s*). *If the statute give the defendant costs, give notice to the plaintiff's attorney of the time of taxing them; bespeak the roll of the Masters, and attend before one of them with the postea, who will thereupon tax the costs, and mark them upon the postea and roll.* It is irregular for the plaintiff to enter the suggestion upon the record (*t*).

Demurring to or traversing suggestion.

Demurring to, or Traversing Suggestion.]—The suggestion may be demurred to, and in some cases traversed by the plaintiff (*u*). A suggestion under the Middlesex Act (23 *G.* 2, *c.* 33, *s.* 19), to deprive the plaintiff of costs, and allow the defendant double costs, is traversable; and that notwithstanding the plaintiff has previously shewn cause against a rule to enter the suggestion (*x*). It may be traversed when the right to any costs is

(*k*) *Unwin* v. *King*, 2 Dowl. 492: *Fassett* v. *Godfrey*, Id. 587. But this is not in general necessary: *Burbidge* v. *Marvin*, 12 M. & W. 8: *Heath* v. *Seagar*, 8 Dowl. 424.

(*l*) *Morsen* v. *Hicks*, 1 Harr. & W. 67. See *Bond* v. *Bailey*, 3 Dowl. 806. As to what affidavit of this fact is sufficient, see *Burton* v. *Campbell*, 6 Dowl. 451.

(*m*) *Bishop* v. *Marsh*, 8 Scott, 129: *Thorn* v. *Chinnock*, 1 Scott, N. R., 138.

(*n*) See *Burbidge* v. *Marvin*, *supra*: *Pomfrey* v. *Cottrell*, 1 Dowl. & L. 845.

(*o*) *Burton* v. *Campbell*, 6 Dowl. 451.

(*p*) *Kidd* v. *Mason*, 3 Dowl. 85.

(*q*) *Forbes* v. *Symmonds*, 2 Scott, N. R., 198; at least this is the case where an application is made under the Middlesex Act, the 19th section of that act leaving no discretion in the court.

(*r*) See form, Chit. Forms, 688, 689.

(*s*) See *Jones* v. *Harris*, 1 Dowl. 638.

(*t*) *Watson* v. *Quilter*, *infra*.

(*u*) *Jeffries* v. *Watts*, 1 New Rep. 157: *Hickman* v. *Colley*, Andr. 330: 2 Str. 1139. *S. C.*: *Barney* v. *Tubb*, 2 H. Bl. 364: *Bartlett* v. *Pentland*, 1 B. & Adol. 759: *Burwood* v. *Law*, 7 M. & W. 202. See *Bartholomew* v. *Carter*, 5 Scott, N. R., 391: 1 Dowl., N. S., 213, *S. C.*, per *Maule*, J.

(*x*) *Watson* v. *Quilter*, 11 M. & W. 702: 1 Dowl. & L. 944, *S. C.*

in question and depends upon a fact, the determination of which is not, by the statute law, vested in the Court (*y*). There are cases, however, as observed by the court of Exchequer in giving judgment in a recent case in which the suggestion is not traversable. For instance, where a statute gives the Court cognizance of the fact, there its decision would not be traversable (*z*). Thus, under 3 *Jac.* 1, *c.* 15, (the London Small Debts Act), the defendant is entitled to his costs, if it *shall appear to the judge or judges of the Court* where the action is tried, that the debt to be recovered does not amount to 40*s.*, and the defendant shall duly prove by testimony on his own oath, to be allowed by the judge or judges of the Court, that he was inhabitant and resident within the city, or the liberties thereof, at the time of the action brought: under this act it belongs to the Court to determine the fact. The 22 *G.* 2, *c.* 47, (Southwark Act), contains a similar clause. Other acts, as 47 *G.* 3, *s.* 1, *cc.* 35, 45, (local and personal), make the defendant's right depend on the judge's certificate, and the fact could not be afterwards disputed; and so, under 43 *G.* 3, *c.* 46, the fact of the defendant being arrested without reasonable cause for a greater sum than the plaintiff recovers, is to be determined by the Court. Another class of cases, where the matter of the suggestion belongs to the Court, is where the Court, having a discretionary power over its own process, is called upon to depart from the usual course, upon the suggestion of some matter which renders such departure expedient or essential for the purposes of justice, as where a *venue* is to be changed because an impartial trial cannot be had, or where the sheriff is a party: in such a case it is manifest that the suggestion cannot be traversed; for to whom is the writ to be directed for trial of the fact: surely not to the sheriff of the county, to be tried by a jury of that county, whether they are impartial, or to be tried by a jury of his own selection, whether he be a party. These cases imply the necessity of a preliminary determination by the Court itself, to whom the process shall be directed (*z*). In one case it was doubted whether a suggestion entered upon the record to change the name of the nominal plaintiff in an action by the public officer of a banking company, under the 7 *G.* 4, *c.* 46, can be traversed (*a*). If the defendant succeeds, he will be entitled to the costs of that traverse (*b*).

(*y*) *Watson* v. *Quilter*, *supra*.
(*z*) *Per cur. Watson* v. *Quilter*, *supra*.
(*a*) See *Webb* v. *Taylor*, 1 Dowl. & L. 676; 13 Law J., N. S., 24, Q. B., *s. c.*
(*b*) *Watson* v. *Quilter*, *supra*.

CHAPTER XXXIII.

DEATH, BANKRUPTCY, OR MARRIAGE OF PARTIES.

Death before Verdict or Judgment by Default, 1406.
Death after Verdict and before Final Judgment, 1407.
Death between Interlocutory and Final Judgment, 1407.
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Death after Execution, 1408.
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Death of Parties, how far it revokes Arbitrator's Authority, post, 1468.
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Death before verdict or judgment by default. Sole plaintiff or defendant.

Death before Verdict or Judgment by Default.]—If a sole plaintiff or defendant die before verdict or judgment by default, the action abates, and the plaintiff or his executor is obliged to commence a new action against the defendant or his executor, provided the cause of action survive to or against the executor (*a*). But where a person admitted to defend alone as landlord in ejectment died before trial, having devised all his real estates to J. S., and the Statute of Limitations prevented the lessor of the plaintiff from bringing a fresh ejectment, the Court, upon application, gave the lessor of the plaintiff leave to sign judgment against the casual ejector in the old suit, unless J. S. would appear and defend the action as landlord (*b*). Where a sole plaintiff dies pending the action, it seems the proper course for the defendant to take, if the action be continued, is by plea in abatement or writ of error, according to the stage of the cause. The Court of Exchequer refused to arrest the judgment or to stay the *postea* in the hands of the associate, though circumstances were brought before them, shewing a strong probability that the plaintiff had died before the trial (*c*). But where, pending an action, reports reached this country of the death of the plaintiff, the Court, on application of the defendant (the plaintiff's attorney not opposing it), stayed the proceedings until the Court or judge should direct the action to proceed (*d*).

Of one of several.

By the 8 & 9 *W.* 3, *c.* 11, *s.* 7, where there are several plaintiffs or defendants, and some of them die, if the cause of action

(*a*) See 2 Saund. 72 i: *Cutfield* v. *Coney*, 2 Wils. 83: *Wallop* v. *Irwin*, 1 Wils. 315: *Taylor* v. *Harris*, 3 B. & P. 549. As to when the death takes place during the assizes or sittings, see *ante*, 1016.

(*b*) *Doe Grubb* v. *Grubb*, 5 B. & C. 457.

(*c*) *Johnson* v. *Hamilton*, 4 Dowl. 762.

(*d*) *Chesser* v. *Ridgway*, 1 M. & Gr. 965; 9 Dowl. 67, S. C.

survive to or against the others, the action does not abate; but the death being suggested upon the roll, the action shall proceed by or against the survivors (*e*). In an action by husband and wife for money lent by the wife before marriage, the death of the wife before trial was holden to abate the suit (*f*).

Death after verdict and before final judgment.

Sole plaintiff or defendant.

Death after Verdict and before Final Judgment.]—By the common law, if any one of the parties died before final judgment, the suit abated (*g*). But by the 17 *Car.* 2, *c.* 8, *s.* 1, if a sole plaintiff or defendant die after verdict, or even after the assizes begin, or after the first day of the sittings, though before the trial, and before final judgment, the action is not thereby abated; but final judgment may be signed within two terms, as if the party were alive, and then revived by *scire facias* by or against the executor, &c. See as to the construction put on this statute, and where and how the judgment in this case must be entered, &c., and when it may be entered *nunc pro tunc*, *ante*, 1015 *to* 1017. Although the plaintiff has died after verdict, the Court may, it seems, grant a new trial on the application of the defendant, and would in such case impose terms on him to prevent his taking advantage of the plaintiff's death (*h*). Where a cause was by order of *Nisi Prius* referred to a barrister to state a special case, and the case was stated after the death of the defendant, the Court refused to set it aside (*i*).

Of one of several.

So, if one of several plaintiffs or defendants die after verdict and before judgment, the action does not abate; but the death being suggested on the roll (*k*), judgment is entered by or against the survivors, and execution sued out accordingly (*l*).

Death between interlocutory and final judgment.

Sole plaintiff or defendant.

Death between Interlocutory and Final Judgment.]—By the 8 & 9 *W.* 3, *c.* 11, *s.* 6, if a sole plaintiff or defendant die after judgment by default, and before final judgment, the action shall not abate, if it be such as might originally be prosecuted by or against the executors (*m*); but the judgment may be revived by *scire facias*, and the parties may thereupon proceed to final judgment (*n*). The Court, in such a case, before the rule of *H. T.*, 4 *W.* 4, *r.* 2, referred it to the Master to compute principal and interest on a bill, during the same term in which the plaintiff died, without a *scire facias*; because the final judgment would be signed as of the same term, and, having relation to the first day of it, would appear to have been signed before the plaintiff's death (*o*); but since that rule, as judgments have not relation to the first day of the term, but only to the day on which they are actually signed, this, it seems, would not be permitted. See the course of proceeding by *scire facias*, &c. in this case, *ante*, 1018.

Of one of several.

Also, by the 8 & 9 *W.* 3, *c.* 11, *s.* 7, if one of several plain-

(*e*) See the mode of entering the suggestion, *ante*, 1404.
(*f*) *Checchi* v. *Powell*, 6 B. & C. 253.
(*g*) 2 Saund. 72 i.
(*h*) *Griffiths* v. *Williams*, 1 C. & J. 47.
(*i*) *Barnes* v. *Crane*, 12 Law J., N. S., 239, Exch.
(*k*) See forms of suggestions, Chit. Forms, 626, 627.
(*l*) *Ante*, 1015, 1016.
(*m*) See *Ireland* v. *Champneys*, 4 Taunt. 884, 858: *Wallop* v. *Jewin*, 1 Wils. 315.
(*n*) *Ante*, 1017, 1018.
(*o*) *Berger* v. *Green*, 1 M. & Sel. 229. See *Calvert* v. *Tomlin*, 5 Bing. 1, 5; 2 Moo. & P. 1, *S. C.*

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tiffs or defendants die after judgment by default and before final judgment, the action does not abate; but the death being suggested on the roll, the action proceeds by or against the survivors (*p*).

Death after final judgment.

Death after Final Judgment.]—If a sole plaintiff or defendant die after final judgment, and before execution, the action is not thereby abated; but the judgment must be revived by *scire facias* by or against the executors, &c. (*q*).

Sole plaintiff or defendant.

Of one of several.

But where there are several plaintiffs or defendants, and some of them die after final judgment and before execution, execution may be sued out by or against the survivors, in the names of all; or, upon suggesting the death upon the roll, execution may be sued out by or against the survivors by name; or, where it is desired to have execution by *elegit* of the lands of a deceased defendant, the judgment may be revived by *scire facias* against his heirs and terretenants, and against the surviving defendants, and an *elegit* thereupon sued out against the lands of the deceased, and the lands and goods of the survivors (*r*).

Death after execution.

Death after Execution.]—If plaintiff die while defendant is charged in execution, and administration is not taken out to the plaintiff, the Court will discharge the defendant, unless cause be shewn by the next of kin to the contrary (*s*). Where either party dies in execution, the other may sue out execution afresh against his land or goods (*t*). See further as to the effect of the death of a plaintiff after execution, *ante*, 1013, 1071; of a defendant, *Vol.* 1, 528, 619, 621.

Death after a writ of error.

Death after a Writ of Error.]—The death of a plaintiff in error, before errors assigned, abates the writ; but if it happen after the assignment of errors, it does not (*u*). The death of a defendant in error, however, in no case abates the writ; but the death being suggested on the roll, the writ proceeds against the survivor; or, if all the defendants die, the executors or administrators may be made parties by the *scire facias ad audiendum errores*.

Death of defendant, when discharges bail.

Death of Defendant, how far a Discharge of his Bail.]—If the principal die at any time before the return of the *ca. sa.*, the bail are thereby discharged; but if he have not been arrested on the *ca. sa.*, and die after it is returnable, the bail are fixed (*x*). This, however, has reference only to bail to the action; bail in error are liable, notwithstanding the death of their principal (*y*). See also in what cases the death of the plaintiff or defendant is a discharge of the bail to the sheriff, *Vol.* 1, 728.

(*p*) See *Fort* v. *Oliver*, 1 M. & Sel. 242.
(*q*) *Ante*, 1013, 1014.
(*r*) *Ante*, 1019.
(*s*) *Parkinson* v. *Horlock*, 2 N. R. 240: *Broughton* v. *Martin*, 1 B. & P. 176: *Wagstaffe* v. *Darby*, Barnes, 366.
(*t*) 21 Jac. 1, c. 24. See *Farncombe* v. *Kent*, 2 Dowl. 464; and *Ex p. Lord of Manor of Wakefield*, 11 Law J., N. S., 41, Q. B.
(*u*) *Ante*, Vol. 1, 484.
(*x*) *Ante*, Vol. 1, 781.
(*y*) *Ante*, Vol. 1, 805.

Death, how far it affects a Cognovit or Warrant of Attorney.]—As to this, see *ante*, 848, 858.

Death, how far it affects cognovit or warrant of attorney.

Death, how far it revokes an Arbitrator's Authority.]—As to this, see *post*, 1468.

How far it revokes an arbitrator's authority.

Marriage of Feme Plaintiff or Defendant.]—As to the effect of a marriage of a feme sole plaintiff in an action, see *ante*, 1095; and as to the effect of a marriage of a defendant in an action, see *ante*, 1097. As to the effect of marriage on an action in general, see *ante*, 1095, 1097.

Marriage of feme plaintiff or defendant.

Bankruptcy of Parties.]—We have already seen what effect the bankruptcy or insolvency of parties has upon the action, and when a *scire facias* is necessary in case of, *ante*, 1020, 1021; also when the bankruptcy of a plaintiff abates the action, *ante*, 1100; also how far the proof of a debt operates as a discontinuance of an action against a bankrupt, *ante*, 1105; also how far the proceedings may be stayed where the defendant has obtained his certificate, *ante*, 1107; and when the defendant will be discharged out of custody on obtaining his certificate, *ante*, 1108.

Bankruptcy of parties.

As to how far bail to the action are discharged by the bankruptcy of the defendant, see *ante*, *Vol.* 1, 781; and as to bail to the sheriff being thereby discharged, see *ante*, 728.

PART VI.

MOTIONS AND RULES—SUMMONSES AND ORDERS—AFFIDAVITS.

CHAPTER I.

MOTIONS AND RULES.

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SECT. 1.

Rules granted upon Motion by Counsel.

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On what side of the court.

RULES granted upon motion by counsel are granted, in the Queen's Bench, either on the *plea* side, or on the *crown* side of the Court. There is no *crown* side in the Common Pleas or Exchequer of Pleas. But rules for attachment in cases of contempts, &c., which are indeed of a criminal nature, though having relation to a civil suit, may be moved for in any one of the courts, and they shall be considered in a subsequent part of the work, where we shall have to treat of attachment generally.

Rules on the plea side of the courts are common or special; the former being obtained from the Master without any assistance of counsel, the latter being obtained through means of that assistance.

Three kinds of rules granted upon motion by counsel.

Rules granted upon the plea side, upon motion by counsel, may be classed under the following heads:—1st, those which are granted upon the motion paper being merely signed by counsel, without any motion being actually made in court; 2ndly, those which are considered so much as a matter of course, that the grounds of the motion are not particularised by counsel, and where in some instances counsel may hand the motion paper to one of the Masters, without making the motion *viva voce*; and 3rdly, those which are granted upon the grounds of the motion being particularised by counsel.

By the 2 & 3 *Vict. c.* 16, *s.* 14, the Court of Common Pleas at Durham, in any action depending in that Court, may, on any question involving a question of law or fact, grant a rule to shew cause before any one of the judges of any one of the superior courts of common law at Westminster, "which judge is hereby authorised and empowered to proceed to hear and determine the merits of all such rules, and to make such orders thereupon as the said judge shall think proper." Court of C. P. at Durham may grant rules nisi.

Rules Absolute in the first instance, or Nisi, how obtained, &c.]— The first class of the above rules, namely, those which are granted upon the mere signature of counsel, are absolute in the first instance, and may be obtained thus:—*Get the motion paper signed by counsel; take it to the Master's office, and draw up the rule; serve a copy of the rule upon the opposite attorney or agent.* Rules absolute in the first instance, or nisi. How obtained, &c.

The remaining two classes of the above rules are either absolute in the first instance, or rules to shew cause. As to what rules in particular cases are *nisi* only, and what are absolute in the first instance, will be found noticed under the different heads throughout this work. All rules to set aside proceedings for irregularity or otherwise are rules *nisi*. If absolute in the first instance, they are obtained thus:—*Let an affidavit be made of the facts necessary to support the application, annex it to a motion paper, and indorse the latter correctly as to the nature of the rule required. Give the motion paper and affidavit to counsel, who will, after signing it, either give it to one of the Masters, or move it in Court, according to the nature of the motion. The motion paper and affidavit should be handed in to one of the Masters, whether the rule be granted or refused. If the rule be granted, call in the evening at the Master's office, and draw up the rule, and serve a copy of it upon the attorney or agent of the opposite party, or on the party himself, if he sue or defend in person, as directed post,* 1415 (*a*).

If the rule required be a rule *nisi* only, *give the motion paper, with the affidavit annexed, to counsel, who will move it accordingly. If granted, draw up the rule with one of the Masters, and serve a copy of it as directed post,* 1415 (*b*).

The formal requisites, and parts of, and other general matters relating to affidavits, will be found treated of, *post, Part* 6, *ch.* 3. As regards the contents of the affidavit, the necessary requisites in each particular case will be found noticed under the particular heads throughout this work. In general, it should state such facts as may induce the Court to grant the application. The facts should in general be alleged as positively and distinctly as the case will admit of, and not be left to mere inference, especially where it lies within the power of the party making the motion to arrive at a certain conclusion as to such facts (*c*). Where it is sought to impeach a rule of Court or judge's order, the materials upon which it was founded should be brought before the Court (*d*). The Court will not even notice the fact of an application having previously been made to a judge at chambers on the same subject, unless it be sub- Affidavit in support of rule.

(*a*) See as to the form of a rule *nisi*, Chit. Forms, 634.

(*b*) When motions may be made before single judge, sitting in pursuance of the G. 4 & 1 W. 4, c. 70, s. 1, see *ante*, 134.

(*c*) See *Green* v. *Rohan*, 4 Dowl. 630: *Classey* v. *Drayton*, 6 M. & W. 17.

(*d*) *Needham* v. *Bristowe*, 11 Scott, N. R., 773; 4 Man. & G. 962, S. C.

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stantiated by affidavit, although the judge be present and admit it (*f*). But where, upon a motion to set aside a judge's order, it was objected that the order was not annexed to the affidavit, or set out verbatim in it, but the substance only of it was stated, the Court held that to be sufficient (*g*). And where all mention of the order was omitted in the affidavit, but the rule appeared to be drawn up upon reading the order, the Court held it to be sufficient (*h*). A rule making the same order in several causes may be moved for, on a single affidavit intitled in all the causes (*i*). If unnecessarily long, or if it contains impertinent matter, the Court will sometimes refer it to the Master, and make the party using it pay the costs occasioned by the unnecessary or impertinent matter (*k*). The affidavit *must be made before the rule is moved for, and produced* in court *at the time of making the motion, and must be filed or deposited with the Masters, otherwise the rule shall not be drawn up, or, if drawn up, shall be of no force or effect* (*l*). If not already filed, it must be handed in to the Master, whether the rule *nisi* be granted or refused (*m*). A party, in order to make use of an affidavit, sworn or filed after he has drawn up and served a rule *nisi*, must, in general, withdraw his motion and move it again (*n*). But *before* the rule is drawn up, he may apply to the Court to have it drawn up on reading the supplemental affidavit also (*o*). Under particular circumstances, the Court will allow the affidavit to be made after the rule is moved for (*p*), but this is not very often done (*q*). In motions to stay proceedings on bail bonds, for setting aside an attachment against the sheriff on payment of costs, if, on shewing cause, it be objected that the affidavits on which the rule *nisi* was obtained are informal, on account of not swearing in a strictly formal manner to a defence on the merits, or that the application is at the instance of the bail, or the like, the Court will enlarge the time for discussing the rule, and permit a supplementary affidavit to be produced and filed (*r*). In one case, the Court of Queen's Bench allowed a fresh affidavit to be filed in support of a rule *nisi* to set aside an award after the rule was obtained (*s*). If you intend, on arguing the case, to rely on any affidavits in the same cause, already on the files of the Court such affidavits must be specified in the rule *nisi* (*t*); and it may be right to mention the fact to the Court at the time of making the motion. As to when such affidavits cannot be used, see *post*, 1421. An affidavit sworn *before* judgment signed, has been held good on motion to issue execution, notwithstanding a tricky writ of error (*u*). And, in general, it seems to be no ob-

When and how made and filed, &c.

(*f*) *Goren* v. *Tute*, 7 Mee. & W. 142.
(*g*) *Shirley* v. *Jacobs*, 3 Dowl. 101.
(*h*) *Atwill* v. *Baker*, 5 Dowl. 462.
(*i*) *Barrack* v. *Newton*, 1 Q. B. 525.
(*k*) *Lewis* v. *Woolrych*, 3 Dowl. 692: *Thompson* v. *Dicas*, 2 Dowl. 93, 95.
(*l*) R. H., 36 G. 3, Q. B. See *Williams* v. *Reeves*, 2 Chit. Rep. 218: *Ditchett* v. *Tollett*, 3 Price, 259: *Salloway* v. *Whorewood*, 2 Salk. 461: *Pilmore* v. *Hood*, 8 Dowl. 21.
(*m*) *Ex p. Dicas*, 2 Dowl. 92: *Ex p. Elderton*, Id. 568: *R.* v. *Peterhouse*, 1 Q. B. 314.
(*n*) *Tilly* v. *Henly*, 1 Chit. Rep. 136: *Shaw* v. *Mansfield*, 7 Price, 709. See *Doe Hill* v. *Tollett*, 1 Dowl. & L. 121, B. C.
(*o*) Per *Littledale*, J., Bail Court, M. 1838, 2 Jur. 290.
(*p*) See *Perrin* v. *Kymer*, 1 H. & W. 20; 4 Nev. & M. 477, *S. C.*
(*q*) See *Bury* v. *Church*, 1 Dowl., N. S. 848.
(*r*) *Merryman* v. *Quibble*, 1 Chit. Rep. 127. See *Sharpe* v. *Doe Ahusin*, 8 Dowl. 664: *Davies* v. *Skerlock*, 7 Dowl. 381: *R.* v. *Templeton*, 9 Dowl. 689: *Anderson* v. *Ell*, 3 Dowl. 73; Chit. Sum. Prac. 10th post.
(*s*) *Perrin* v. *Kymer*, 1 H. & W. 20; 4 Nev. & M. 477, *S. C.*
(*t*) MS., E., 1834, per *Bayley*, J.: *Doe Woolf* v. ——, 2 Chit. Rep 14: *R.* v. *Peterhouse*, 1 Q. B. 314.
(*u*) *Bankett* v. *Barnard*, 4 M. & Sel. 331.

jection to an affidavit that it was sworn before the precise circumstances arose on which the motion is founded, provided it could in any way be material at the time (*x*).

Notice of motion.

Previously to moving for a rule *nisi*, a *notice of the intended motion* is sometimes given to the opposite party, particularly where it is desired that time and expense may be saved by affording the adverse party an opportunity of shewing cause against it in the first instance, or where the object is to induce the Court to disallow the costs of proceedings had after such notice, and before motion (*y*). In the Queen's Bench, notice of motion is necessary in the case of an information, or to quash a conviction (*z*). But it need not, in that Court, be given in order to obtain a rule for a stay of proceedings of the opposite party (*a*), unless, perhaps, in the case of a rule under the first section of the Interpleader Act (*b*). In the Exchequer (*b*) and Common Pleas (*c*), such notice is necessary to obtain such stay of proceedings. In the Exchequer, it seems, a two days' notice is requisite (*d*). Where no proceedings have been had for four terms exclusive, a term's notice of motion is in general requisite (*e*); but as the object of this rule is, that the opposite party may be informed of an intention to take a step in *proceeding to judgment*, it does not apply to applications to set aside proceedings (*f*).

What motions cannot be made on last day of term.

Certain motions cannot be made on the last day of term; thus, a rule which is *nisi* only, as a rule for an attachment (*g*); or to answer matters of an affidavit (*h*); or to stay proceedings (*i*); or for the Master's report after the examination of a party on interrogatories (*k*), or to enter a suggestion for costs (*l*), cannot be moved for on the last day of term. And it seems that no motion can be made, nor can any question touching an award be discussed on that day (*m*). Nor will the Courts on that day permit a matter of law to be discussed upon motion (*n*), except under very special circumstances (*o*). Nor will any of the Courts make a rule *nisi* a stay of proceedings, which is granted on that day. But a motion for an attachment for non-payment of costs on the Master's *allocatur* (*p*), or against the sheriff for not returning a writ of *capias* or bringing in the body (*q*), may

(*x*) *Read* v. *Maseis*, 4 Dowl. 681. See *Lang* v. *Comber*, 4 East, 348: *Langston* v. *Wetherell*, 14 M. & W. 104.

(*y*) Tidd, 441. See *Anon.*, 1 Wils. 30. And see Chit. Forms, 633.

(*z*) *Rex* v. *Johnson*, M., 22 G. 3, Q. B.; Tidd, New Pract. 241.

(*a*) *Stratton* v. *Rogan*, 2 Dowl. 585: overruling *Fortescue* v. *Jones*, 1 Id. 524. See *ante*, 1045.

(*b*) *Smith* v. *Wheeler*, 3 Dowl. 431; 1 Gale, 15, *S. C.*

(*c*) See *Rolfe* v. *Brown*, 1 Hodges, 27.

(*d*) *Hannah* v. *Wyman*, 3 Dowl. 673.

(*e*) *Tipton* v. *Meeke*, 8 Moore, 579; *ante*, Vol. 1, 132.

(*f*) *Lumley* v. *Hempson*, 6 Dowl. 558; *ante*, Vol. 1, 132.

(*g*) *Anon.*, 3 Smith, 118: *Ashmore* v. *Ripley*, 2 Scott, N. R., 903.

(*h*) *Baily* v. *Jones*, 1 Chit. Rep. 744: *Ex p. Anon.*, 2 Dowl. 227: *Re Turner*, 3 Dowl. 557: *Jacob's case*, 4 Burr. 502. The Court of Exchequer have refused to permit such a motion to be made so late in the term that the opposite party could not shew cause in that term: *Ex p. Anon.*, *ubi supra*.

(*i*) *Baily* v. *Jones*, 1 Chit. Rep. 744: *Anon.*, 2 Price, 143. See *Gronow* v. *Pointer*, 3 Dowl. 571.

(*k*) *R.* v. *Wheeler*, 1 W. Bl. 311. Under very special circumstances, a rule for this purpose might be moved for on the last day of term, (*S. C.*)

(*l*) *Anon.*, 4 M. & Gr. 906.

(*m*) *Bignall* v. *Gale*, 2 Scott, N. R., 582; 9 Dowl. 393, *S. C.*: *Kerr* v. *Jeston*, 1 Dowl., N. S., 340: *Watkins* v. *Philpots*, M'Clel. & Y. 393: *Nettleton* v. *Crosby*, Tidd's Prac. 9th ed., 498: *Treance* v. *Pinnager*, Cowp. 23: *Re Evans* v. *Howell*, 5 Scott, N. R., 240: *Brooks* v. *Parsons*, 7 Jur. 1016, B. C. And see 9 & 10 W. 5, c. 15, s. 2; R. M., 36 G. 3, K. B.

(*n*) See *Turner* v. *Mayor of Kendal*, 2 Dowl. & L. 197.

(*o*) See *Drury* v. *Hounsfield*, 11 Ad. & E. 105, n.: *R.* v. *Wheeler*, 4 W. Bl. 311: *Doe Stevens* v. *Lord*, 6 Dowl. 256.

(*p*) 5 Burr. 686, Q. B.

(*q*) 1 Burr. 651, n.: K. B., R. T. 38 G. 3; C. P., 1 B. & P. 312: *Rex* v. *York*, 5 Burr. 2686: *Rex in the case of Walker* v.

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be moved for on the last day of term. And where the subject-matter of the motion has occurred at the end of the term, and the party has not been able to complete his affidavits before the last day, and the matter is of a nature pressing for immediate decision, the Court, on the last day of the term, will sometimes grant a rule *nisi* to shew cause in the following vacation, on an early day, (a week or more), before a judge at chambers (*r*), or direct the party to apply by summons to a judge at chambers; and such judge would, when justice requires it, either make an order, or stay the proceedings till the next term, in order to give the party an opportunity then to move the Court. As we shall shew, *post*, 1423, side bar rules may, by *R. H.*, 2 *W.* 4, *r.* 96, be obtained on the last day of term, as well as any other. The Court of Exchequer will sometimes take the new trial paper on that day (*s*).

What parties it should include.

The rule should be drawn up in such a manner that all those who are to be affected by it, and upon whom it is intended to be served, shall be required to shew cause against it; for the Court cannot make an order upon any person, not even on the attorney in the cause for payment of costs, unless he be called upon by the rule *nisi* to shew cause against it (*t*). If the rule is moved for in a cause, it should in general call upon the party, and not merely his attorney, to shew cause (*u*), unless it be a matter of complaint against the attorney personally (*v*).

For what time the rule should be drawn up.

The rule when *nisi* only, unless when moved for on the last day of the term, requires the opposite party to shew cause upon some day certain in term, usually three or four days in a town cause, or six days in a country cause (*x*), or more, (according to the distance of the opposite party's residence), after it is drawn up; but where the rule is obtained the day before the last day of term, and the transaction to which it relates took place in town, it may be drawn up for the last day of term, and may be made absolute at the rising of the Court on that day. A rule *nisi* for setting aside an award, however, should not be drawn up for the last day of term; for by *R. M.*, 36 *G.* 3, counsel cannot be heard to shew cause against it on that day (*y*). A rule *nisi*, except under special circumstances, will not be granted to shew cause at chambers (*z*). It is, however, frequently so granted in the case of a prisoner, also in interpleader cases (*a*).

To shew cause at chambers.

Stating grounds of rule in rule nisi.

A rule *nisi* cannot be supported or made absolute on a ground different from that stated therein (*b*). Also, by *R. T.*, 42 *G.* 3, *K. B.* (*c*); *R. M.*, 10 *G.* 4, *r.* 2, *C. P.* (*d*), "where a rule to shew cause is obtained in this Court for the purpose of setting aside an annuity, the several objections thereto intended to be insisted upon by the counsel at the time of making such rule absolute, shall be stated in the said rule to shew cause." So, by *R. E.*, 2 *G.* 4, *K. B.*; *R. M.*, 10 *G.* 4, *r.* 3, *C. P.* (*e*), "where

Setting aside annuity, &c.

(*r*) *Whaley*, and *M'Evoy* v. *M'Intosh*, 1 Chit. Rep. 249.
(*s*) Chit. Sum. Prac. 106. But see *Fell* v. *Fell*, 2 Dowl. 88.
(*t*) *Lambert* v. *Heath*, 15 Law J., N. S., 296, Exch.: *Bold* v. *Wainwright*, 10 Jur. 396.
(*u*) *Chesiyn* v. *Pearce*, 4 Dowl. 693: *Norton* v. *Curtis*, 3 Dowl. 245. See *post*, 1420.
(*v*) *Engler* v. *Tuteien*, 8 Law J., 128, C. P.: 4 Bing., N. C., 714, *S. C.*
(*w*) *Baber* v. *Harris*, 7 Dowl. 569.
(*x*) See *Arthur* v. *Marshall*, 2 Dowl. & L. 376.
(*y*) See *post*, 1505.
(*z*) *Fell* v. *Fell*, 2 Dowl. 88: *Arthur* v. *Marshall*, 2 Dowl. & L. 376.
(*a*) *Poscelier* v. *Lock*, 4 Nev. & M. 683: *Beamer* v. *Cross*, 4 Dowl. 122: *Bailey* v. *Dimsey*, 2 Scott, 183.
(*b*) See *Smith* v. *Clark*, 2 Dowl. 298: *Doe Fish* v. *Macdonell*, 8 Dowl. 488: *post*, 1493.
(*c*) 2 East, 569.
(*d*) 6 Bing. 347.
(*e*) And see 11 Price, 57.

a rule to shew cause is obtained in this Court to set aside an award, the several objections thereto intended to be insisted upon at the time of making such rule absolute shall be stated in the rule to shew cause." An objection to the grounds, arising from the mistake of the clerk of the Court, will not be allowed to prevail (*f*). It is not necessary, in a rule *nisi* to set aside proceedings for irregularity, to specify the grounds of irregularity on which the party relies (*g*), though this is otherwise in the case of a summons before a judge for that purpose (*h*).

If the rule be drawn up wrong, by mistake, the Court, as we shall presently see, will order it to be corrected (*i*). Amendment of.

Service of.]—A copy of the rule *nisi*, or the rule *nisi* itself (*k*), must be served on the party against whom it has been obtained. Service of.

By a rule of all the courts of *H.*, 2 *W.* 4, *r.* 51, "it shall not be necessary to the regular service of a rule, that the original rule should be shewn, unless sight thereof be demanded, except in cases of attachment" (*l*). If not shewn when demanded, or in a reasonable time after, the service would perhaps be void. Shewing original rule.

The copy of the rule should be delivered open, and not enclosed in a sealed letter, otherwise it would have to be established, in order to render it good service, that it was opened by the attorney or his clerk, or the party, or some one authorised by him, and this before nine at night (*m*), that being the time of the day limited for service of rules, &c. As to service through the post, see *post*, 1417. Should be left open.

The service must, by rule of *H. T.*, 2 *W.* 4, *r.* 50, be before nine o'clock at night (*n*). It cannot be served on a Sunday (*o*). It must be served a reasonable time before the day specified in it for shewing cause. Where a rule *nisi* to compute was served at York on the day cause was to be shewn, it was held insufficient to authorise making the rule absolute, even although ten days had elapsed since the service (*p*). As to enlarging the rule when it is served so late that the party cannot shew cause against it in time, &c., see *post*, 1419. If there is not time to draw up the rule, arising from a press of business in the office, or the like, a notice of the same having been obtained should be served, in order to give the rule effect as to staying proceedings, or otherwise, until it is drawn up (*q*). Time of service.

Personal service is required only in the case of a rule *nisi* for an attachment, or where a rule is served, and the money or other thing required by it is demanded, with a view to obtain an attachment for the disobedience of it; or, it seems, with a view to proceed under the 1 & 2 *Vict. c.* 110, *s.* 18, (*post*, 1428); and in such a case, the original must be shewn to the party at Personal service, when necessary.

(*f*) *Walker* v. *Needham*, 1 Dowl., N. S., 223.

(*g*) *Rennie* v. *Bruce*, 2 Dowl. & L. 946.

(*h*) *Ante*, 1276; *post*, 1434.

(*i*) *Post*, 1423, 1427.

(*k*) *Leaf* v. *Jones*, 3 Dowl. 315.

(*l*) In the C. P. the practice was formerly, it seems, otherwise. (*Wye* v. *Wright*, Barnes, 403. But see *Holmes* v. *Senior*, 4 Moo. & P. 638; 7 Bing. 169, *S. C.*) It was always the practice in Q. B. (*R.* v. *Smithers*, 3 T. R. 351: *Bellows* v. *Poultney*, 6 M. & Sel. 230; 1 Chit. Rep. 466, *S. C.*); and in Exch. (*Farnstone* v. *Taylor*, 2 Y. & J. 30).

(*m*) See *Arrowsmith* v. *Ingle*, 8 Taunt. 234.

(*n*) *Ante*, Vol. 1, 80, where see the construction of this rule. It extends to summonses: *Blackburne* v. *Peate*, 2 C. & M. 244: *Caine* v. *Lord Lyttleton*, 2 W. Bla. 950.

(*o*) *M'Ilcham* v. *Smith*, 8 T. R. 86.

(*p*) *Farrell* v. *Dale*, 2 Dowl. 15, per *Gurney*, B.

(*q*) See *Tiley* v. *Hodgson*, 2 Dowl. & L. 655; 13 M. & W. 638, *S. C.*

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the time the copy is delivered to him. Service on the under-sheriff, or deputy sheriff, is, however, sufficient in the case of a rule against the sheriff (*r*).

Where party defends, &c. by attorney.

If a party sues or defends by attorney, the service must be on him, and not on the client, so long as the authority continues (*s*). So, if the attorney appoint a town agent, the service must, in general, be on him, and not on the attorney. Where, indeed, the attorney's or agent's residence is unknown, the service should be on the party himself, if he can be found; and if none can be found, then leave of the Court should be obtained for a service in the best manner the circumstances will admit of (*t*). Service on the attorney or his clerk at his office of business is, in general, sufficient. If he be an attorney of the Queen's Bench or Exchequer, the rule may be served, by leaving a copy at the place mentioned in the book at the Master's office (*u*), with any person resident at or belonging to such place; and if such attorney have not entered his name and place of abode, &c., in the said book, then fixing up the copy in the Master's office shall be deemed a sufficient service (*x*). Service at the chambers of an attorney on his laundress will not suffice, unless she act as his servant, and the affidavit of service state that fact, or the deponent's belief to it (*y*); and also the defendant's belief that the attorney has received the rule (*z*). Service at the house of the defendant's attorney with a female servant, who stated she was authorised to receive papers for the attorney, has been held sufficient (*a*) Putting the copy of the rule under the door of the attorney's chambers or place of business (*b*), or into a letter-box (*c*), unless there is a notice requesting papers, &c., to be so left (*d*), or unless you ascertain that it has been received, and swear to the belief of such receipt (*e*), will not suffice.

Where party sues or defends, &c. in person.

If the opposite party sues or defends in person, and a personal service is not required, the copy of the rule may be left at his residence, with his wife or a domestic servant, or some person who, from the habit of receiving messages for him or otherwise, may be presumed to have authority from him to receive it (*f*); and it may be so left at his residence, though he himself is not then actually residing there, if his family are (*g*). Thus, service upon the party's mother (*h*), or sister (*i*), at his residence, is sufficient. So is a service on a female who is sworn to be a member of the party's family, though the degree of relationship be not known (*k*). So is a service on the land-

(*r*) *Ante*, Vol. 1, 550.
(*s*) See *Margetson* v. *Rush*, 8 Dowl. 388.
(*t*) *Post*, 1418.
(*u*) See Vol. 1, 55.
(*x*) R. H., 8 G. 3: R. M., Q. B., 1 W. 4, r. 2, s. 8, Exch. See *Blackburn* v. *Peate*, 2 Dowl. 293; 2 C. & M. 244, *S. C.*
(*y*) *Kent* v. *Jones*, 3 Dowl. 210: *Williams* v. *Passmore*, Id. 211, n.: *Smith* v. *Spurr*, 2 Dowl. 231: *Brown* v. *Wildbore*, 1 Scott, N. R., 159; 8 Dowl. 592, *S. C.*, nom. *Brown* v. *Whitfull*.
(*z*) *Robinson* v. *Gemperts*, 4 Ad. & E. 82.
(*a*) *Lancaster* v. *Castle*, 8 Jur. 849, B. C.: *Alanson* v. *Walker*, 3 Dowl. 258.
(*b*) *Strutton* v. *Hawkes*, 3 Dowl. 25.
(*c*) *Braham* v. *Sawyer*, 1 Dowl. & L. 466; 13 Law J., N. S. 40, Exch., *S. C.*
(*d*) *Warren* v. *Thompson*, 2 Dowl., N. S., 294. See *Stout* v. *Smith*, 1 Dowl. 506; *Engleheart* v. *Morgan*, Id. 422.
(*e*) See *Clarke* v. *Roberts*, 1 Dowl., N. S., 778: *Rayner* v. *Hedges*, Id. 863: *Witham* v. *Tuck*, 9 Dowl. 335: *Robinson* v. *Gemperts*, 4 Ad. & E. 82: *Josephs* v. *Stegmann*, 7 Jur. 725.
(*f*) See *Rowland* v. *Vicetelly*, 7 Scott, N. R., 429; 1 Dowl. & L. 767, *S. C.*: *Taylor* v. *Whitworth*, 9 M. & W. 478; 1 Dowl., N. S., 600, *S. C.*; *Smith* v. *Stubbs*, 6 Jur. 300: *Alanson* v. *Walker*, 3 Dowl. 258: *Thomas* v. *Lord Ranelagh*, 5 Id. 288: *Edwards* v. *Napier*, 9 Id. 177.
(*g*) See *Payett* v. *Hill*, 2 Dowl. 682: *Smith* v. *Jones*, 6 Jur. 1090: *Carew* v. *Winslow*, 5 Dowl. 543.
(*h*) *Warren* v. *Smith*, 2 Dowl. 216. And see *Payett* v. *Hill*, 2 Dowl. 682.
(*i*) *Archer* v. *Evans*, 1 Dowl., N. S., 861.
(*k*) *Weedon* v. *Lissman*, 9 Dowl. 111.

lord or a servant at an inn, in which the party to be served is residing or making his usual place of abode (*l*). So, service by leaving a copy of the rule with a porter at a club-house, of which the party was a member, the action being on a bill accepted by him payable at the club-house, and it being sworn that his servant called there every day for his letters, &c., has been held sufficient (*m*). Where there is a board on the door of the party's chambers, desiring all messages and parcels to be left at a particular place off the premises, service there will not, perhaps, of itself be sufficient (*n*); but if it be left there, and the person with whom it is left afterwards says that he gave it to the defendant, that, it seems, will be sufficient (*o*). Where the service was at the party's chambers on the servant of the laundress, it was deemed insufficient (*p*). And service by putting the copy of the rule under the door of the defendant's (an attorney's) chambers is, it seems, not sufficient, although the laundress afterwards stated that the defendant would probably have the copy in the course of the day (*q*). Service by leaving the copy of the rule in the party's room in a college, or in apartments in which the party resides, no person being there to receive it (*r*); or by leaving it at the party's office in which there is a letter-box, over which is written "letters," will not suffice (*s*); but it would be otherwise, if there be a notice on the door directing papers, &c., to be put into the box, &c. (*t*). Nor is service at a house or place of business which the party to be served has left (*u*). Nor is service on a workman on the party's premises (*x*); or on a warehouseman at the party's warehouse (*y*). Nor is service on a clerk or servant at the counting-house, place of business, or warehouse of the party, for he may not go there for some time (*z*). Nor is service on a person whom deponent "believes" to be a friend of the party, staying at his house, and authorised to receive messages for him (*a*). Nor in general is service on his landlady at his lodgings (*b*). But the service in any of these cases will suffice, if it can be made appear that the copy of the rule afterwards came to the party's hands (*c*).

By Post.

Where a copy of a rule was sent in a letter by post to the defendant with the rule itself, and the latter was returned indorsed, "received a copy of the within rule," and signed by the defendant, the service was held to be sufficient (*d*).

(*l*) *Tuck* v. *Corfe*, 13 Law J., N. S., 39, Exch.: *Gosling* v. *Best*, 1 Dowl., N.S., 333. And see *Brandon* v. *Edwards*, 2 Dowl., N. S., 225.

(*m*) *Ridgway* v. *Baynton*, 2 Dowl. 183. Service at Heralds' college: *Groom* v. *Fitzroy*, 8 Dowl. 29.

(*n*) *Stout* v. *Smith*, 1 Dowl. 506.

(*o*) *Engleheart* v. *Morgan*, 1 Dowl. 422.

(*p*) *Smith* v. *Spurr*, 2 Dowl. 231. But see *Dodd* v. *Drummond*, 1 Dowl. 361: *Stout* v. *Smith*, Id. 506.

(*q*) *Stratton* v. *Hawkes*, 3 Dowl. 25.

(*r*) *Chaffers* v. *Glover*, 5 Dowl. 81.

(*s*) *Braham* v. *Sawyer*, 1 Dowl. & L. 408; 13 Law J., N. S., 40, Exch., S. C.

(*t*) *Warren* v. *Thompson*, 2 Dowl., N. S., 224.

(*u*) *Black* v. *Cloup*, 4 Dowl. 270: *Castle* v. *Sowerby*, 4 Dowl. 669: *Neilson* v. *Shee*, 8 Dowl. 32.

(*x*) *Hitchcock* v. *Smith*, 5 Dowl. 248.

(*y*) *Ibotson* v. *Phelps*, 6 M. & W. 626; 8 Dowl. 770, S. C.

(*z*) See *ante*, 912, and cases there cited in n. (*a*). It might, perhaps, suffice, if the clerk's business be shewn to be to forward messages and notices to his master. Id.

(*a*) *Brandon* v. *Edwards*, 2 Dowl., N. S., 255. And see *Taylor* v. *Whitworth*, 11 Law J., N. S., 137, Exch.: *Monroe* v. *Reader*, 1 Dowl., N. S., 564.

(*b*) *Gardner* v. *Green*, 3 Dowl. 343: *Salisbury* v. *Sweetheart*, 5 Dowl. 81. But see *Lawes* v. *Scales*, 2 Dowl., N. S., 342.

(*c*) See cases cited in n. (*c*), *ante*, 1416.

(*d*) *Smith* v. *Campbell*, 6 Dowl. 728. And see *Grant* v. *Stoneham*, 7 Dowl. 126.

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On prisoner.

In the case of a prisoner, service on the turnkey of the prison in which he is detained will suffice (*e*).

On one of several parties.

In an action brought by several parties, service on one would, in general, be good service on all, if they be all acting together. Where several suffer judgment by default, in an action on a promissory note, they acknowledge a joint cause of action, and that *quoad hoc* they are partners; service, therefore, on one is service for all (*f*). It seems, that, in an action against several executors, each must be served, unless one acts for all, or all defend by one attorney (*g*).

Service where residence unknown, &c.

Sometimes, in the absence of the opposite party, or where his residence is unknown, the Court will, on an affidavit shewing the necessity of it, make it part of the rule *nisi* (*h*), that it be served in a particular manner, being the best the circumstances will admit of, as by leaving a copy of it at a particular place, or by sticking it up in the office; or in the case of absence abroad and an agent here, by serving it on such agent, or the like (*i*). Service of a rule by sticking it up in the office will not be allowed upon an affidavit that the attorney's residence is unknown, unless it is also sworn that the party's residence is unknown (*k*). Where the Court gives leave to serve a defendant in a particular manner, they will not, in general, make a prospective rule, that service of future rules, &c., may be effected in the same way (*l*).

Irregularities in service, how waived.

In all cases, even where personal service is required, any irregularity in it is deemed to be waived by the party moving to enlarge the rule (*m*), or appearing to shew cause against it (*n*). But by thus appearing he does not waive any irregularity in the copy of the rule served, as, that it is not intitled in the cause, or the like (*o*).

Affidavit of service.

In general, the affidavit of a service of a rule must allude to the "*copy of a rule hereunto annexed*," and "not the rule in this cause (*p*)." An affidavit stating the service "of a true," omitting the word "copy," has been held sufficient (*q*). So has an affidavit of the service of the original rule, and not a copy (*r*). An affidavit alleging a service "on the day of the date hereof," no date appearing in the affidavit, except the date of the *jurat*, is insufficient (*s*). Where a rule is served on a sister or daughter of a party at his dwelling-house, the affidavit must state that she resides there; otherwise where the service has been on a wife or domestic servant (*t*). We have seen (*ante*, 1416, 1417) as to when the affidavit should state the de-

(*e*) *Moore* v. *Newbold*, 11 Leg. Obs. 307, *ante*, 1055.

(*f*) *Figgins* v. *Ward*, 2 Dowl. 364; 2 C. & M. 424, *S. C.*; *Amlot* v. *Evans*, 7 M. & W. 463; 9 Dowl. 219, *S. C.*, nom. *Ainslie* v. *Evans*. And see *Grant* v. *Stoneham*, 7 Dowl. 126: *Carter* v. *Southall*, 3 M. & W. 128.

(*g*) *Panter* v. *Seaman*, 5 Nev. & M. 679

(*h*) It must be part of the rule, see *Neilson* v. *Shee*, 8 Dowl. 32.

(*i*) See *Neilson* v. *Shee*, 8 Dowl. 32: *Sealey* v. *Robertson*, 2 Dowl. 568: *Brown* v. *Stittle*, 1 M. & W. 672: *Gibson* v. *Lord Ranelagh*, 7 Scott, 231.

(*k*) *Wright* v. *Gardiner*, 3 Dowl. 657. See *Mudie* v. *Newman*, 2 Dowl. 639.

(*l*) *Davies* v. *Jenner*, 2 Scott, N. R., 202; 9 Dowl. 45, *S. C.*; *Martin* v. *Colvill*, 2 Dowl. 694: *Layton* v. *Mason*, 6 Dowl. 275.

(*m*) *Cartwright* v. *Blackworth*, 1 Dowl. 489.

(*n*) Tidd, 445: *Levy* v. *Duncombe*, 3 Dowl. 447.

(*o*) *Wood* v. *Critchfield*, 1 C. & M. 72; 1 Dowl. 587, *S. C.* And see *Cuthbar* v. *Ese*, 3 Moo. & Sc. 216; 2 Dowl. 731, *S. C.*

(*p*) *Fidlett* v. *Bolton*, 4 Dowl. 282.

(*q*) *R.* v. *Sheriff of Stafford*, 5 Dowl. 238.

(*r*) *Leaf* v. *Jones*, 3 Dowl. 315.

(*s*) *Hughes* v. *Browne*, 7 Scott, N. R., 517; 1 Dowl. & L. 788, *S. C.*

(*t*) *Holland* v. *Wright*, 9 Jur. 405, Exch.

fendant's belief that the copy of the rule has come to the defendant's hands, where it has not been personally served upon him.

When a stay of proceedings.

When Rule Nisi a Stay of Proceedings, &c.]—The rule *nisi*, when it states that "all proceedings shall be in the meantime stayed," suspends the proceedings for all purposes, until the rule is disposed of; and, therefore, pending such rule, the plaintiff cannot move to make a rule in the cause absolute (*u*), or move to enlarge another rule in the cause (*x*), or even obtain a rule to discontinue the action (*y*). If a rule *nisi* be moved for on the last day of term, it will not operate as a stay of proceedings, nor will the Court allow the rule to be worded so as to give it such an operation, unless, perhaps, under very special circumstances (*z*). If the rule operate as a stay of proceedings, any proceedings, directly or collaterally, had in the cause, whilst the rule so operates, may be set aside. As to what time a party has for taking the next step after the rule is disposed of, see *post*, 1425.

Abandoning rule nisi.

Abandoning Rule Nisi.]—A party who has obtained a rule *nisi* cannot be compelled to proceed with it (*a*); and it would seem, that he may abandon it, even after service, on giving notice of abandonment to the opposite side, and paying, or offering to pay, any costs which may have been incurred in consequence of the rule. If the rule be not drawn up within the time for acting upon it, it will be considered as abandoned (*b*). As to the time allowed for service of the rule in general, see *ante*, 1415. As to moving to open or rescind a rule, or moving a second time upon the same subject, see *post*, 1425.

Enlarging rule nisi.

Enlarging Rule Nisi.]—Either party, if not prepared to support or shew cause against the rule, should move that it be *enlarged* to a future day in the same or the next term; or to support or shew cause against it before a judge at chambers in the vacation. It is seldom necessary to move to enlarge the rule to another day in the same term, as counsel will in general consent to this. But if a rule be drawn up to shew cause in one term, it cannot be made absolute in the next term without enlarging it, though it may be revived (*c*). But it is not by any means as of course that the Court will thus enlarge a rule; sufficient grounds must be stated to induce them to do so (*d*). If the application be made by the party who obtained the rule, the Court usually grant it where it is in his own delay; but not where it would have the effect of detaining the opposite party in custody; nor, in other cases, without consent or some evident necessity: if moved for by the opposite party, the Court will frequently enlarge the rule upon terms (*e*); or, if the rule were not served in time to give the party an opportunity of

(*u*) *Anderson* v. *Southern*, 9 Dowl. 994.
(*x*) *Wyatt* v. *Prebble*, 5 Dowl. 268. And see *Swayne* v. *Cramond*, 4 T. R. 176.
(*y*) *Murray* v. *Silver*, 1 Com. B. 638; 3 Dowl & L. 26, *S. C.*
(*z*) *Ante*, 1413.
(*a*) *Doe Harcourt* v. *Roe*, 4 Taunt. 883.
(*b*) *Gingell* v. *Bean*, 1 Scott, N. R., 390.
(*c*) *Smith* v. *Collier*, 3 Dowl. 100: *Rowbottom* v. *Ralphs*, 6 Dowl. 291.
(*d*) MSS. E., 1814.
(*e*) See 6 Scott, 900. As to when affidavits should be filed, when rule enlarged, see *post*, 1421.

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On prisoner.

In the case of a prisoner, service on the [illegible] in which he is detained will suffice (*e*).

On one of several parties.

In an action brought by several p[illegible] in general, be good service on all. Where several suffer judgment [illegible] promissory note, they acknowl[illegible] that *quoad hoc* they are party [illegible] service for all (*f*). It seem[illegible] executors, each must be se[illegible] fend by one attorney (*g*).

Service where residence unknown, &c.

Sometimes, in the [illegible] his residence is unkno[illegible] the necessity of it, [illegible] served in a particul[illegible] will admit of, as b[illegible] by sticking it up[illegible] and an agent h[illegible] Service of a r[illegible] allowed upon [illegible] known, unl[illegible] known (*k*), [illegible] in a parti[illegible] spective [illegible] in the [illegible]

Irregularities in service, how waived.

In [illegible] regul[illegible] to e[illegible] it (*l*). [illegible] la[illegible] ir[illegible]

Affidavit of service.

wing Cause against Rule Nisi.]—Upon the day appointed [illegible]ne rule, the opposite party must *shew cause* against it, un[illegible]s it be enlarged, or by consent it stand over until another day [illegible]n the same term (*r*). But, in the Exchequer, when a rule is drawn up in one term to shew cause in another, and the same is put into the peremptory paper, cause must be shewn upon the day for which the rule is drawn up (*s*). After the day mentioned in the rule, no cause can be shewn against a rule *nisi* for costs of the day, or any other rule which becomes absolute without further motion (*t*). In many cases cause is permitted to be shewn in the first instance; but this is a matter entirely in the discretion of the Court, even where notice has been given to the party moving (*u*). No person not included in the rule *nisi* has a right to shew cause against it, even though he may have been served with a copy of the rule, and the Court will not allow him his costs of appearing (*x*).

How shewn.

In order to shew cause against a rule *nisi*, *get an office copy*

(*g*) Tidd, 447, 448. See *Anon.*, 1 Smith, 199.
(*h*) R. v. *Anderson*, 9 Dowl. 1041, B. C.
(*i*) *Ante*, 1412.
(*k*) *Re Templeton*, 9 Dowl. 692. By the 4 & 5 Vict. c. 24, the stamping of affidavits is rendered unnecessary.
(*l*) *Anderson* v. *Ell*, 3 Dowl. 73. See *Davies* v. *Sherlock*, 7 Dowl. 592.
(*m*) *Case* v. *Case*, 7 Jur. 1087, B. C.
(*n*) Formerly, notice was given to the counsel on the other side. (R. M., 2 G. 2, C. P. And see *Anon.*, Cas. Pr. C. P. 67).
(*o*) *Anon.*, 1 Smith, 199.
(*p*) See *ante*, Vol. 1, 136. In the Q. B., there is no peremptory paper. (Id.)
(*q*) *Chambers* v. *Bruine*, 2 Dowl., N.S., 671.
(*r*) See *Smith* v. *Cutter*, 3 Dowl. 169.
(*s*) *Warner* v. *Wood*, 3 Dowl. 362.
(*t*) *Scott* v. *Marshall*, 2 C. & J. 60.
(*u*) *Doe* v. *Smith*, 3 Nev. & P. 356; 8 Ad. & E. 259, S. C. See *Quin* v. *King*, 4 Dowl. 736: *Anon.*, 4 Taunt. 690. See the instances as to a motion to put off a trial, *ante*, 1291.
(*x*) *Johnson* v. *Marriott*, 2 Dowl. 353; *ante*, 1414.

...) upon which it was granted; ...avit when necessary, and a ...be not obtained, cause ... counsel, on appear- ...h an office copy, ...ime to obtain ...q shewing ...ved for ...heard

Affidavits for, when and how made and filed, &c.

...he counsel ...t the rule for ...nsel cannot come ...affidavits (*b*). But, ...appointed day, but be- ...may be read (*c*). When, for filing affidavits is pre- ...frequently is, a term of en- ...filed afterwards is admissible, ...stances of inevitable accident (*d*); ...on should be made before the day of ...to file the affidavits *nunc pro tunc* (*e*). ...pose is only *nisi* in the first instance (*f*). ...ging a rule it is made a term that any further ...be filed before a certain day, a party is not pre- ...using an affidavit which was sworn before the day ... which was resworn after that day, for the purpose of ...ng a mistake in the *jurat* (*g*). In the Exchequer, upon ...larged rule, the affidavit must be filed before shewing ...se, although it be not so expressed in the rule of enlarge- ...nt (*h*). In all the courts, if a rule is enlarged from one term ...another, affidavits to be used in shewing cause must be filed ...week before the latter term (*i*). A party is precluded from ...ailing himself of an objection that the affidavits were not filed ...proper time, if he has taken copies of them (*j*). If a rule is ...arged, at the instance of the party opposing it, upon the ...rms that all affidavits to be used in shewing cause are to be ...d within a certain time, the Court will nevertheless allow the ...rty to shew cause upon an affidavit sworn, and filed, for the ...rposes of the motion to enlarge (*k*). Where a rule is en- ...ged, and affidavits to be used on shewing cause are, by the

Enlarging Rules.

...opy of the rule has come to the defend- ...t been personally served upon him.

...ceedings, &c.] — The rule nisi, when a stay ...shall be in the meantime of proceedings, ...all purposes, until the ... such rule, the plain- ...e absolute (*w*), or ...or even obtain ...t be moved ...a stay of ...ounded ...very

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(*a*) See *Brown* v. *Probert*, 1 Dowl. 659: *Walker* v. *Needham*, 4 Scott, N. R., 222; 3 Dowl., N. S., 220, S. C.

(*b*) *Re Rogers*, 9 Dowl. 926. See *Walker* v. *Needham*, 4 Scott, N. R., 222; 1 Dowl., N. S., 220, S. C.

(*c*) *Pitt* v. *Coombe*, 4 Nev. & M 535; 1 A. & W. 13, S. C.

(*d*) *Kebbinchite* v. *Jeffreys*, 1 Chit. Rep. 719: *Tripp* v. *Bellamy*, 5 Price, 384: *Oakes* v. *Allin*, M'Clel. 562; Chit. Sum. Prac. 564.

(*e*) 1 Chit. Rep. 27 a: *Tilly* v. *Henly*, 1 Bing. 326: *Braine* v. *Hunt*, 2 Dowl. 391: *Johnson* v. *Beaumont*, 5 Dowl. 49: *Pim* v. *Hardwick*, 4 Scott, N. R., 567; 3 M. & G. 839.

(*f*) R. H., 36 G. 3: *Hoar* v. *Hill*, 1 Chit. Rep. 27: *Harding* v. *Austen*, 3 Moore, 523: *Turner* v. *Unwin*, 1 H. & W. 186; 4 Dowl. 16, S. C.: *Cosby* v. *Betts*, 1 Dowl., N. S., 503; 3 M. & G. 882; 4 Scott, N. R., 373, S. C.: *Wright* v. *Lewis*, 8 Dowl. 298: *Lewis* v. *Kirby*, 8 Scott. 179.

(*g*) *Hoar* v. *Hill*, 1 Chit. Rep. 27: *Re Mackay*, 12 Law J., N. S., 337; 1 Dowl. & L. 206, S. C.

(*h*) *Pryor* v. *Swaine*, 2 Dowl. & L. 37; 13 Law J., N. S., 214, Q. B., S. C.

(*i*) *Ouchterlony* v. *Gibson*, 5 M. & G. 579.

(*j*) *Barker* v. *Richardson*, 1 Y. & J. 362.

(*k*) See *Gilson* v. *Carr*, 4 Dowl. 618: *Johnson* v. *Marryatt*, 2 Dowl. 343: *Harding* v. *Austen*, 3 Moore, 523.

(*l*) *Re Mackay*, 12 Law J., N. S., 337; 1 Dowl. & L. 206.

(*k*) *Chambers* v. *Briant*, 2 Dowl., N. S., 671.

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shewing cause against it, he may demand that the rule be enlarged as a matter of right (*g*), in which case no terms will be imposed (*h*). Sometimes, upon the rule coming on for argument, the Court will enlarge the rule in order that a defect in the affidavit may be cured (*i*). Where an unexpected and unusual objection, that an affidavit made in opposition to the rule was not stamped, was made, the Court enlarged the rule to give time to get the affidavit stamped (*k*). And the same, in order that a defect in the title (*l*), or the jurat, may be cured; but only upon payment of the costs occasioned by the enlargement (*m*).

No notice necessary.

By a rule of all the courts of *H. T.*, 2 *W.* 4, *s.* 1, *r.* 97, "a rule may be enlarged, if the Court think fit, without notice" (*n*).

Enlarged rule need not be served.

It is not the practice to serve an enlarged rule, because both parties are before the court (*o*).

Argument of.

If the rule be enlarged to a subsequent term, it is, in the Common Pleas and Exchequer, set down in the peremptory paper, and called on in its order (*p*); but if it be enlarged or stand over to another day in the same term, either party may bring it on, upon the day so appointed, by moving to discharge the rule, or make it absolute. Where a rule was enlarged for the purpose of the party shewing cause and obtaining affidavits, but he, upon doing so, produced no fresh affidavits, but relied upon that on which the motion for enlargement was made, the Court discharged the rule only on payment of the costs of the enlargement (*q*).

Shewing cause against rule nisi.

Shewing Cause against Rule Nisi.]—Upon the day appointed by the rule, the opposite party must *shew cause* against it, unless it be enlarged, or by consent it stand over until another day in the same term (*r*). But, in the Exchequer, when a rule is drawn up in one term to shew cause in another, and the same is put into the peremptory paper, cause must be shewn upon the day for which the rule is drawn up (*s*). After the day mentioned in the rule, no cause can be shewn against a rule *nisi* for costs of the day, or any other rule which becomes absolute without further motion (*t*). In many cases cause is permitted to be shewn in the first instance; but this is a matter entirely in the discretion of the Court, even where notice has been given to the party moving (*u*). No person not included in the rule *nisi* has a right to shew cause against it, even though he may have been served with a copy of the rule, and the Court will not allow him his costs of appearing (*x*).

How shewn.

In order to shew cause against a rule *nisi*, *get an office copy*

(*g*) Tidd, 447, 448. See *Anon.*, 1 Smith, 199.
(*h*) R. v. *Anderson*, 9 Dowl. 1041, B. C.
(*i*) *Ante*, 1412.
(*k*) *Re Templeton*, 9 Dowl. 692. By the 4 & 5 Vict. c. 24, the stamping of affidavits is rendered unnecessary.
(*l*) *Anderson* v. *Ell*, 3 Dowl. 73. See *Davies* v. *Sherlock*, 7 Dowl. 592.
(*m*) *Case* v. *Case*, 7 Jur. 1087, B. C.
(*n*) Formerly, notice was given to the counsel on the other side. (R. M., 2 G. 2, C. P. And see *Anon.*, Cas. Pr. C. P. 67).
(*o*) *Anon.*, 1 Smith, 199.
(*p*) See *ante*, Vol. 1, 136. In the Q. B., there is no peremptory paper. (Id.)
(*q*) *Chambers* v. *Bruint*, 2 Dowl., N. S., 671.
(*r*) See *Smith* v. *Cotter*, 3 Dowl. 100.
(*s*) *Warner* v. *Wood*, 3 Dowl. 262.
(*t*) *Scott* v. *Marshall*, 2 C. & J. 60.
(*u*) *Doe* v. *Smith*, 3 Nev. & P. 355; 8 Ad. & E. 259, S. C. See *Quin* v. *King*, 4 Dowl. 736; *Anon.*, 4 Taunt. 690. See the instances as to a motion to put off a trial, *ante*, 1291.
(*x*) *Johnson* v. *Marriott*, 2 Dowl. 343; *ante*, 1414.

of the rule, and of the affidavit (*y*) *upon which it was granted; and give them, together with an affidavit when necessary, and a brief, to counsel.* If such office copy be not obtained, cause cannot be shewn, though sometimes when counsel, on appearing to shew cause, is not prepared with such an office copy, as a matter of discretion, the Court will allow time to obtain same (*z*). When affidavits intended to be used on shewing cause are filed, it is not necessary for the party who moved for the rule *nisi*, to obtain office copies of them, before he is heard in support of his rule (*a*).

Affidavits for, when and how made and filed, &c.

The affidavits should be sworn, and handed to the counsel who is to shew cause, before the day named in the rule for shewing cause; and, after shewing cause, counsel cannot come on another day in such term with better affidavits (*b*). But, in general, an affidavit sworn after the appointed day, but before the actual time of shewing cause, may be read (*c*). When, however, a particular day or time for filing affidavits is prescribed by the rule *nisi*, or, as it frequently is, a term of enlarging such rule, no affidavit filed afterwards is admissible, unless under special circumstances of inevitable accident (*d*); and then a special motion should be made before the day of shewing cause for leave to file the affidavits *nunc pro tunc* (*e*). A rule for this purpose is only *nisi* in the first instance (*f*). Where upon enlarging a rule it is made a term that any further affidavits shall be filed before a certain day, a party is not precluded from using an affidavit which was sworn before the day fixed, but which was resworn after that day, for the purpose of rectifying a mistake in the *jurat* (*g*). In the Exchequer, upon an enlarged rule, the affidavit must be filed before shewing cause, although it be not so expressed in the rule of enlargement (*h*). In all the courts, if a rule is enlarged from one term to another, affidavits to be used in shewing cause must be filed a week before the latter term (*i*). A party is precluded from availing himself of an objection that the affidavits were not filed in proper time, if he has taken copies of them (*j*). If a rule is enlarged, at the instance of the party opposing it, upon the terms that all affidavits to be used in shewing cause are to be filed within a certain time, the Court will nevertheless allow the party to shew cause upon an affidavit sworn, and filed, for the purposes of the motion to enlarge (*k*). Where a rule is enlarged, and affidavits to be used on shewing cause are, by the

(*y*) See *Brown* v. *Probert*, 1 Dowl. 659: *Walker* v. *Needham*, 4 Scott, N. R., 222; 1 Dowl., N. S., 220, *S. C.*

(*z*) *Re Rogers*, 9 Dowl. 926. See *Walker* v. *Needham*, 4 Scott, N. R., 222; 1 Dowl., N. S., 220, *S. C.*

(*a*) *Pitt* v. *Coombs*, 4 Nev. & M 535; 1 H. & W. 13, *S. C.*

(*b*) *Kibblewhite* v. *Jeffreys*, 1 Chit. Rep. 142: *Tripp* v. *Bellamy*, 5 Price, 384: *Oakes* v. *Albin*, M'Clel. 582; Chit. Sum. Prac. 104.

(*c*) 1 Chit. Rep. 27 a: *Tilly* v. *Henly*, Id. 136: *Braine* v. *Hunt*, 2 Dowl. 391: *Graham* v. *Beaumont*, 5 Dowl. 49: *Pim* v. *Grazebrook*, 4 Scott, N. R., 567; 3 M. & G. 863.

(*d*) R. M., 36 G. 3: *Hoar* v. *Hill*, 1 Chit. Rep. 27: *Harding* v. *Austen*, 8 Moore, 523: *Turner* v. *Unwin*, 1 H. & W. 186; 4 Dowl. 16, *S. C.*: *Cosby* v. *Betts*, 1 Dowl., N. S., 503; 3 M. & G. 882; 4 Scott, N. R., 373, *S. C.*: *Wright* v. *Lewis*, 8 Dowl. 298: *Lewis* v. *Kirby*, 8 Scott. 179.

(*e*) *Hoar* v. *Hill*, 1 Chit. Rep. 27: *Re Mackay*, 12 Law J., N. S., 337; 1 Dowl. & L. 206, *S. C.*

(*f*) *Pryor* v. *Swaine*, 2 Dowl. & L. 37; 13 Law J., N. S., 214, Q. B., *S. C.*

(*g*) *Ouchterlony* v. *Gibson*, 5 M. & G. 879.

(*h*) *Barker* v. *Richardson*, 1 Y. & J. 362.

(*i*) See *Gibson* v. *Carr*, 4 Dowl. 618: *Johnson* v. *Marryatt*, 2 Dowl. 343: *Harding* v. *Austen*, 8 Moore, 523.

(*j*) *Re Mackay*, 12 Law J., N. S., 337; 1 Dowl. & L. 206.

(*k*) *Chambers* v. *Briant*, 2 Dowl., N. S., 671.

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rule, to be filed on a certain day, and affidavits are filed accordingly, the opposite party has a right to take office copies, and make use of them, though the party who filed them may not be desirous of doing so (*l*). Affidavits sworn in opposition to one rule on which the allegations in them may be immaterial, cannot be used without re-swearing in opposition to another rule on which they may become material, although the same question may be intended to be raised by the first rule which was actually raised on the second (*m*). But if they could be material at the time, it would seem they may be used (*n*). If a rule is moved without affidavits, none can be used in answer to it (*o*). No affidavits can be used in reply to those used by the party shewing cause (*p*). It is usual for the counsel who is instructed to shew cause to hand over the affidavits on his side to the opposite counsel, a reasonable time before the day appointed for shewing cause (*q*). As to enlarging the rule to cure defect in the stamp, title, or *jurat* of the affidavit, *see ante*, 1420.

The argument, &c.

Upon the argument, the counsel shewing cause is first heard; and the counsel for the party who obtained the rule will then be heard in reply: also, if cause be shewn in the first instance, the counsel who moved for the rule *nisi* is in like manner entitled to the reply (*r*). Although the Court will seldom hear more than one counsel upon moving for a rule *nisi*, yet, upon shewing cause, the number is not limited: and if there be two or more counsel on either side, they are heard in the order of their precedence. Counsel must confine themselves strictly to the facts stated in the affidavits (*s*); but of some facts the Court will take judicial notice, though not stated in the affidavit. After the argument is concluded, the Court deliver their opinion, and make the rule absolute or discharge it accordingly.

Reference to Master.

In a case involving complicated accounts, or confused or contradictory statements of fact, the Court will frequently refer it to one of the Masters. On such a reference, the Master may receive fresh affidavits, but cannot, except by special direction in the rule, receive *vivâ voce* evidence (*t*).

Drawing up rule.

When the rule is disposed of, the rule by which it is made absolute or discharged must, in all cases, be drawn up, and, in strictness, ought to be served. As a general rule, it is the successful party who procures the rule to be drawn up and served. But although the general practice may be for one party to the suit to draw up a rule, obtained in the progress of a cause, if the other party wishes to act upon it, he should draw it up within the time to which it relates, and if not so drawn up it will be considered as abandoned (*u*).

Motion to

If no cause be shewn on the day appointed, counsel may

(*l*) *Price* v. *Hayman*, 4 M. & W. 8.

(*m*) *Quaile* v. *Boucher*, 1 Scott, 283: 3 Dowl. 107, *S. C.*: *R.* v. *Mixen*, 1 Dowl. N. S., 865.

(*n*) See *Baskett* v. *Barnard*, 4 M. & Sel. 331: *Lang* v. *Comber*, 4 East, 348: *Read* v. *Massey*, 4 Dowl. 681: *Ryan* v. *Smith*, 9 M. & W. 223: *Langston* v. *Wetherell*, 14 M. & W. 104.

(*o*) *Atkins* v. *Meredith*, 4 Dowl. 658: *Doe* v. *Baytun*, 1 H. & W. 270.

(*p*) *Shaw* v. *Mansfield*, 7 Price, 769: *Berry* v. *Clench*, 1 Dowl. N. S., 848.

(*q*) See *R.* v. *Hudson*, 9 Jur. 345, Q. B. H. T. 1845.

(*r*) *Anon.*, 4 Taunt. 690.

(*s*) See *Altham* v. *Furnival*, 2 Doug. 48.

(*t*) *Nay* v. *Reynolds*, 4 Nev. & M. 462.

(*u*) *Gingell* v. *Bean*, 1 M. & G. 38: 1 Scott, N. R., 153, *S. C.*; *Sawyer* v. *Thompson*, 9 M. & W. 246.

move on the following day to make the rule absolute, on an affidavit of service of the rule *nisi* (*x*); and if cause be not then shewn, the Court will grant a rule for making the latter rule absolute (*y*). Where a rule is drawn up to shew cause peremptorily on a certain day, counsel may move to make it absolute immediately after the Court has gone through the bar on that day, which, for this purpose, is considered to be the rising of the Court (*z*). *Draw up this latter rule with one of the Masters, and serve a copy of it upon the opposite attorney, or agent, before nine at night* (*a*). But when the counsel who is instructed to shew cause informs the opposite counsel that he is instructed so to do, it is the usual practice for the opposite counsel not to move for the rule absolute till a subsequent day. And if, after a rule has been made absolute, it appear that counsel was instructed in time, it is usual and proper courtesy, in most cases, to open the rule, and obtain back the brief, without compelling such counsel to move the Court that he may be heard; but if this be refused, the Court will order the rule to be opened (*b*).

Rule absolute where no cause shewn.

In many cases the Court will grant a rule *nisi*, which will make itself absolute, unless cause be shewn to the contrary within a limited time, as, for instance, a rule to discharge a rule for a new trial (*c*); or, a rule in the Exchequer, for costs of the day for not proceeding to trial in pursuance of notice (*d*).

Rules absolute without motion.

The rule *nisi* cannot be supported or made absolute upon a ground different from that stated therein: therefore, if a rule *nisi* be drawn up for setting aside proceedings for irregularity, it cannot be made absolute on the ground of such proceeding being against good faith (*e*). The Court, however, are not bound by the exact terms of the rule *nisi*, but may mould it so as to meet the justice of the case (*f*).

Rule absolute on a different ground from that in rule nisi.

Where it was sought to draw up a rule for an attachment for non-performance of an award, it was held, that it was competent for the officer of the Court to object to the absence of a stamp on the award, and, therefore, to refuse to draw up the rule (*g*).

Officer refusing to draw up for defective stamp.

Title and Date of Rule.]—By rule of all the courts of *H. T.*, 1 *Vict. r.* 4, it is ordered, "that henceforth every rule of court, delivered out in vacation, shall be dated the day of the month and week on which the same is delivered out, but shall be intitled as of the term immediately preceding such vacation" (*h*). Where a rule is applied for on one day, but from the Court taking time to consider it is not granted till another, it must be dated as of the former day (*i*).

Title and date of rule.

Costs.]—The costs of the application are wholly in the dis-

Costs.

(*x*) See forms of affidavit, Chit. Forms, 569. 572.
(*y*) See the form, Chit. Forms, 635.
(*z*) *Lace* v. *Adamson*, 12 M. & W. 807.
(*a*) *Ante*, 1411, 1415.
(*b*) Chit. Sum. Pract. 108.
(*c*) See *Phillips* v. *Warren*, 3 Dowl. & L. 301.
(*d*) *Ante*, 1297.
(*e*) *Smith* v. *Clark*, 2 Dowl. 218. And see *Doe Fish* v. *Macdonnell*, 8 Dowl. 488; *ante*, 1276.
(*f*) *Doe Stevens* v. *Lord*, 6 Dowl. 256. See *Higgins* v. *Nicholls*, 7 Dowl. 551. See *Bate* v. *Kenney*, 1 C., M., & R., 38, where a rule *nisi* for a nonsuit was treated as a rule for a new trial.
(*g*) *Hill* v. *Slocombe*, 9 Dowl. 339.
(*h*) *Badman* v. *Pugh*, 2 Dowl., N. S., 907, C. P.; 5 M. & G. 381; 6 Scott, N. R., 150, *S. C.*, where a judge's order made in vacation was made a rule of court in vacation.
(*i*) *Egan* v. *Rowley*, 8 Dowl. 145.

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cretion of the Court (*k*). When the rule *nisi* is drawn up upon payment of costs, whether cause be shewn against it or not, and whether made absolute or discharged, the Court almost always make the party who obtained the rule pay the costs. If the rule *nisi* be drawn up with costs, and no cause be shewn against it, it is made absolute, with costs, as of course; if cause be shewn against it, and the rule be made absolute, the Court will make it absolute with costs, or without, in their discretion, according to the circumstances of the case; but, if it be discharged, the Court almost always order the costs to be paid by the party who obtained it. But, if, in discharging it after argument, nothing be said as to costs by the Court, it must be understood in the Queen's Bench, that the Court make no order as to costs (*l*). But in the Common Pleas, the rule is to be considered as discharged with costs, unless otherwise ordered. If the rule *nisi* be silent as to costs, then, if no cause be shewn, neither party is ordered to pay costs (*m*); but if cause be shewn, the rule is made absolute or discharged, with or without costs, in the discretion of the Court, according as they are of opinion that the motion ought or ought not to have been made, and ought or ought not to have been resisted (*n*). If, in such a case, the Court say nothing as to costs, it must be considered that costs are not granted (*o*), and no subsequent application can be made for them (*p*). Where a rule is discharged on a mere technical objection, it is generally so without costs (*q*), but sometimes with costs (*r*). A party served with a rule calling upon him to shew cause, is not entitled to his costs of appearing upon the rule, if he has no cause to shew (*s*). Where a party required by law to pronounce a decision on certain points, is brought before the Court by a motion impugning such decision, the general rule is, that he shall have costs if the application fails (*t*). In general, where a party shews cause successfully in the first instance, he is not entitled to costs (*u*). But where the rule, if obtained, have operated as a stay of proceedings, or have prejudiced the opposite party, he is (*x*). Where the moving party is successful, and the motion is necessarily made, costs are allowed (*y*). If the party who obtained the rule succeed only in part, the Court will not give costs (*z*); and it seems that the opposite party would be entitled to costs if he gave notice that he was ready to yield the points on which the rule was afterwards made absolute (*a*). Where a party applies to the Court, where the case is such that he ought to have applied to a judge at chambers, he will not in general be allowed

(*k*) Every person who comes before the Court subjects himself to its jurisdiction as to costs. (*Peters* v. *Sheehan*, 10 M. & W. 213, per *Alderson*, B.)

(*l*) See *Drinker* v. *Pascoe*, 4 Dowl. 566.

(*m*) See *Jeves* v. *Hay*, 1 Scott, N. R., 399.

(*n*) See cases, *ante*, 1277, n. (z). And see *ante*, 1276, as to costs on applications to set aside proceedings for irregularity.

(*o*) *Anon.*, 1 Chit. 396.

(*p*) *Holmes* v. *Edwards*, 6 Dowl. 51. And see *Shelton* v. *Braithwaite*, 8 M. & W. 252.

(*q*) *Prady* v. *Lovell*, 4 Dowl. 671: *Doe Neville* v. *Lloyd*, 2 Dowl., N. S., 330.

(*r*) *Houldsitch* v. *Swinfen*, 5 Dowl. 36.

(*s*) *Cassidy* v. *Stewart*, 3 M. & G. 575; 4 Scott, N. R., 187, *S. C.*

(*t*) *Queen* v. *The Mayor of Bridgenorth*, 10 Ad. & El. 67. And see *Reg.* v. *Dodson*, 9 Ad. & El. 704.

(*u*) *Fitch* v. *Green*, 2 Dowl. 493: *Read* v. *Speer*, 5 Dowl. 330. And see *Begbie* v. *Greenville*, 3 Dowl. 502: *Casel* v. *Pariente*, 8 Scott, N. R., 240: and the cases, *ante*, 1292, as to motions for putting off the trial.

(*x*) *Rennie* v. *Beresford*, 3 D. & L. 469; 15 Law J., N. S., 78, Exch., *S. C.* And see *Blackburne* v. *Edwards*, 2 P. & D. 137; 10 Ad. & Ell. 21, *S. C.*

(*y*) *Casel* v. *Pariente*, 8 Scott, N. R., 240.

(*z*) *Aliven* v. *Furnival*, 2 Dowl. 49: *Newton* v. *Harland*, 3 Scott, N. R., 232: *Wilson* v. *Knapp*, 8 Dowl. 426: *Rising* v. *Dolphin*, 4 Jur. 193, B. C.

(*a*) Id. And see *M'Andrew* v. *Adam*, 3 Dowl. 130.

costs (*b*). Where libellous and impertinent matter is introduced into an affidavit in support of the rule, the Court will sometimes deprive the party of the costs to which otherwise he would have been entitled (*c*). Where a rule to refer a matter to the Master has been moved without costs, and the subject-matter for inquiry is matter of fact only, the Court will not entertain an application for costs of the inquiry after the report of the Master is made (*d*). As to when the costs of a rule are costs in the cause, see *ante*, 1388. As to the costs of making a judge's order a rule of court, see *post*, 1441.

Limiting time for payment of.

The Court, upon making a rule absolute upon payment of costs, will not, in general, limit any time for the payment of such costs, if the rule does not operate as a stay of proceedings (*e*).

Payment of, when a mere condition, &c.

When a rule, which stays proceedings, is granted conditional upon payment of costs, the Court will discharge it, if such costs are not paid within a reasonable time (*f*). But in general there seems to be no mode of obtaining the payment of such costs if the rule is abandoned, as it is conditional merely, and optional with the party whether he will abide by it or not (*g*).

Ordering costs to be paid by person not party to the rule.

The Court will not order a person, not a party to the rule, to pay the costs, without a separate application for that purpose (*h*). By a rule of the Queen's Bench of *E. T.*, 6 *Vict.*, in every case in which the Court shall grant a rule to compel any person not a party to an original rule to pay the costs of such original rule, such rule for costs shall be drawn up on reading all the affidavits filed in support of, and in opposition to, the original rule. As to how far third parties can be ordered to pay costs, see *ante*, 1396.

Time for taking next step after rule disposed of.

Time to take the next step after Rule disposed of.]—As regards the time allowed for taking the next step after a rule staying the proceedings, or operating as such stay, is disposed of, a distinction has been taken between such rules obtained by a plaintiff and by a defendant; if obtained by a *plaintiff*, the defendant is allowed the same time after the rule is disposed of to take the next step, that he had when the rule *nisi* was served upon him; but if the rule were obtained by the *defendant*, then he must take the next step on the same day the rule is disposed of (if discharged), at his peril; but he is allowed the whole of that day so to do (*i*). The defendant ought, therefore, in the latter case, pending the rule, to take all proceedings essential to be completed by the time the rule will be disposed of, or else obtain time for that purpose, if he can, when it is disposed of (*k*).

Opening and rescinding the rule, or moving again.

Opening and rescinding the Rule, or moving again.]—There is an old rule of court, *H.*, 3 *J.* 1, by which it is ordered, that if a cause be moved in court in the presence of counsel of both

(*b*) *Vaughan* v. *Trevenni*, 2 Dowl. 299.
(*c*) *Thompson* v. *Dicas*, 2 Dowl. 93.
(*d*) *Holmes* v. *Edwards*, 6 Dowl. 51.
(*e*) *Bennett* v. *Gardiner*, 2 Dowl., N. S., 50.
(*f*) See *ante*, 1346, 1347, as to costs on a rule for a new trial. See *Bennett* v. *Gardiner*, *supra*.
(*g*) *Pugh* v. *Kerr*, 5 M. & W. 164; 6 M. & W. 17; 8 Dowl. 218, *S. C.*
(*h*) *R.* v. *Philp*, 7 Ad. & E. 608; *R.* v. *Dodson*, 9 Ad. & E. 704; *R.* v. *Green*, 2 G. & D. 789; *Hayward* v. *Gifford*, 4 M. & W. 194; *Rusk* v. *Kennedy*, 3 Jur. 198, Exch.; *R.* v. *Borron*, 3 B. & Ald. 432; *ante*, 1414.
(*i*) *Hughes* v. *Waldon*, 5 B. & C. 771; *St. Hawkins* v. *Ryan*, 4 Id. 970; 7 D. & R. 458, *S. C.*; *Vernon* v. *Hodgens*, 1 M. & W. 151; 4 Dowl. 665, *S. C.*; *Mongens* v. *Perry*, 15 Law J., N. S., 307, Exch. See the prior case of *Swayne* v. *Cramond*, 4 T. R. 176.
(*k*) See per *Parke*, B., 1 M. & W. 152.

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parties, and the Court shall thereupon make an order, no person shall afterwards cause the same to be moved contrary to such rule or order, under pain of an attachment; and the counsel knowingly making such motion shall not be heard here in any cause during the same term (*m*). If, however, the rule was made absolute too soon, or either party was taken by surprise, the Court will open the rule. But they will not do so, upon the ground that the affidavit upon which cause was shewn against it, was false (*n*); or because counsel omitted to present to their notice a statute, or other authority, which might have affected their decision (*o*); or, upon a suggestion by affidavit, that the report of the Master, upon which the Court acted in disposing of the rule, was erroneous (*p*); or, upon the ground that it was moved contrary to an alleged understanding between the plaintiff's attorney and the defendant's counsel, at a conversation which took place upon their accidentally meeting in the street (*q*). A rule made in the Bail Court is not more liable to be re-opened than a rule made in full court; therefore, such a rule will not be permitted to be re-opened and argued in full court after the term in which it was made, although the judge who heard the case sanctioned the application to the full Court (*r*). As to the opening or rescinding of a rule for judgment as in case of a nonsuit, see *ante*, 1310.

Rules absolute in first instance.

This rule against opening or rescinding rules made after hearing both parties does not apply to rules which are made absolute in the first instance; as the common rule for changing the venue, or for costs of the day for not proceeding to trial in pursuance of notice, or the like. The party against whom such rules are made absolute may move to discharge them, on shewing sufficient reasons why they should not have been granted.

Renewing application when refused, because affidavit defective.

As a general rule, if a party make an application to the Court, and fail from a defect in the body of his affidavit, he cannot renew his application upon an amended affidavit (*s*). But where a rule is discharged upon the ground that the affidavit is defective in the title or the *jurat*, the Court will allow the application to be renewed upon the affidavit being amended and resworn (*t*). And if a party has succeeded in obtaining a rule, but has not acted upon it, he may move to revive it, or obtain a new rule upon the same subject (*u*); but the Court will not always grant this indulgence (*x*).

Filing affidavits.

Filing Affidavits.]—Whether the Court grant the rule *nisi* or not, or make it absolute or discharge it, the affidavits on

(*m*) See *Joynes* v. *Collinson*, 2 Dowl. & L. 449; 13 M. & W. 556, *S. C.*

(*n*) *Davies* v. *Cottle*, 3 T. R. 405: *Rossett* v. *Hartley*, 1 H. & W. 561; 7 A. & E. 522, n.: *Dillamore* v. *Capon*, 1 Bing. 398: *Bickley* v. *Fill*, 6 Scott, N. R., 706.

(*o*) *Dillamore* v. *Capon*, 8 Moore, 462; 1 Bing. 396, *S. C.*

(*p*) *Gingell* v. *Bean*, 1 M. & G. 555; 1 Scott, N. R. 390. *S. C.*

(*q*) *Richardson* v. *Pate*, 9 Dowl. 73.

(*r*) *Todd* v. *Jeffry*, 2 Nev. & P. 443; 7 A. & E. 519, *S. C.*: *Rossett* v. *Hartley*, *supra*.

(*s*) *Levi* v. *Cogle*, 2 Dowl., N. S., 932; 12 Law J., N. S., 295, B. C.: *R.* v. *Pickles*, 12 Law J., 40, where the application was made by churchwardens: *R.* v. *Barton*, 9 Dowl. 1021: *R.* v. *Manchester and Leeds Railway Company*, 1 P. & D. 164; 8 Ad. & E. 413: *R.* v. *Great Western Railway Company*, *infra*: *Joynes* v. *Collinson*, 2 Dowl. & L. 449; 13 M. & W. 558: *Withers* v. *Spooner*, 6 Scott, N. R., 165: *R.* v. *Harland*, 8 Dowl. 323: *Ex p. Haslam*, 1 Dowl., N. S., 792. And see *Saunderson* v. *Westley*, 8 Dowl. 652, where the application was made by a prisoner.

(*t*) *R.* v. *Great Western Railway Company*, 1 Dowl. & L. 874; 5 Q. B. 897: *Shaw* v. *Perkin*, 1 Dowl., N. S., 306: *R.* v. *Jones*, 8 Dowl. 307. See *Doe Hull* v. *Tullett*, 1 Dowl. & L. 121.

(*u*) *Rowbottom* v. *Ralphs*, 6 Dowl. 221.

(*x*) See *Jones* v. *Hay*, 1 M. & G. 390.

both sides must be filed with the Masters, as has been already mentioned (*y*).

Amendment of rules.

Amendment of Rules.]—If a rule or order of the Court be drawn up wrong by mistake, the Court will frequently order it to be corrected (*z*). Where the christian and surname were transposed by mistake in an order of reference, the Court allowed it to be amended (*a*). But the Court, in a more recent case, refused to allow an amendment in a rule for setting aside an award (*b*). Where the defect is attributable to the officer of the Court, it will be amended without costs (*c*). The Court has no jurisdiction to amend an order of *Nisi Prius* until it has been made a rule of court (*d*). Also, as we have seen, *ante*, 1423, the Court are not bound by the literal terms of the rule granted, but may make the rule absolute in what amended form they please, so as substantially to effect the object for which the rule was granted.

SECT. 2.

Rules granted without Motion by Counsel.

Rules obtained upon a judge's fiat.

Rules obtained upon a Judge's Fiat.]—The following rules are obtained in this manner:—

That an infant be admitted to sue by *prochein amy*, or guardian; that an infant be admitted to defend by guardian; that plaintiff may sue *in formâ pauperis;* to discharge a prisoner, upon bail being justified in vacation; to change the venue in Common Pleas or Exchequer in vacation; to plead several matters, not enumerated in the rule, *T. T.*, 1 *W.* 4; to compute in vacation; that a writ of inquiry be executed before a judge at *Nisi Prius.*

When you have obtained the judge's fiat, take it to the office of the Masters, and they will thereupon draw up the rule. In the fifth and seventh instances above mentioned, you must also take a motion-paper, signed by counsel, to the Masters, together with the fiat.

Rules obtained from the Masters, upon a præcipe.

Rules obtained from the Masters, upon a Præcipe.]—The following are, it seems, the only rules obtained in this manner:—

Rule to plead generally; to plead in *scire facias;* to avow in replevin; for a view; to appear to a *scire facias.*

In these cases you make out a præcipe or memorandum of the rule you want; take it to the Masters, and they will draw up the rule.

Rules obtained from the Masters, without a præcipe.

Rules obtained from the Masters, without a Præcipe.]—The following are the rules obtained directly from the Masters:—

Rule to declare in replevin; to appear in Common Pleas in

(*y*) *Ante*, 1421; and see *post*, 1458.

(*z*) Tidd, 432. See *Lopez* v. *De Tastet*, 8 Taunt. 712; 7 Moore, 120, *S. C.*

(*a*) *Price* v. *James*, 2 Dowl. 435.

(*b*) *Sherry* v. *Oke*, 3 Dowl. 349.

(*c*) *Downing* v. *Jennings*, 5 Dowl. 373. See *Walker* v. *Needham*, 4 Scott, N. R., 222, n.

(*d*) *Crouch* v. *Tregoning*, 5 Dowl. 230.

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replevin; to reply; to rejoin, surrejoin, &c.; that the defendant produce the record on *nul tiel* record.

Side-bar rules.

Side-bar Rules.]—These rules were formerly moved for by the attornies at the side-bar in court; but they may now be had of the Masters, upon a *præcipe* or memorandum, in the manner above mentioned. "Side-bar rules may be obtained on the last, as well as on other days in term." If obtained irregularly, the Court, upon application, will grant a rule to shew cause why they should not be discharged; which rule may afterwards be made absolute in the ordinary way, if no sufficient cause be shewn.

The following is a list of most of the side-bar rules:—

Rule that the sheriff return the writ; that the sheriff bring in the body; for time to declare, or for further time; for leave to pay money into court under 3 & 4 *W.* 4, *c.* 42, *s.* 21; for leave to discontinue before verdict, &c.; to be present at the taxing of costs, unless where notice of taxation is required to be given; for a *scire facias* to revive a judgment more than seven years old, and not ten; for the keeper to acknowledge the defendant in his custody; and the consent rule in ejectment.

SECT. 3.

Enforcing Rules for Payment of Money, Costs, &c., under 1 & 2 *Vict. c.* 110, *s.* 18.

Enforcing rules for payment of money and costs. 1 & 2 Vict. c. 110, s. 18.

BEFORE the 1 & 2 *Vict. c.* 110, the only mode of enforcing rules of court was by attachment, and this is still the case as to all rules not included in the provisions of the 18th section of that act. That section enacts, "That all decrees and orders of courts of equity, and all rules of courts of common law, and all orders of the Lord Chancellor or of the Court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law; and the persons to whom any such monies or costs, charges or expenses, shall be payable, shall be deemed judgment-creditors within the meaning of this act; and all powers hereby given to the judges of the superior courts of common law with respect to matters depending in the same courts shall and may be exercised by courts of equity with respect to matters therein depending, and by the Lord Chancellor and the Court of Review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment-creditors, are in like manner given to persons to whom any monies or costs, charges or expenses, are by such orders or rules respectively directed to be paid." By the 19th section of the act, no decree or order in any court of equity, nor any rule of a court of common law, nor any order in bankruptcy or lunacy, shall, by virtue of this act, affect any lands, tene-

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ments, or hereditaments, as to purchasers, mortgagees, or creditors, unless registered as mentioned in that section. See this 19th sect., *Vol.* 1, 465; and see *Id.* as to registering judgments.

Effect of enactment.

The above 18th section, it will be seen, gives to the decrees, orders, &c., therein mentioned, the effect of judgments in the superior courts of common law. But a rule of court has not, by this enactment, the full effect of, and cannot be pleaded in answer to a formal judgment (*e*). It is not a judgment for all purposes, but the statute merely gives the party, in whose favour the rule is made, a better remedy on it than he had before (*f*).

What cases within it.

The enactment extends only to rules of court, and not to judge's orders; but a judge's order for the payment of money, unless obtained *ex parte* (*g*), may be enforced under this enactment, by first making it a rule of court, which may be done as of course, then issue execution on the rule, as directed in the following Chapter (*h*). And though the order be obtained *ex parte*, it may be enforced in a similar way upon obtaining a rule *nisi* to shew cause why the opposite party should not pay the money, and afterwards getting the rule made absolute.

When execution may be issued direct on the rule.

When a rule of court expressly orders the payment of a specific sum of money, execution may be issued upon it as of course, without any leave of the Court (*i*), or demand (*k*), or other preliminary proceeding, the same as on a writ of execution. So execution may be issued for costs ordered to be paid by a rule immediately after they have been taxed, and the Master's *allocatur* obtained without obtaining any fresh rule of court specifying specifically what their amount is (*l*); and, in fact, the Court will not grant the rule, or, if granted, will discharge it (*m*).

When a further rule necessary.

But execution cannot be issued directly upon a rule of court for a sum of money other than costs not mentioned in it, or where something is to be done by the party who is to receive it before he is entitled to do so. In such cases, the advantage of the above enactment may be obtained by obtaining a rule to shew cause why the sum of money should not be paid (*n*), and making such rule absolute; upon which rule execution may be issued. Thus, when an award directs a sum of money to be paid, and the submission is made a rule of court, execution for the sum awarded cannot issue without a previous rule calling on the party to shew cause why he should not pay the money awarded, and making such rule absolute (*o*). It is no answer to

(*e*) *Farmer* v. *Mottram*, 7 Scott, N. R., 408; 1 Dowl. & L. 781, *S. C.*

(*f*) Id. See per *Tindal*, C. J.

(*g*) *Rickards* v. *Patterson*, 1 Dowl., N. S., 52; 8 M. & W. 313, *S. C.*

(*h*) *Wallis* v. *Sheffield*, 7 Dowl. 793: *Watson* v. *Holcombe*, 11 Law J., N. S., C. P.

(*i*) *Wallis* v. *Sheffield*, 9 Law J., N. S., 2, Exch., somewhat differently reported in 7 Dowl. 793, *S. C.*: *Hobson* v. *Paterson*, 2 Dowl., N. S., 129.

(*k*) *Wallis* v. *Sheffield*, *supra*.

(*l*) *Hobson* v. *Paterson*, 2 Dowl., N. S., 129: 5 Scott, N. R., 764; 4 M. & G. 333, *S. C.*: *Watson* v. *Holcombe*, 4 M. & G. 136: *Jones* v. *Williams*, 8 M. & W. 349; 9 Dowl. 702, *S. C.*: *Badman* v. *Pugh*, 6 Scott, N. R., 150: *Wright* v. *Burrows*, 2 Dowl. & L. 94; 13 Law J., N. S., 249, Q. B., *S. C.*

(*m*) See Id.: *Wright* v. *Burroughs*, 2 Dowl. & L. 94.

(*n*) See *Doe Drew* v. *Martin*, 7 Jur. 86, B. C.

(*o*) *Jones* v. *Williams*, 11 Ad. & E. 175; 4 P. & D. 217, *S. C*: *Rickards* v. *Paterson*, 1 Dowl., N. S., 52, per *Parke*, B.: *Jones* v. *Williams*, 8 M. & W. 349; 9 Dowl. 702, S. C.; and per *Parke*, B., "It seems to me, that, according to the proper construction of the act, it does not apply to any costs, charges, or expenses, except those which are ordered *by the Court* to be paid; and that it does not embrace cases in which something is necessary to be done in order to give the party a title to the money, but including those only in which the obligation to pay the money appears on the face of the judgment, decree, or order:" *Doe* v. *Amery*, 8 M. & W. 565; 1 Dowl., N. S., 23, *S. C.*

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such a rule to shew cause that the applicant has filed an affidavit of debt in the Court of Bankruptcy under 1 & 2 *Vict. c.* 110, *s.* 8 (*ante*, 1125), for the sum awarded, and that the defendant has given a bond with sureties, if no further proceedings have been taken (*p*). But if it be doubtful whether the award is a valid one, the Court will not grant the rule, regarding a motion for such a rule much in the same light as an application for an attachment (*q*). Nor will the Court grant such a rule against a party, if it is doubtful whether he is liable to pay the sum awarded (*r*). Where an arbitrator made his award on the 1st of September, 1841, directing payment on the 25th of January, 1842, of a certain sum "with interest," it was held, that, under that award, upon a rule under this enactment, the plaintiff could recover no interest accruing subsequently to the 25th of January (*s*). The rule calling on a party to pay money due on an award, is a six-day rule, and the Court will not, in the absence of any special reason, make it returnable in a shorter date to save the term; nor will they make it returnable at chambers (*t*). The Court will enforce the payment of costs due under the consent rule in an action of ejectment in this way (*u*). The Court, however, will not, in general, grant this further rule in these cases, unless the same formalities in service are observed as in the case of an application for an attachment. Therefore, they will not grant a rule calling on a party to pay money pursuant to an award as above, unless it be shewn that the award has been personally served on him in the same way as if the application were for an attachment (*x*). So, they will not grant a rule calling upon a party to pay money mentioned in the Master's *allocatur*, unless the *allocatur* has been personally served (*y*). But, under special circumstances, the Court will dispense with personal service (*z*). An insufficient service is not cured by the party appearing and shewing cause against the rule (*a*). Upon moving for the rule there should be an affidavit of the personal service (*b*), or an affidavit stating such circumstances as may induce the Court to dispense with it. An order of reference empowering an arbitrator to enlarge the time for making his award, having been made a rule of court, on affidavits verifying the order and enlargement, the Court granted a rule calling on the defendant to pay two sums of money pursuant to the award, without the production of a fresh affidavit that the enlargements had been duly made (*c*). It is not necessary

Where demand and service necessary to obtain further rule.

Affidavit to obtain such rule.

The rule.

(*p*) *Mendell* v. *Tyrrell*, 9 M. & W. 217; 1 Dowl., N. S., 453, *S. C.*

(*q*) *Hawkins* v. *Benton*, 2 D. & L. 465: *Spencer* v. *Clarkson*, 1 Dowl., N. S., 837, B. C.: *Kerr* v. *Jeston*, 1 Dowl., N. S., 340: *Dickenson* v. *Allsop*, 13 M. & W. 722; 2 Dowl. & L. 657, *S. C.*

(*r*) *Holcroft* v. *Manby*, 2 Dowl. & L. 319; 8 Scott, N. R., 473, *S. C.*

(*s*) *Doe Moody* v. *Squire*, 2 Dowl., N. S., 327.

(*t*) *Arthur* v. *Marshall*, 13 M. & W. 465.

(*u*) See *Doe Steer* v. *Bradley*, 1 Dowl., N. S., 259: *Doe Whatley* v. *Knight*, 7 Jur. 815: *Doe Drew* v. *Martin*, 7 Jur. 86, B. C.

(*x*) *Hawkins* v. *Benton*, 2 Dowl. & L. 465: *Winwood* v. *Holt*, 3 Dowl. & L. 67: *Abrahams* v. *Tsunton*, 1 Dowl. & L. 319: *Wilson* v. *Foster*, 6 Scott, N. R., 936; 1 Dowl. & L. 469, *S. C.*, where the party was abroad, but knew of the award, and the rule was refused, the award not having been served. But see *Doe Moody* v. *Squire*, 2 Dowl., N. S., 327.

(*y*) *Doe Steer* v. *Bradley*, 1 Dowl., N. S., 259.

(*z*) *Hawkins* v. *Benton*, *supra*: *Doe Steer* v. *Bradley*, 1 Dowl., N. S., 259. As to personal service being necessary in the case of an attachment, see *post*, Part 8.

(*a*) *Archbutt* v. *Pennell*, 1 D. & L. 318.

(*b*) *Pearson* v. *Archbold*, 11 M. & W. 109; 2 Dowl., N. S., 769, *S. C.*

(*c*) *Peebles* v. *Hay*, 8 Jur. 338, B. C. See *Doe* v. *Amery*, 1 Dowl., N. S., 23.

to make it part of the rule that the applicant should be at liberty to issue execution, &c., or that he foregoes the remedy by attachment (*d*). The rule *nisi* should be personally served, though, perhaps, under very special circumstances personal service might be dispensed with (*e*). After a judge's order had been made a rule of court, it is too late to object in answer to a rule calling upon the party to pay money in pursuance of such order, that the judge had no power to make it (*f*).

Service of.

Shewing cause.

The practice and law as to suing out and executing a writ of execution on rules within the above statute is the same, mutatis mutandis, as that of suing out and executing execution on a judgment. As to the forms of writs of execution framed by the judges, in pursuance of the 20th section of the 1 & 2 *Vict. c.* 110, see *Vol.* 1, 535, 536. No. 9 of the forms of writs framed by the judges in 1839, expressly points out how the costs of the rule are to be stated on the face of the writ, making the date of the taxation the period from which the interest is to commence; it must, therefore, be assumed that the judges considered that statement material and a matter of substance, so as to make the total omission of it an irregularity at the least (*g*). Where the order, which was made a rule of court, was to set aside a judgment *with costs*, and the writ commanded the sheriff to levy "9*l.* 6*s.* 8*d.*, which lately in our court, before our justices at Westminster, by rule of our said court, intituled &c., were by the said Court ordered to be paid," &c., treating the order as an order to pay not costs, but a specific sum of money, the Court held the form of writ bad (*h*). The judges have not framed a form of *fi. fa.* for the payment of costs only (*i*).

The writ of execution, &c.

It is proper to mention, that decrees and orders of the courts of equity should be enforced under the above enactment of 1 & 2 *Vict. c.* 110, *ss.* 18, 19, by process sued out of those courts, and not out of the courts of law, and the equity judges have framed writs for the purpose (*k*). It seems that an order made by a court of equity, directing a party to pay a sum of money into the Bank to the credit of a cause, to be laid out in the purchase of bank annuities in the name and with the privity of the accountant-general, to abide the further order of the Court, is not an order for the payment of money to any person, within the meaning of the above enactment (*l*).

Decrees and orders in equity.

As to the removal of rules and orders of inferior courts into the superior courts, for the purpose of having execution on them, where the judge of the court is a barrister of seven years' standing, under the 1 & 2 *Vict. c.* 110, *s.* 22, see *ante*, 1159. As to the removal of rules and orders from the Courts of Common Pleas at Lancaster and Durham, into the superior courts, for the purpose of execution, see *ante*, 1161.

Removal of rules, &c. of inferior courts, and from C. P. at Lancaster and Durham, for execution on them.

(*d*) *Burton* v. *Mendizabal*, 1 Dowl., N. S., 336, B. C.

(*e*) *Jordan* v. *Barwick*, 1 Dowl., N. S., 271. See *Wilson* v. *Foster*, 1 Dowl. & L. 496; 6 Scott, N. R., 936, *S. C.*; *Doe* v. *Amery*, 1 Dowl., N. S., 23: *Winwood* v. *Holt*, 3 Dowl. & L. 87.

(*f*) *Wilson* v. *Northorp*, 4 Dowl. 441.

(*g*) *Badman* v. *Pugh*, *infra*, *per cur.* See the forms, Chit. Forms, 637 to 642.

(*h*) *Badman* v. *Pugh*, *infra*.

(*i*) *Badman* v. *Pugh*, 6 Scott, N. R., 150; 2 Dowl., N. S., 907; 5 M. & G. 383, *S. C.* See a form, Chit. Forms, 639.

(*k*) *Stanford* v. *Robinson*, 3 M. & G. 407; 4 Scott, N. R., 23; 1 Dowl., N. S., 183, *S. C.* See forms, 1 Beav. 51: and see Chit. Forms, 637, n.

(*l*) *Gibbs* v. *Pike*, 9 M. & W. 351: 1 Dowl., N. S., 409, *S. C.*; 8 M. & W. 223; 9 Dowl. 731, *S. C.*

CHAPTER II.

SUMMONSES AND ORDERS.

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Power of a Judge at chambers or on circuit.

Power of a Judge at Chambers or on Circuit.]—WHEN, in the progress of a suit, it becomes necessary to obtain the order of the Court relative to any of the proceedings, we have seen, in the last Chapter, that the parties may apply for it in term time by motion to the Court. But in vacation, in most instances, or in term time, in all matters of minor importance, the same effect may be had by obtaining the order of a judge at chambers (*a*).

Judges of all the courts a concurrent jurisdiction.

And by the 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 4, every judge is authorised to transact such business at chambers or elsewhere, depending (*b*) in any of the superior courts [as relates to matters over which the said courts have a common jurisdiction (*c*) and] as may, according to the course and practice of the Court, be transacted by a single judge. And by 1 & 2 *Vict. c.* 45, *s.* 1, every judge of the superior courts is authorised "to transact out of court such business as may, according to the course and practice of the court, be so transacted by a single judge, relating to any suit or proceeding in either of the said Courts of Queen's Bench or Common Pleas, or on the common law or revenue side of the said Court of Exchequer, or relating to the granting writs of *certiorari* or *habeas corpus*, or the admitting prisoners on criminal charges to bail, or the issuing of extents or other process for the recovery of debts due to her majesty, or relating to any other matter or thing usually transacted out of court, *although the said courts have no jurisdiction therein*, in like manner as if the judge transacting such business had been a judge of the court to which the same by law belongs." The judges might also, before these enactments, by stat. 1 *G.* 4, *c.* 55, *ss.* 5, 6, be-

(*a*) As to the origin of the power of judges at chambers, see *R.* v. *Alcwin*, Wilmot's Notes, 264; and for the present extent of it, see Moseley's Law Tracts, pp. 1 to 5.

(*b*) Even before the 1 & 2 Vict. c. 45, an affidavit to hold to bail, sworn before a commissioner of the court, was held to be business "depending" in court, so as to authorise a judge of another court in making an order to hold to bail at chambers: *Griffin* v. *Taylor*, 6 Dowl. 690.

(*c*) See *Phillips* v. *Drake*, 2 Dowl. 45. Now extended, by 1 & 2 Vict. c. 45, s. 1, to cases in which there is not a common jurisdiction.

sides granting summonses and making orders at chambers, grant and make them upon circuit, in cases depending in any of the courts at Westminster, in which the issues, if brought to trial, would be tried upon their circuits respectively, in the same manner as if they were judges of the court in which such causes shall be so depending (*d*). These statutes give to the judges of the respective courts, when sitting at chambers or on circuit, a general and concurrent jurisdiction in the transaction of business, the same as if they were judges of the court in which the business or action is pending (*e*). And by the 5 & 6 *Vict. c.* 86, intituled, "An act for abolishing certain offices on the Revenue side of the Court of Exchequer in England, and for regulating the office of her Majesty's Remembrancer in that Court," it is enacted by sect. 9, "that all such orders relating to revenue causes, and matters of revenue, as have heretofore been made at the sittings of the Court of Exchequer appointed and held after term, may be made at any time by any single judge out of Court." Where a statute expressly directs the application to be made to the *Court*, a judge at chambers or on circuit has, it seems, no power to interfere (*f*), and *vice versâ* (*g*); nor has a judge at chambers any power over a rule of the full Court, unless the Court direct it, or unless by consent of the parties (*h*). Unless there is a cause in Court, an application cannot be made at chambers against an attorney (*i*). As to his power in respect of costs, see *post*, 1439. The instances in which these summonses may be granted, and orders made thereon, have been already fully noticed in the course of this work.

Revenue cases.

When Court alone has jurisdiction.

The Summons, how obtained, and Service of, &c.]—To obtain a judge's order, you must in general first summon the attorney or agent, if any, of the opposite party before a judge (*k*); *for which purpose, apply to the judge's clerk at the chambers in Rolls' Garden, Chancery-lane, who will make out the summons* (*l*). *If it is intended to attend the hearing of the summons by counsel, notice thereof should be given to the opposite party, either on the face of the summons or otherwise. If not, and the opposite party does not attend with counsel, and wishes to do so, the judge would adjourn the summons, to enable him to obtain counsel's attendance. If it be expedient to procure the attendance of the opposite party at the return of the first summons, the judge granting the summons will, where the case requires it, make the summons a peremptory one, and mark it as such accordingly.* As to the contents of the sum-

The summons, how obtained.

Form and contents of.

(*d*) See *ante*, 140. See the case of *Halkhead* v. *Abrahams*, 3 Taunt. 81, decided before this act; and that of *Ashworth* v. *Heathcote*, 6 Bing. 596, decided since, but before the passing of the above other acts.

(*e*) *Bennett* v. *Dean*, 5 Scott, N. R., 196: *Dew* v. *Katz*, 8 C. & P. 315.

(*f*) *Morgan* v. *Lute*, 1 Chit. Rep. 381: *Shaw* v. *Roberts*, 2 Dowl. 25: *Jones* v. *Fitzaddams*, 2 Dowl. 111; 3 Tyr. 904; 1 C. & M. 855, *S. C.*: *Gooch* v. *Goppin*, 3 Dowl. 74: *Ex p. Owen*, 1 Dowl. 511: *Lander* v. *Gordon*, 7 M. & W. 218.

(*g*) See per *Coleridge*, J., 7 Dowl. 726: *Morse* v. *Apperley*, 6 M. & W. 146: *Barnett* v. *Craw*, 1 Dowl., N. S., 774: *Wearing* v. *Smith*, 16 Law J., N. S., 1, Q. B.,

(*h*) See *Joseph* v. *Perry*, 3 Dowl. 669.

(*i*) *Kirby* v. *Ellier*, 4 Tyr. 239; 2 C. & M. 315; 2 Dowl. 219, *S. C.*

(*k*) In some cases the judge may proceed *ex parte*, as in making an order to hold to bail; and in other cases, where a statute or the practice authorises it, see *post*, 1436. If he proceed *ex parte*, where the opposite party ought to have had an opportunity of shewing cause, the order will be rescinded on application to the court: see *Clark* v. *Stocken*, 2 Bing., N. C., 651.

(*l*) See as to the form, Chit. Forms, 643. Every summons is stamped with a seal, as issuing from the judge's chambers. Formerly it bore the name and style of the court. This, however, was considered as no more than the mere mark of the judge's clerk, and not the seal of the Court: *per cur. Barrett Navigation Company* v. *Shawe*, 8 Dowl. 173.

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mons, they should give the opposite party due and reasonable information for what he is to appear, that he may come prepared to shew cause, and, in this respect, should be like a rule *nisi*, as to which, see *ante*, 1414, 1415; except that in the case of a summons to set aside any proceedings for irregularity, the ground of such irregularity must be particularised in the summons, otherwise it will not be available to the party. The summons should be correctly intitled in the cause (*m*), and bear date the day of the month on which it is issued, but an imperfect designation of the year, or even its omission, is immaterial (*n*); and, in general, only the surnames and not the christian names of the parties are inserted in the title. It is generally directed "to the attorney or agent" in the cause, without naming him: where there is no attorney or agent in the cause, or his residence is unknown, it is in like manner directed to the party himself. It should state where the party is to attend before the judge, and which, generally, is at the judge's chambers, in Rolls Garden, Chancery-lane; but it may be at his private house or elsewhere, if the judge thinks fit, and the case requires it. In term time, it is sometimes made attendable in the morning at Westminster, where it is expedient to prevent a judgment being signed before the opening of the office at eleven, or the urgency of the case otherwise requires it (*o*). So it is frequently made attendable before the judge at the assize town, in a cause triable at the assizes, and the case renders it expedient it should be so. The summons may be returnable at such time as the judge thinks fit. In term, it is generally made returnable at three o'clock in the afternoon; in vacation, at ten o'clock in the morning of the next day. But in vacation, where the expediency of the case requires it, the judge will frequently grant a summons, returnable at an earlier hour, either at Westminster or at the judge's chambers; and this, even though no judge will attend at the latter place at such hour (*p*). Where the summons is to be served in the country, it is generally made returnable in two days, so as to save the trouble of a second summons; and this summons is what is generally called "a double summons."

Title and direction of.

Place and time of attendance.

Double summons.

Service of.

Take a copy of this summons, and let the person who is to serve it examine it with the original, that he may be able to swear to the service, if it afterwards become necessary to do so; then serve the copy on the attorney or agent of the opposite party. As matter of precaution, the person who is to serve the summons should indorse on the original, immediately after service of the copy, the day when and the place where served, that he may be able to swear to the service, if necessary. The law and practice as to the service of the summons is the same as that relative to the service of a rule *nisi*, and which is noticed, *ante*, 1415.

Orders granted without summons.

Orders granted without Summons.]—Besides the orders granted upon summons, there are some cases where a judge at chambers will make an order without summons; such as an order

(*m*) *Jeves* v. *Hay*, 1 Scott, N. R., 399.
(*n*) *Solomon* v. *Naisby*, 7 Dowl. 459; 5 M. & W. 389, S. C.
(*o*) See per *Alderson*, B., in *Bebb* v. *Wales*, 5 Dowl. 456. In a case of *Minet* v. *Earpe*, cor. *Patteson*, J., at chambers, 10th May, 1844, he said, that all the judges had come to a resolution, that this summons might be granted so returnable.
(*p*) See *Byles* v. *Walter*, 5 Dowl. 233. But see *Bebb* v. *Wales*, Id. 456: *Spencely* v. *Sheals*, Id. 562.

that defendant may be held to bail (*q*); that plaintiff may issue a *distringas* to compel the appearance of, or to outlaw defendant (*r*); that plaintiff may sue *in formâ pauperis* (*s*); that, unless an infant defendant appear, John Doe may be assigned as his guardian, and a common appearance be entered for him (*t*); to compel the attendance of a witness, or the production of documents, before an arbitrator (*u*); to amend the *teste* or return of a *distringas*, or *habeas corpora*, or clause of *Nisi Prius* (*x*); to charge a prisoner in custody on a criminal account with a civil action (*y*); to enter up judgment on an old warrant of attorney (*z*), or to issue execution on a judgment or rule of an inferior court or Court of Pleas at Lancaster or Durham (*a*). There are also other cases in which the judge's order or fiat merely requires one of the Masters to draw up a rule of court, where such rule becomes necessary in vacation; for instance, an order for a rule that a *prochein amy* be admitted to prosecute an action for an infant plaintiff (*b*); and other instances pointed out, *ante*, 1427.

Order nisi making itself absolute.

In some cases an order *nisi* is granted without summons, and makes itself absolute, unless cause be shewn, the same as in some cases a rule *nisi* will do (*c*). When the party obtaining such an order does not attend, the other party should go before the judge and say that he is ready to shew cause and apply to have the order discharged, otherwise the order will become absolute (*d*). In country causes, the order for a prisoner's discharge is drawn up, unless cause be shewn in four days, or such further time as the judge directs, in order to give the attorney or agent an opportunity of consulting his client (*e*).

Obtaining irregularly an order without a summons.

If a party obtain an order *ex parte* without summons, where the opposite party ought to have had an opportunity of shewing cause, the order will be rescinded on application to the Court (*f*); and, in some cases, might perhaps be treated as a nullity.

When summons operates as a stay of proceedings.

When Summons operates as a Stay of Proceedings.]—As a general rule, a summons does not operate as a stay of proceedings, unless it be a part of the application, "why in the meantime all further proceedings should not be stayed," nor does an order, unless it so expresses (*g*). The exceptions are where the applicant has to take the next step, and the application relates to the time or mode of taking that step; as where the summons is for time to plead (*h*); for leave to plead several matters (*i*); to strike out a count, &c.: cases where a stay of proceedings is necessarily implied (*j*). It seems, that a summons served after judgment signed (*k*), or a summons taken out for a purpose

(*q*) Vol. 1, 667.
(*r*) Vol. 1, 176.
(*s*) *Ante*, 1121.
(*t*) *Ante*, 1092.
(*u*) *Post*, 1472.
(*x*) *Ante*, 1347.
(*y*) *Ante*, 1061.
(*z*) *Ante*, 869.
(*a*) *Ante*, 1158, 1160.
(*b*) See *ante*, 1089. See form of fiat, Chit. Forms, 511.
(*c*) See *ante*, 1423.
(*d*) *Humphreys* v. *Jones*, 6 M. & W. 418; 8 Dowl. 408, *S. C.* See *Spicer* v. *Bond*, 2 Dowl., N. S., 955.
(*e*) See R. H., 2 W. 4, s. 89, *ante*, 1066. And see Bagley's Pract. 91.
(*f*) See *Clark* v. *Stocken*, 2 Bing., N. S., 651).
(*g*) See Lush. Pract. 803.
(*h*) As to when a summons for time to plead is a stay of proceedings, see Vol. 1, 216. And see *Beazley* v. *Bailey*, 16 Law J., N. S., 1, Exch.
(*i*) *Spenceley* v. *Shoals*, 5 Dowl. 562.
(*j*) *Redford* v. *Edis*, 6 Taunt. 240: *Burnett* v. *Newton*, 1 Chit. Rep. 689. See *Anthill* v. *Metcalf*, 2 N. R. 169: *Hodgson* v. *Caley*, 8 Dowl. 318: *Phillips* v. *Birch*, 2 Dowl., N. S., 101; 5 Scott, N. R., 537, *S.C.*
(*k*) *Phillips* v. *Birch*, 5 Scott, N. R., 178; 4 M. & Gr. 403; 2 Dowl., N. S., 109, *S. C.*

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collateral to the proceedings in the cause, does not operate as a stay of proceedings (*l*). Nor does a summons, it is apprehended, operate as such stay, if it could be clearly established that it was not *bonâ fide* taken out, and was an abuse of the party's right to take it out, otherwise a party might by repeated summones delay the proceedings as long as he might think fit (*m*). A summons is a stay of proceedings only from the time at which it is *attendable*, and not from the time of the service (*n*), and it operates as such stay the moment the clock strikes the hour at which it is attendable (*o*); therefore a summons for further time to plead, or to plead several matters, is a stay of proceedings if it is returnable before or at the time the judgment office opens on the day after the time for pleading expires, and the plaintiff could not sign judgment until the summons is disposed of (*p*). And it operates as such a stay, although it be attendable at ten or eleven o'clock in the morning in term time at chambers, provided the judge specially grants such a summons, and this notwithstanding the judge does not attend chambers at that hour (*q*). It operates as a stay of proceedings from the time it is attendable until it is disposed of, provided the party who obtained it uses due diligence in following it up (*r*), that is to say, by obtaining and serving a second summons on the same day the first was attendable, in case the opposite party failed to attend it, and then an order. If the parties attend and agree to adjourn the summons, the stay continues until it is disposed of (*s*). It will cease to operate as a stay if the party taking it out expressly by notice or otherwise abandon it. And where a summons was returnable at eleven o'clock, at which time also judgment was due, and at half-past ten the defendant delivered a plea, it was held that he had abandoned the summons, by delivering the plea before it was attendable (*t*). When a party has been misled by the service of a summons, the Court will not permit the adverse party to take advantage of the mistake: therefore, when a defendant took out a summons to put off a trial at the assizes, in consequence of the absence of a material witness, and the hearing of the summons was only four days before the commission day, and no order was made on it, but the plaintiff countermanded the trial, thinking he might be put to inconvenience, it was holden, that there had been no default which would entitle the defendant to move for judgment as in case of a nonsuit (*u*).

(*l*) *Phillips* v. *Birch*, 2 Dowl., N. S., 97: *Anon.*, M. T., 28 G. 3, Q. B.; Tidd's New Prac. 256: Tidd, 9th ed. 470.

(*m*) *Bebb* v. *Wales*, 5 Dowl. 458.

(*n*) *Morris* v. *Hunt*, 2 B. & Ald. 355; 1 Chit. Rep. 93, *S. C.*: *Rex* v. *Sheriff of Middlesex*, 5 B. & Ald. 746: *Glover* v. *Watmore*, 5 B. & C. 769: *Anthill* v. *Metcalfe*, 2 New Rep. 169: *Reiford* v. *Ettis*, 6 Taunt. 240. There is a difference in this respect between a rule *nisi* and a summons, the former operating as a stay from the time of the service; the reason for such difference being, that the latter is the act of the Court, the former the act of the party.

(*o*) *Wells* v. *Secret*, *infra*: *Abernethy* v. *Paton*, 6 Scott, 586.

(*p*) *Wells* v. *Secret*, 2 Dowl. 447: *Knowles* v. *Vallance*, 1 Gale, 16: *Roberts* v. *Cuthill*, 4 Dowl. 204: *Spenceley* v. *Shouls*, 5 Dowl. 562: *Burton* v. *Warren*, 3 Dowl. & L. 142. It is a stay though defendant was under a *peremptory* order to plead: *Beasley* v. *Bailey*, 16 Law J., N. S., 1, Exch.

(*q*) *Eyles* v. *Walter*, 5 Dowl. 232. See as to making a summons so returnable, *ante*, 1434.

(*r*) *Knowles* v. *Vallance*, 1 Gale, 16: *Spenceley* v. *Shouls*, 5 Dowl. 562: *Sargent* v. *Brown*, 2 Dowl., N. S., 985: *Trego* v. *Tatham*, 2 Scott, N. R., 517; 9 Dowl. 379; 2 M. & G. 509, *S. C.*

(*s*) See *Sargent* v. *Brown*, 2 Dowl., N. S. 985.

(*t*) *Burton* v. *Warren*, 3 Dowl. & L., 142.

(*u*) *Randall* v. *Bailey*, 2 Dowl. 113.

When the summons operates as a stay, it has the same effect as a rule of the court staying proceedings, which has been already noticed, *ante*, 1419. A party cannot make even an application to the Court respecting a matter pending before a judge at chambers (*x*). And it would seem that the plaintiff could not even properly obtain a rule to discontinue (*y*).

What proceedings stayed.

The time allowed for taking the next step after a rule *nisi* staying the proceedings has been disposed of will be found pointed out, *ante*, 1425; and the rule there laid down is applicable to the case of a summons.

Time to take the next step after summons disposed of.

Attendance on Summons and Order, &c.]—When the opposite attorney is served with a copy of the summons, if he have no cause to shew, he may indorse upon the summons his consent to an order being made; it is optional with him, however, whether he do so or not. If he indorse his consent, *you may immediately take the summons so indorsed to the judge's chambers, and the clerk will make out the order as a matter of course* (*z*). *In some cases, however, notwithstanding the opposite party is thus willing to consent to the order, the judge may require his attendance before making it. On the order being obtained, serve it on the opposite attorney or agent.* Unless the order be actually drawn up and served without delay, the other party may proceed as if no summons had been taken out, and this although he have indorsed his consent, as above mentioned (*a*).

Attendance on summons and order, &c.

Where consent to order.

If the opposite attorney or agent do not consent to an order, *attend at the judge's chambers at the hour appointed by the summons, and wait there half an hour* (*b*); *and if the opposite attorney or agent, or some person for him, do not attend within that time, then take out a second summons, and serve him with a copy of it, as at first; and if he do not attend within the half hour after the time appointed by such second summons* (*c*), *then upon affidavit of the service of the two summonses and attendances* (*d*), *the judge's clerk will make out the order required, and give it to you; then serve the order on the opposite attorney or agent, as directed with respect to the service of the summons, ante*, 1434. *If the party obtaining the summons do not attend, it will be considered that he has abandoned it. In that case, if he afterwards wish to renew the summons, he must take out and serve a fresh one.*

Where opposite side neither consents nor attends.

The parties frequently agree to the summons being adjourned by the judge till the next or future day; in which case the adjournment by consent should be marked by the judge, and it will operate as a stay of proceedings until it is disposed of (*e*); on such adjournment no second summons is necessary.

Where parties agree to adjourn.

In some cases by the practice, and in other cases under particular circumstances to be named to the judge, the summons is granted *peremptorily* in the first instance, and a second sum-

On peremptory summons.

(*x*) *Abbott* v. *Hopper*, 8 Dowl. 19. And see *Trees* v. *Fatham*, 9 Dowl. 379; and *ante*, 1419.

(*y*) *Murray* v. *Silver*, 3 Dowl. & L. 26; 1 Com. B. 638, *S. C.*

(*z*) See the form, Chit. Forms, 643.

(*a*) *Joddrell* v. ——, 4 Taunt. 253. And see *post*, 1440.

(*b*) R. T., 35 G. 3; 4 T. R. 402.

(*c*) R. T., 1 W. 4, r. 9. That rule provides, "That hereafter it shall not be necessary to issue more than two summonses for attendance before a judge, upon the same matter; and the party taking out such summonses shall be entitled to an order on the return of the second summons, unless cause is shewn to the contrary." Before this rule there must have been *three* summonses, and an affidavit of attendance thereon, before the judge could make an order for non-attendance. (Tidd, 9th ed. 511).

(*d*) See a form, Chit. Forms, 643.

(*e*) *Ante*, 1436.

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mons is not required (*f*). Where on motion to set aside an irregular judgment of *nonpros*, it appeared that the plaintiff's attorney's clerk without authority, though without any sinister motive, had inserted the word *peremptory* in a previous summons for the purpose, the Court made the plaintiff's attorney pay costs (*g*).

Order nisi making itself absolute.

As to an order *nisi* making itself absolute, and as to shewing cause against it, see *ante*, 1435.

When opposite party attends.

If the opposite attorney or agent attend upon any of these summonses, you will be called in before the judge in your turn, and upon your stating the grounds of the application, and the opposite attorney shewing cause against it, the judge either grants or refuses the order, as he thinks fit.

Grounds of application to be fully stated in first instance.

The party applying is bound to state fully and fairly the grounds of his application. Thus, before the introduction of the practice which requires the grounds of irregularity to be particularised in the summons to set aside proceedings on that account, it was considered that a party applying to set aside any proceeding was bound to state, on his first application, all the grounds why he prayed that it may be set aside (*h*). And in a case where a party applied to a judge in vacation to set aside an execution, upon the ground that he had not been served with written notice of taxation, but said nothing of a subsisting writ of error, the allowance of which must have been known to him when he took out the summons; upon motion to the Court afterwards to set aside the judgment, on the ground that a writ of error had been sued out, the Court refused to interfere, because the defendant, by not communicating the circumstance in the first instance, had induced the plaintiff to take another step attended with expense (*i*).

Affidavit, when required.

In general, an affidavit is not absolutely necessary in support of the application or against it, unless expresly required by act of Parliament, or by rule of Court (*k*). Where, however, the facts are disputed, and sometimes in other cases, the judge requires one. An affidavit, if made, should contain all the general requisites of an affidavit; and as to which see *post*, 1445, &c. As to the filing of it, see *post*, 1458.

Attendance by counsel, &c.

In ordinary cases, the attornies, by themselves or their clerks, attend before the judge and support the application, or shew cause against it; but in cases of difficulty they usually attend with counsel, or special pleader, in which case they have precedence. In term time, the Court will not, in general, hear counsel or pleader; but this rule does not apply to summonses which are taken out and returnable in vacation, and are adjourned to a day in term (*l*). Notice of attendance by counsel or pleader should be given a reasonable time before the hearing of the summons, otherwise the judge will postpone the case if the opposite party wishes it, in order that he may have counsel's or pleader's assistance. On the dismissal of the summons or order made, each party attending by counsel or pleader will have to pay the judge's clerk a fee of 5*s*., or 7*s*. in case the summons was adjourned.

(*f*) See *ante*, 1434.
(*g*) *Finnerty* v. *Smith*, 1 Bing., N. S., 649; 1 Scott, 743, S. C.
(*h*) 7 T. R. 455; 1 H. Bla. 101; 1 East, 537; 5 Taunt. 850; Bagley's Pract. 26.
(*i*) *Thorpe* v. *Bear*, 1 Chit. Rep. 194.
(*k*) See *Joseph* v. *Parry*, 3 Dowl. 699.
(*l*) *Doe Roberts* v. *Roe*, 13 M. & W. 691; 14 Law J., N. S., 101, Exch., S. C.

If the summons be dismissed the judge will mark such dismissal on the back of the copy served on the opposite party; and if dismissed with costs, or on any terms, the same will be so marked accordingly; and, in that case, the latter party should have an order drawn up for such costs, &c., and serve it on the opposite attorney or agent, and proceed to enforce it accordingly, if the costs be not paid. Summons dismissed.

If the judge refuses to decide upon the summons, but refers the applicant to the Court, he should apply to the Court promptly; and if the hearing was in vacation, he should apply early in the ensuing term, and not delay the application until the end of it (*n*). Referring the parties to the Court.

Costs.]—A judge at chambers has power to give costs on a summons (*o*). The judges resolved at one time not to give them except in extreme cases (*p*), but this is not always acted on in practice. The granting or refusing of them is entirely in the discretion of the judge, and he may, if he like, refuse them altogether, or he may fix the amount of them, or make the payment of them a condition of his granting the order (*q*). And the Court will rarely, except in an extreme and clear case, review his decision as to them (*r*). It is not usual for the judges to give costs at chambers on the discharge of a summons (*s*), unless the summons was vexatious or against good faith, or clearly ought not to have been taken out (*s*), or unless it is taken out asking for costs (*t*). If the order set aside proceedings "on payment of costs," by this is meant the costs of the particular act or acts set aside, the costs of the application, *i. e.* the summons, &c., and the costs of actually setting it aside (*u*). If nothing is said in the order as to the costs of it, such costs will not in general be costs in the cause, unless made so by the judge (*v*). If so made, the costs will be taxed for the successful party. When the order contains a condition which requires the taxation of costs, it may be taken, in the first instance, to the Master for an appointment, which he will mark on the original order (*x*). The appointment so marked should then be copied on the order to be served; and the Master's appointment should, of course, be attended to, or he will proceed *ex parte*, without making a second appointment (*y*). Costs.

Drawing up and Service of Order.]—If an order be made, it Drawing up

(*n*) *Warner* v. *Haddon*, 9 Dowl. 260: *King* v. *Birch*, 3 Q. B. 425: *Bate* v. *Lawrence*, 2 Dowl. & L. 83, *post*.

(*o*) *Dee Prescott* v. *Roe*, 1 Dowl. 274; 2 Moo. & Scott, 119; 9 Bing. 104, *S. C.*; *Hughes* v. *Brand*, 2 Dowl. 131: *Clement* v. *Weaver*, 4 Scott, N. R., 229; 3 M. & G. 551, *S. C.* This was formerly much doubted. *Bridge* v. *Wright*, 2 Ad. & E. 48; 4 Nev. & M. 5, *S. C.*; *Spicer* v. *Todd*, 2 C. & J. 165; 1 Dowl. 306, *S. C.*; *Kent* v. *Lee*, 2 B. & Adol. 415; 1 Dowl. 52, *S. C.*

(*p*) See *per Cur.* in *Re Bridge & Wright*, 4 Nev. & M. 5; 2 Ad. & E. 48, *S. C.*; *Sheriff* v. *Greeley*, 5 Nev. & M. 491; 1 H. & W. 588, *S. C.*; *Doe Prescott* v. *Roe*, 2 Moo. & Scott, 119; 9 Bing. 104; 1 Dowl. 274, *S. C.*

(*q*) See *Collins* v. *Aaron*, 4 Bing., N. S., 233; 6 Dowl. 423, *S. C.* Where the judge taxed the costs of an amendment at 3*s.* 4*d.*, and the Court held he had power to do so. And see *Tomlinson* v. *Bellard*, 12 Law J., N. S., 257, Q. B.; 3 G. & D. 607, *S. C.* See also *Davey* v. *Brown*, 1 Scott, 394; 1 Bing., N. S., 480, *S. C.*

(*r*) See *Hargrave* v. *Holden*, 3 Dowl. 176: *Sheriff* v. *Greeley*, 5 Nev. & M. 493: *Giraud* v. *Austin*, 1 Dowl., N. S., 703. Per *Parke*, B., in *Davey* v. *Brown*, *supra*: *Tegetgin* v. *Langford*, 10 M. & W. 556.

(*s*) *Thorncroft* v. *Dellis*, 11 Leg. Obs. 261; Tidd, New Pract., 256.

(*t*) See as to costs on the discharge of a rule *nisi*, or on making it absolute, *ante*, 1423, 1424.

(*u*) *Christie* v. *Thomson*, 1 Dowl., N. S., 592.

(*v*) *Mummery* v. *Campbell*, 10 Bing. 511; 4 Moo. & Scott, 379, *S. C.* And see further, *ante*, 1388.

(*x*) See *Waller* v. *Joy*, 16 Law J., N. S., 17, Exch.

(*y*) R. H., 2 W. 4, r. 1, s. 92.

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and service of order.

must be drawn up and served within a reasonable time (*z*), or the opposite party may treat it as abandoned, even though the order was drawn up by consent (*a*), or though his attorney

In what time.

was present at the time the order was made (*b*), or though the order be conditional as "on the payment of costs" (*c*). If an order be obtained at five o'clock in the afternoon, and the parties live within a short distance of each other, it should be served before nine o'clock at night, or at all events a reasonable time before the opening of the offices on the following morning (*d*). Where the plaintiff obtained an order to amend the postea at half-past nine o'clock on the 22nd of November, but did not draw it up until the 23rd, and it was not served until four o'clock on the 24th, it was held, that, as no fresh step could have been taken by the defendant, the plaintiff had not abandoned the order (*e*). There is a rule in the Queen's Bench of *H. T.*, 59 *G.* 3, that "no summons for further time to plead, reply, or rejoin, or summons for further particulars of the plaintiff's demand, defendant's set-off, or other particular, be granted in any action depending in that court, unless the last previous order for time, further time, or particulars respectively, be first drawn up, and such order produced at the time of applying for any such summons."

Who may draw up the order.

Where, upon a summons attended at a judge's chambers, the judge indorses a minute of an order, it is at the option of the party by whom the summons was taken out, to have an order drawn up in pursuance of such minute or not (*f*); and this, although the opposite party consent to an order (*g*). If he do not draw it up, and the party summoned considers that the order pronounced is in his favour, he should take out a cross summons for the purpose of obtaining a similar order (*f*). And if parties, being before a judge at chambers, go by consent into matter not within the summons, and the judge make a minute of an order, the party in whose favour such minute is made, is, it seems, entitled to draw up an order accordingly (*f*).

Effect of.

Effect of the Order, and how enforced.]—The order made as above mentioned is in effect as binding and imperative as a rule of court (*h*). If, indeed, it has been obtained by a fraud practised on the judge's clerk who drew it up, or if the judge had no jurisdiction whatever over the subject-matter of the application, and consequently none to make it, it seems it might be disregarded altogether (*i*).

How enforced.

A judge's order may, after making it a rule of court, be enforced by attachment, in the manner pointed out in a subsequent Chapter, or, if it be for payment of money or costs, by execution, under the 1 & 2 *Vict. c.* 110, *s.* 18, as pointed out,

(*z*) *Kenney* v. *Hutchinson*, 6 M. & W. 134; 8 Dowl. 171, *S. C.* See *Maple* v. *Woodgate*, 10 Jur. 839.

(*a*) *Charge* v. *Farhall*, 4 B. & C. 865; 7 D. & R. 422, *S. C.*; *Edenor* v. *Hoffman*, 2 C. & J. 140: *Sedgwick* v. *Allerton*, 7 East, 542. See *Wright* v. *Stevenson*, 5 Taunt. 850: *Wilson* v. *Hunt*, 1 Chit. 647.

(*b*) *Kenney* v. *Hutchinson*, *supra*.

(*c*) *Normanby* v. *Jones*, 3 Dowl. & L. 43.

(*d*) *Kenney* v. *Hutchinson*, *supra*.

(*e*) *Sandford* v. *Alcock*, 10 M. & W. 689; 2 Dowl., N. S., 463, *S. C.*

(*f*) *Macdougall* v. *Nicholls*, 5 Nev. & M. 366; 3 Ad. & E. 813; 1 Har. & W. 462, *S. C.*; *Selly* v. *Richardson*, 6 Dowl. 774; Tidd, New Pract., 258.

(*g*) *Ante*, 1167.

(*h*) See per Lord *Mansfield*, C. J., in *R.* v. *Wilkes*, 4 Burr. 2569: *Wood* v. *Plant*, 1 Taunt. 47: *Lench* v. *Pargiter*, Doug. 682: *Briggs* v. *Sharp*, 6 Bing. 517: *Wilson* v. *Northorp*, 4 Dowl. 441.

(*i*) *Woosman* v. *Price*, 1 C. & M. 382: *Lander* v. *Gordon*, 7 M. & W. 218.

ante, 1429 (*j*). A conditional order for payment of costs cannot be enforced by attachment, although the step to be allowed on payment of costs has been taken without such payment (*k*); in that case there should be another order obtained, ordering absolutely the payment; but it does not follow that such order would, in all cases, be granted, and generally it would not be so (*l*). It seems, that if an order be made in an action brought in the Exchequer, and it be part of such order that it shall be made a rule of the Queen's Bench, there is no objection to its being so made (*m*). The rule for making a judge's order a rule of court is absolute in the first instance (*n*). Where the original order cannot be obtained, a duplicate may be sometimes made a rule of court (*o*). In the Queen's Bench and Exchequer, where the judge's order is made in vacation, it cannot be made a rule of court in that vacation (*p*); but this is otherwise in the Common Pleas (*q*); and, in the Queen's Bench and Exchequer, a judge's order may be made a rule of court in vacation, as of the preceding term, where the order was made in that term or before it. By *R. T.*, 3 *Vict.* (*r*), where a judge's order is made a rule of court, it shall be a part of the rule of court that the costs of making the order a rule of court shall be paid by the party against whom the order is made, provided an affidavit be made and filed, that the order has been served on the party or his attorney, and disobeyed (*s*). On this affidavit the rule for making the order a rule of court is, it seems, absolute in the first instance (*t*). A town agent conducting the cause in the court above is "an attorney" within the meaning of this rule (*u*).

Making order a rule of Court.

Costs of so doing.

A judge's order proves itself on mere production (*v*); or, if made a rule of court, it may be proved by production of the rule (*x*).

How proved.

When and how it may be abandoned.]—As soon as the order is drawn up and served, it is binding upon the party who obtains it (*y*), unless, indeed, it gives him liberty to adopt its terms or not; as, for instance, an order for liberty to amend, or the like (*z*). When an order for a stay of proceedings is obtained, there is a *locus pœnitentiæ* until it is served; but when once served, it cannot be got rid of without an instrument of equal force and authority; therefore, defendant cannot abandon an order for particulars by notice at foot of a demand of declaration; and judgment of *nonpros* signed pending such order will

When and how it may be abandoned.

(*j*) See *Hart* v. *Draper*, 2 Marsh. 358. 7 Taunt. 43, *S. C.*; *Baker* v. *Rye*, 1 Dowl. 689: *Ex p. Lawrence*, 2 Dowl. 230: *Jameson* v. *Raper*, 3 Moore, 65, n.

(*k*) *Rex* v. *Fenn*, 2 Dowl. 182: *Turner* v. *Gill*, 3 Dowl. 30. See *ante*, 1425.

(*l*) See *ante*, 1425.

(*m*) *Milstead* v. *Cranfield*, 9 Dowl. 194.

(*n*) *Wilson* v. *Northorp*, 2 C., M., & R. 326: *Swaine* v. *Stone*, 4 Moo. & Scott, 584: *Black* v. *Lowe*, 19th Nov. 1846, Exch.

(*o*) *Thomas* v. *Phelby*, 2 Dowl. 145.

(*p*) See *Rex* v. *Price*, 2 C. & M. 212; 2 Dowl. 233, *S. C.*

(*q*) See *Badman* v. *Pugh*, 6 Scott, N. R., 158; 2 Dowl., N. S., 912, *S. C.*

(*r*) 1 Scott, N. R., 215; 6 M. & W. 603; 12 Ad. & E. 1.

(*s*) See *Thompson* v. *Billing*, 11 M. & W. 361; 2 Dowl., N. S., 824, *S. C.*: *R.* v. *Jameson*, 6 M. & W. 603; 8 Dowl. 795: *Barehead* v. *Hall*, 8 Dowl. 796.

(*t*) *Black* v. *Lowe*, 19th Nov. 1846, Exch. But see *Spicer* v. *Bond*, 2 Dowl., N. S., 955, Q. B., cor. *Wightman*.

(*u*) *Thompson* v. *Billing*, 11 M. & W. 361; 2 Dowl., N. S., 824, *S. C.*: *Morris* v. *Bedward*, 9 Dowl. 130.

(*v*) *Davis* v. *Parsons*, 2 Dowl., N. S., 934.

(*x*) *Hill* v. *Halford*, 4 Camp. 17.

(*y*) *Griffin* v. *Dickenson*, 7 Dowl. 860: *Wilson* v. *Hunt*, 1 Chit. Rep. 647. See *Macdougall* v. *Nicholls*, 3 Ad. & E. 813; 5 Nev. & M. 366; 4 Dowl. 76, *S. C.*

(*z*) *Black* v. *Sangster*, 3 Dowl. 206; 1 C., M., & R. 521, *S. C.*

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be irregular (*a*). Where a defendant obtained an order to set aside a judgment upon payment of costs, the Court would not relieve him from the condition, and held that that he was not at liberty after service to abandon the order, and apply to the Court (*b*). As to treating an order as abandoned, when not served within a reasonable time, see *ante*, 1440.

Setting aside, &c., order by application to a judge.

Setting aside or Amending Order.]—When an order has been made, or the conditions annexed to an order imposed, under a mistake, or when new circumstances arise which render it clearly essential to the justice of the case, a judge will amend or vary his order, or will sometimes even rescind it, when it appears to have been irregularly and improperly obtained (*c*). The application for this purpose must be by summons, as in the first instance, which will be granted by any judge of the court, but it can only be heard before the judge who made the order; and, in general, no judge will hear a summons relating to, or, indeed, interfere in any way with the order of another judge (*d*), unless the judge who made the order is not in town, or some new matter is to be considered, or when urgent and peculiar circumstances render it obviously necessary for the purposes of justice (*e*). After an appeal to the judge who made the order, it seems that a further appeal cannot be made to the Court (*f*).

By application to the Court.

In what cases.

A party dissatisfied with a judge's order may, in general, apply to the Court to have it rescinded, and this, although the decision of the judge in the case was on the merits (*g*). And even where, by an act of Parliament, power is given to a single judge to decide a matter, an appeal in general lies to the Court against his decision (*h*). But not so where the power is vested in him alone, and the jurisdiction of the Court to interfere is excluded. Nor will the Court, in general, review a judge's order in cases where the subject-matter is left exclusively to his discretionary power, as in the case of an amendment at *Nisi Prius*, under the 9 *G.* 4, *c.* 15 (*i*); or in the case of his certifying under the stat. 3 & 4 *Vict. c.* 24, and other acts to give plaintiff his costs (*j*); or of certifying his opinion under the rule of *H. T.*, 4 *W.* 4, *ante*, *Vol.* 1, 269, that a distinct subject-matter of complaint or defence was intended to be set up under two or more counts or pleas (*k*); or, in the case of his ordering a poor debtor to be discharged, under the now repealed Lords Act, during the vacation, for nonpayment by his creditor of 2*s.* 4*d.* a-week (*l*); or in the case of his deciding that an application to set aside proceedings for irregularity is made in time, and his making an order accordingly, for the question as to the time for making the application is for his discretion (*m*). Nor will the

(*a*) *Wickens* v. *Cox*, 4 M. & W. 67.
(*b*) *Giraud* v. *Austen*, 4 Scott, N. R., 750; 1 Dowl., N. S., 703, *S. C.*
(*c*) *Clark* v. *Manns*, 1 Dowl. 656; Bagley's Prac. 29: *Hall* v. *West*, 1 Dowl. & L. 412.
(*d*) 2 Chit. Rep. 83: *Wright* v. *Stevenson*, 5 Taunt. 850: *Thompson* v. *Becke*, *supra*.
(*e*) Price's N. R. 317.
(*f*) *Thompson* v. *Becke*, 4 Q. B. 759. See *Thomas* v. *Evans*, 9 M. & W. 899.
(*g*) *Pike* v. *Davis*, 8 Dowl. 367.
(*h*) *Shortridge* v. *Young*, 12 M. & W. 5: *Tuggin* v. *Langford*, 2 Dowl., N. S., 467; 10 M. & W. 556, *S. C.*: *Fowler* v. *Churchill*, 2 Dowl., N. S., 868: *Brown* v. *Bamford*, 9 M. & W. 42.
(*i*) *R.* v. *Archbishop of York*, 3 Nev. & M. 453; 1 Ad. & E. 394, *S. C.* And see *Atkinson* v. *Baynton*, 1 Bing., N. C., 749; 1 Hodges, 144, *S. C.*
(*j*) *Ante*, 1362, 1364.
(*k*) *Jenkins* v. *Treloar*, 1 M. & W. 16: *Chalmondeley* v. *Payne*, 3 Bing., N. S., 708.
(*l*) *Leach* v. *Pargiter*, 1 Dowl. 68.
(*m*) *Tadman* v. *Wood*, 4 A. & E. 1011: and see *Lane* v. *Newman*, 1 Bail C. Rep. 88.

Court rescind a judge's order, which appears upon the face of it to have been made by consent; and if the words "by consent" have been improperly inserted, application should be made to the judge to set it right (*m*). Nor will the Court, as we have seen, in general interfere with the judge's decision, as to the costs of the application to him (*n*). Other instances also have been noticed in other parts of this work, where the Court will not interfere with a judge's decision. It may be added, that there is no necessity for applying to the Court to set aside an order which is a nullity (*o*).

Time for application.

If the order was made in term, the party dissatisfied with it may immediately apply to the Court to have it set aside (*p*); or, if made in vacation, he may apply to the Court in the following term to have, not only the order, but also all other proceedings which have been had under it, set aside (*q*). The application should be made as early as possible, so as to prevent the opposite party from incurring further expense (*r*); and, if practicable, before the order has been acted on (*s*). Where judgment was signed for want of a plea on the 17th of April, and a summons for setting it aside was discharged on the 23rd, and execution issued on the 27th, and a rule *nisi* was obtained on the 28th, to set aside the order, it was held too late, and that the defendant ought to have applied on the 24th or 26th (*t*).

Form, &c. of application.

The application should be to discharge the order; for instance, if pleas have been pleaded by a judge's order, the motion should be to rescind the order, and not to strike out the pleas (*u*). So, in the case of an order to hold to bail, founded on the insufficiency of the affidavit of debt, the application should be to set aside the order, and not the *capias* (*x*). It is not necessary to make the order a rule of court before moving to set it aside (*y*). But if the order has been made a rule of court, the application should be to set aside such rule (*z*). The application may be made to a single judge sitting in the Bail Court (*a*); but it is usual and best to apply to the full Court.

Affidavit in support of.

The application should be made on producing a copy of the order (*b*), which should be annexed to or set forth in the affidavit, or the affidavit should state the substance of the order, which has been held sufficient without producing a copy (*c*). The materials upon which the order was founded, should be brought

(*m*) *Hall* v. *West*, 1 Dowl. & L. 412. See a case in which the Court, under special circumstances, interfered, though the order was drawn up by consent: *Wade* v. *Simson*, 2 Dowl. & L. 658.

(*n*) *Ante*, 1439.

(*o*) *Lander* v. *Gordon*, 7 M. & W. 218. *Woosnam* v. *Price*, 1 C. & M. 352.

(*p*) *Jones* v. *Kirk*, 1 Chit. 246: *Peacrase* v. *Hardy*, 1 B. & Ad. 154: *Doe Duram* v. *Meare*, 4 Moo. & P. 761; 7 Dowl. 194, *S. C.*: *Eusbank* v. *Owen*, 5 Ad. & E. 298.

(*q*) See per Lord *Mansfield*, C. J., in *Rex* v. *Wilkes*, 4 Burr. 2569: *Granby* v. *Freood*, 11 Leg. Obs. 213: *Cocker* v. *Tempest*, 7 M. & W. 502; 9 Dowl. 306.

(*r*) *Thompson* v. *Carter*, 3 Dowl. 667: *Clement* v. *Weaver*, 4 Scott, N. R., 229; 1 Dowl., N. S., 193, *S. C.*; *Walker* v. *Perkins*, 2 Dowl. & L. 982: *Warner* v. *Haddon*, 9 Dowl. 960: *King* v. *Birch*, 3 Q. B. 425: *Bell* v. *Lawrence*, 2 Dowl. & L. 83.

(*s*) *Thompson* v. *Becke*, 4 Q. B. 759: *Simmons* v. *King*, 2 Dowl. & L. 786.

(*t*) *Shield* v. *Quick*, 8 M. & W. 290. And see *Clement* v. *Weaver*, *supra*.

(*u*) *South Eastern Railway* v. *Sprot*, 11 Ad. & E. 167.

(*x*) Vol. 1, 702.

(*y*) *Spicer* v. *Todd*, 2 C. & J. 165; 1 Dowl. 306, *S. C.* But see *Hawes* v. *Johnson*, 1 Y. & J. 12: *Crunch* v. *Tregoning*, 5 Dowl. 230.

(*z*) *Clement* v. *Weaver*, 4 Scott, N. R., 229; 1 Dowl., N. S., 193, *S. C.* See *Flight* v. *Cook*, 1 Dowl. & L. 714.

(*a*) *King* v. *Myers*, 5 Dowl. 696.

(*b*) *Hoby* v. *Pritchard*, 5 Dowl. 300.

(*c*) *Shirley* v. *Jacobs*, 3 Dowl. 101: *Barrett Navigation* v. *Shower*, 8 Dowl. 173.

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before the Court (*d*). The same affidavits as were used before the judge on obtaining the order may be used on the application to set it aside (*e*). But the Courts of Queen's Bench and Common Pleas, it seems, will not allow any affidavits to be used stating facts within the knowledge of the party at the time the order was made (*f*), though this is otherwise in the Exchequer (*g*), provided the affidavits used before the judge be also produced (*h*). The affidavit in support of the rule need not take notice of a previous application for the same purpose to a judge at chambers, and refused, unless to account for any delay (*i*); and, in general, if the application be late, and there are grounds to excuse the delay, these should appear on the affidavits (*j*). If the affidavits which were used at chambers be intended to be used upon the motion, notice should be given to the judge's clerk to produce them, and he will thereupon hand them to the officer acting as clerk of the rules; but if he have already returned them to the rule office, notice should be given to the clerk of the rules to have them in Court (*k*).

Costs.

In general, no costs are allowed on the rescinding (*l*). But if no mention was made of costs, it seems that, in the Exchequer, they would be costs in the cause (*m*).

How to proceed if order refused, and party dissatisfied with refusal.

How to proceed if Order refused, and Party dissatisfied with Refusal.]—When an order is refused by a judge, the applicant, if dissatisfied, should apply to the Court (*n*), and not to another judge. The practice of applying to a second judge for an order which has been refused by the first, has been severely reprobated (*o*). In the Court of Exchequer, it would seem that the application to the Court may be strengthened by additional affidavits (*p*). But this is otherwise in the other courts (*q*). If a summons to set aside proceedings for irregularity is dismissed by a judge at chambers, on the ground that the application is too late, the Court, it seems, will not interfere (*r*).

(*d*) *Needham* v. *Bristow*, 4 Scott, N. R., 773; 1 Dowl. 700; 4 M. & Gr. 262, *S. C.*: *Heath* v. *Nesbitt*, 2 Dowl., N. S., 1041.

(*e*) *Pickford* v. *Ewington*, 4 Dowl. 453; 1 T. & G. 29; 1 Gale, 357, *S. C.*

(*f*) *Alexander* v. *Porter*, 1 Dowl., N. S., 299: *Ryall* v. *Bland*, 5 Jur. 1037: *Flight* v. *Cook*, 1 Dowl. & L. 714: *Hallett* v. *Cresswell*, 10 Jur. 966; 1 Bail C. Rep. 1, *S. C.*

(*g*) *Gibbons* v. *Spalding*, 2 Dowl., N. S., 746; 12 Law J. 185, Exch., *S. C.*: *Pike* v. *Davis*, 6 M. & W. 546; 8 Dowl. 387, *S. C.*; *Thomas* v. *Evans*, 9 M. & W. 829.

(*h*) *Heath* v. *Nesbitt*, 2 Dowl., N. S., 1041: *Needham* v. *Bristow*, *supra*.

(*i*) *Thomas* v. *Evans*, 9 M. & W. 829.

(*j*) *Sugars* v. *Concannon*, 5 M. & W. 20.

(*k*) See *Needham* v. *Bristow*, *supra*.

(*l*) *Hargrave* v. *Holden*, 3 Dowl. 176; *Wright* v. *Skinner*, 1 T. & G. 69: *Wilkes* v. *Ottley*, 2 Nev. & P. 99: *Bathbank* v. *Owen*, 5 Ad. & E. 298. See *Jones* v. *Hay*, 1 Scott, N. R., 399.

(*m*) *Wright* v. *Skinner*, 1 T. & G. 69.

(*n*) See *Johnstone* v. *Knowles*, 1 Dowl., N. S., 30: *Morse* v. *Apperley*, 6 M. & W. 145.

(*o*) *Wright* v. *Stevenson*, 5 Taunt. 850: *Steer* v. *Smith*, 1 Chit. Rep. 80: *Thompson* v. *Becke*, 4 Q. B. 750; 1 Dav. & Mer. 49, *S. C.*

(*p*) *Pike* v. *Davis*, 8 Dowl. 387; 6 M. & W. 546, *S. C.*, *ante*, 1442.

(*q*) See *supra*, n. (*g*); and *Flight* v. *Cook*, 1 Dowl. & L. 714. See *Hallett* v. *Cresswell*, 10 Jur. 966, B. C.; 1 Bail C. Rep. 1, *S. C.*

(*r*) *Lane* v. *Newman*, 1 Bail C. Rep. 93. And see *Tadman* v. *Wood*, 4 A. & E. 1011; *ante*, 1442.

CHAPTER III.

AFFIDAVITS.

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Contents of.]—THE contents of an affidavit must necessarily vary according to the circumstances of each case. The rules relating to them in particular cases will be found under their respective heads throughout the work. The only general rule which can be laid down is, that the affidavit should set forth all the facts and circumstances necessary to be stated in each particular case, explicitly and with certainty; and that where a deponent swears to any fact as within his own knowledge, he must swear directly and positively. For instance, material dates must be sworn to positively, and the word "about" being considered to depend upon the conscience of the party making the affidavit, should not be used in specifying them (*a*). An affidavit of service made "on the day of the date hereof," no date being mentioned but that of the jurat, is insufficient (*b*). An allegation that deponent objects that there is no notice, &c., is not a sufficient averment that in fact there was no notice (*c*). Where the fact is not within the defendant's knowledge, so much precision is not necessary (*d*). Where the deponent states a fact from information, he should in general add that he verily believes it to be true. An affidavit that the deponent "verily believes," is entitled to some credit in the absence of a contrary affidavit (*e*). Affidavits in support of a rule to set aside proceedings must shew a clear case for relief; and, therefore, when it was moved to set aside a judgment on the ground that the accounts between the parties had been investigated and found to be incorrect, and that the plaintiff had agreed that any error should be rectified, it was held that the affidavits were defective, in not stating that the error was in the amount (*f*). So, on application for a review of taxation of costs, the affidavit should state the specific objections to the taxation (*g*).

In general.

(*a*) *Willes* v. *James*, 1 Dowl. 498. See *Basket* v. *Barnard*, 4 M. & Sel. 231.

(*b*) *Hughes* v. *Browne*, 1 Dowl. & L. 789; 7 Scott, N. R., 517, S. C.; 6 M. & Gr. 751.

(*c*) *R.* v. *Manchester Railway Company*, 3 Nev. & P. 439; And see *Clussey* v. *Drayton*, 6 M. & W. 17.

(*d*) See *West* v. *Eyles*, 2 W. Bl. 1059.

(*e*) Per Lord *Abinger*, *Maton* v. *Haytor*, Eq. Exch. T. T. 1839; 3 Jurist, 769.

(*f*) *Preedy* v. *Lovell*, 4 Dowl. 671. And see *ante*, 1274, as to the affidavit to set aside proceedings for irregularity.

(*g*) See *Daniel* v. *Bishop*, M'Clel. 61; *ante*, 1395.

PART VI.

Formal parts.

When the affidavit is made by one person only, it begins thus:—"*A. B., of* ——, *Gentleman, maketh oath and saith, that*" &c.; but when made by more than one person, then thus:—"*A. B., of* ——, *Gentleman, and C. D., of* ——, *Esquire, severally make oath and say; and first this deponent A. B., for himself saith, that*" &c.; "*and this deponent C. D., for himself saith, that*" &c. And if there be any facts to which both of them can swear, then "*and these several deponents, A. B. and C. D., say, that*" &c. (*h*)

Clerical error.

An affidavit in which the word "oath" was omitted (*i*), and another in which the word "said" was substituted for "saith," were held insufficient (*k*). So was an affidavit of service in ejectment omitting the word "copy" (*l*). But, in general, clerical errors and mistakes in spelling are not considered a sufficient ground for rejecting an affidavit when the meaning is clear (*m*).

Erasures.

An unauthorised alteration in the *jurat* or other parts of the affidavit after it is sworn, will render it null, and invalidate any proceeding founded on it (*n*). If any interlineation be made in the affidavit previously to its being sworn, it should be noticed, by the commissioner or other officer before whom it is sworn, by placing his initials in the margin, or the affidavit cannot be read.

Unnecessary matter.

It may be here observed that the affidavit should not contain unnecessary matter; if it does so to any great extent, the Court will refer it to the Master, and make the party using it pay the costs occasioned by the unnecessary matter (*o*). The rule for this purpose is absolute in the first instance (*p*).

Stamp.

Stamp.]—No stamp duty is necessary upon affidavits to be filed, read, or used, in any of the courts of law or equity at Westminster, or before any judges or officers of the said courts, in any action or suit, or otherwise howsoever (*q*).

Title of the court.

Title of the Court.]—If there be a cause in court, all affidavits made use of in the progress of it must be intitled correctly in the court (*r*). Therefore, an affidavit to support a motion made in a cause removed by *certiorari* into the Court of Queen's Bench, should be intitled in that court (*s*). And, generally, the affidavit should be intitled in the court in which it is to be used (*t*). But if there be any other thing on the face of the

(*h*) *Preedy* v. *Lovell*, 4 Dowl. 671. See Chit. Forms, 644.

(*i*) *Oliver* v. *Price*, 3 Dowl. 261: *Doe* v. *Clark*, 2 Dowl., N. S., 393. This is the case, though the affidavit purports by the jurat to be duly sworn (*S. C.*)

(*k*) *Hesworth* v. *Hubberstey*, 3 Dowl. 455.

(*l*) *Anon.*, 1 Chit. 562, n.

(*m*) *Hesworth* v. *Hubberstey*, 3 Dowl. 455.

(*n*) *Finnerty* v. *Smith*, 1 Bing., N. C., 649: *Wright* v. *Skinner*, 5 Dowl. 92. See further, *post*, 1454.

(*o*) *Bromley* v. *Foster*, 1 Chit. Rep. 562: *Lewis* v. *Woolrych*, 3 Dowl. 692: *Ex p. Heullan*, 7 Price, 594: *Thompson* v. *Dicas*, 2 Dowl. 93, 95. In *Williams* v. *Hunt*, 1 Chit. 321, the Court refused a rule to review taxation, because the affidavit on which it was moved contained a mass of irrelevant matter as to the merits of the case. But see *The King* v. *Burn*, 7 Ad. & E. 190.

(*p*) *Balls* v. *Smythe*, 2 Scott, N. R., 495; 2 M. & G. 350: *Ex p. Chisman*, 2 Gl. & J. 315.

(*q*) See 4 & 5 Vict. c. 34; 5 G. 4, c. 41; 55 G. 3, c. 184: *Re Templeman and Reed*, 9 Dowl. 962: *Hill* v. *Slocombe*, 9 Dowl. 339: *R.* v. *Mayor of Lichfield*, 1 Q. B. 453.

(*r*) *Mulling* v. *Poland*, 3 M. & Sel. 137: *R.* v. *Hare*, 13 East, 169: *Osborn* v. *Tatum*, 1 B. & P. 271. And see *Reid* v. *Burke*, 12 Moore, 298; 4 Bing. 101, S. C., in which case the affidavit was intitled in the "Common Place" instead of "Common Pleas," and held good. So an affidavit intitled "In the Exchequer" instead of "In the Exchequer of Pleas," is sufficient: *Hands* v. *Clements*, 11 M. & W. 816.

(*s*) *Franks* v. *Wicks*, 9 Dowl. 489. And see as to a *habeas cum causâ*, *Perrin* v. *West*, 5 N. & M. 291.

(*t*) See *Osborne* v. *Tatum*, 1 B. & P. 271: *Wigden* v. *Birt*, 1 Dowl., N. S., 93: *Re Lord Cardross*, 5 M. & W. 545.

affidavit which sufficiently shews the court in which the affidavit is to be used, it will suffice. Therefore, if sworn before a judge of the court it will suffice, though not intitled in the court (*u*). An affidavit of debt not intitled in the court, but purporting at the foot of it to have been sworn before "J. Y., deputy filazer" (*v*), or "at the King's Bench Office, Inner Temple, before me, C. T." (*x*), has been held sufficient. Where the affidavit was intitled "In the Exchequer," but it appeared by the *jurat* to be sworn before an officer on the plea-side of the court, it was held sufficient (*y*). If the affidavit be sworn before a commissioner of the court, it need not be intitled in it, if on the face of the affidavit or *jurat* he appear to be such commissioner (*z*). And by *R. H.* 2 *W.* 4, *r.* 4, "an affidavit sworn before a judge of any of the Courts of King's Bench, Common Pleas, or Exchequer, shall be received in the court to which such judge belongs, though not intitled of that court, but not in any other court, unless intitled of the court in which it is to be used." Where an affidavit of debt was sworn in Ireland, before a commissioner of the Common Pleas and Exchequer, it was held that the title of the court need not be prefixed to the affidavit when sworn, but that the affidavit might be taken before such commissioner to be afterwards intitled, and used in either of the courts (*a*). And it seems that it may be used in either court without being previously intitled, if it appear by the *jurat* that the person before whom it was sworn is a commissioner of both courts (*b*).

Title of cause.

Title of the Cause.]—If there be a cause in court, the affidavit in support of or in opposition to a motion respecting it, must also be intitled *in the cause*, stating the christian names as well as the surnames of *all* the parties, otherwise it cannot be used (*c*). Intitling it T. *v.* G "and others," would be bad (*d*). The christian names must be written at length (*e*). But an affidavit in an action in which the defendant has been described by the initial letter of his christian name only, should, in the title, describe him by such initial letter (*f*). It seems, however, that, in this latter case, the affidavit should shew a ground for such title; and where, in an action on a bill, the initial merely of the defendant's christian name was given, it was held, that it should be accompanied by an affidavit that the defendant had signed the bill in the same way (*g*). It must also clearly appear which of the parties are plaintiffs and which are defendants (*h*). Even intitling the cause as "C. D.

All parties' names should be stated.

Initials.

Should appear who plaintiff and who defendant.

(*u*) *R.* v. *Hare*, 13 East, 189.
(*v*) *Bland* v. *Drake*, 1 Chit. Rep. 165.
(*x*) *Howell* v. *Wilkin*, 7 B. & C. 783.
(*y*) *Hands* v. *Clements*, 11 M. & W. 816; 1 Dowl. & L. 370, *S. C.*
(*z*) *Urquhart* v. *Dick*, 3 Dowl. 17. In that case the affidavit was sworn in Scotland.
(*a*) *Perse* v. *Browning*, 1 M. & W. 362.
(*b*) *White* v. *Irving*, 5 Dowl. 289.
(*c*) *Forse* v. *Diemar*, 7 T. R. 661: *Bullman* v. *Callow*, 1 Chit. Rep. 727: *Anderson* v. *Baker*, 3 Dowl. 107. See *Dand* v. *Barnes*, 1 Marsh. 403; 6 Taunt. 5, *S. C.*: *Mackenzie* v. *Martin*, Id. 286: *Cohen* v. *Williams*, 8 Dowl. 418: *Bodley* v. *Reynolds*, 15 Law J., N. S., 152, Q. B. The affidavit of verification annexed to a plea in abatement need not be intitled if the plea be so, *ante*, 819.
(*d*) *Tomkins* v. *Gooch*, 5 Dowl. 509: *Doe* d. *Pryme* v. *Roe*, 8 Dowl. 340: *Doe* v. *Welsford*, 7 Scott, 172.
(*e*) *Masters* v. *Carter*, 4 Dowl. 577.
(*f*) *R.* v. *Sheriff of Surrey*, 8 Dowl. 510. See *Sims* v. *Prosser*, 15 M. & W. 151. According to *Lomax* v. *Kilpin*, 16 Law J., N. S., 23, Exch., the affidavit may in such a case be intitled in the name in full.
(*g*) *Hilbert* v. *Wilkins*, 8 Dowl. 139.
(*h*) *Harris* v. *Griffiths*, 4 Dowl. 289; 1 H. & W. 515, *S. C.*

PART VI.

Consequence of defect.

Discharging rule for defective title.

Alias.

Describing party as "the elder."

Where defendant has been misnamed.

Describing plaintiff as "gentleman," one, &c.

Where several defendants.

Several actions.

Representative character, &c.

ats. A. B." instead of A. B. *v.* C. D., has been held bad(*h*). If defective in either of these respects, the Court will not allow it to be read, even although the adverse party be willing to waive the objection (*i*). And if the affidavit be in verification of a plea in abatement, the plaintiff might, for such a defect, in general sign judgment for want of a plea (*j*). The Court, when they discharge a rule upon the ground that the affidavit upon which it is obtained is wrongly intitled in the cause, almost invariably do so without costs (*k*). We will proceed to enumerate a variety of instances as to the sufficiency or insufficiency of affidavits in respect of the title in the cause. An affidavit in a cause between the plaintiff "and J. Tilly, otherwise J. Tillay," intitled as between the plaintiff and J. Tilly, was held sufficient (*l*). In a cause between "J. S. and G. J., the elder," an affidavit was intitled omitting the words "the elder," the Court held it properly intitled, as G. J. meant G. J. the elder (*m*). But an affidavit intitled "G. Shrimpton *v.* Wm. Carter *the elder*, sued as William Carter," the cause being G. Shrimpton *v.* Wm. Carter, was held bad (*n*). On an application to set aside a distringas, or the like, on the ground of misnomer, the affidavit must in the Exchequer be intitled in the action as it is, until appearance (*o*), but after that with the defendant's real name, "sued by the name &c." in the writ (*p*). In the Common Pleas it may be in the latter form in both cases (*q*). An affidavit to set aside a *ca. sa.* for misnomer of the defendant should be intitled in the name by which he was sued (*r*). Describing the plaintiff, in the title of the affidavit, as "Gent., one" &c., he not being an attorney, does not vitiate it; such description may be rejected as surplusage (*s*). In an action against several defendants, if they be not all in court, the affidavit may be intitled in the names of those only who are in court (*t*). An affidavit in an action against two before declaration may, it seems, be intitled "A. *v.* B.," (the defendant who makes the application (*u*)), or "A. *v.* B. sued with C." (the other defendant (*x*)). A motion on behalf of the same plaintiff, in two different actions, upon the same ground of application, may be made upon one affidavit intitled in both actions (*y*). It should also appear from the title of the affidavit, in what *character* the parties sue or are sued (*z*). Styling the plaintiff as "assignee &c.," without saying of whom, is

(*h*) *Richard* v. *Isaac*, 1 C., M., & R. 136; 2 Dowl. 710, *S. C.*

(*i*) *Owen* v. *Hurd*, 2 T. R. 644.

(*j*) *Ante*, 819.

(*k*) *Doe Nevills* v. *Lloyd*, 2 Dowl., N. S., 330: *Harris* v. *Matthews*, 4 Dowl. 606. See *ante*, 1424.

(*l*) *Cooper* v. *Tilly*, 7 Jur. 679, Exch.

(*m*) *Singleton* v. *Johnson*, 9 M. & W. 67; 1 Dowl., N. S., 356, *S. C.* See *Young* v. *Young*, 1 Dowl., N. S., 865.

(*n*) *Shrimpton* v. *Carter*, 3 Dowl. 648. See *Barthwick* v. *Ravenscroft*, *infra*.: *Singleton* v. *Johnson*, *supra*.

(*o*) *Barthwick* v. *Ravenscroft*, 5 M. & W. 31; 7 Dowl. 393, *S. C.* And see *Swift* v. *Knight*, 5 M. & W. 618; 7 Dowl. 563, *S. C.*

(*p*) *Jones* v. *Eldridge*, 1 Dowl., N. S., 710; 4 Scott, N. R., 751; 4 M. & G., 995: *Dunn* v. *Hodson*, 1 Dowl. & L. 204. See *Finch* v. *Cocker*, 2 Dowl. 393; 2 C. & M. 412, *S. C.*: *Sims* v. *Roper*, 15 M. & W. 151: *Franklin* v. *Hodgkinson*, 15 Law J., N. S., 132, Q. B.

(*q*) *Jones* v. *Eldridge*, *supra*.

(*r*) *Thorpe* v. *Hook*, 1 Dowl. 494.

(*s*) *Reeves* v. *Crisp*, 6 M. & Sel. 274. 2 Dowl. 710, *S. C.*

(*t*) *Dand* v. *Barnes*, 6 Taunt. 5; 1 Marsh. 403, *S. C.* But see 1 Chit. Rep. 737, 738, n.

(*u*) *Dand* v. *Barnes*, *supra*.

(*x*) *Mackenzie* v. *Martin*, 6 Taunt. 296.

(*y*) *Pitt* v. *Evans*, 2 Dowl. 296. But see *Harper* v. *Mount*, Ball Court, M. 1838, per *Littledale*, J., 2 Jur. 990: *Barrack* v. *Newton*, 1 Q. B. 525.

(*z*) *Stayner* v. *Cottrell*, 3 Taunt. 377: *Wright* v. *Hunt*, 1 Dowl. 457: *Anon., Executors* v. *Administrators*, Id. 97.

defective (*a*). So is an affidavit "A. *v.* B., executor &c.," or "administrator &c.," without specifying the party of whom the defendant is executor or administrator (*b*). It seems doubtful whether the same rule applies in the case of persons empowered to sue by act of Parliament, where they are not suing for their own benefit, as in the case of a clerk to trustees under a turnpike act (*c*). Even where "deceased" was added to the plaintiff's name, in the title of the affidavit, the Court held the affidavit defective (*d*). In a cause in which E. A. was suing by *his* next friend, an affidavit intitled "E. A. suing by *her* next friend," was held sufficient (*e*). Upon an application for a rule that an attorney pay over a sum of money, or give up a document received by him in a particular cause, the affidavits must be intitled in the cause in which the money or document was received (*f*). And they may be so intitled although judgment has been signed and execution issued (*g*). An affidavit in support of a rule to set aside a bail-bond, on the ground of a mistake in the defendant's surname, must be intitled with the right name of the party, and not with the name by which he was arrested (*h*). An affidavit to support a rule *nisi* for staying proceedings on a bail-bond may be intitled in the action against the bail (*i*), or in the original action (*k*); if, however, proceedings against bail be founded upon a judgment irregularly obtained by the plaintiff, only one application is necessary to set aside the irregular judgment and the proceedings against the bail; and the affidavits, in such a case, must be intitled in the original action (*l*). On an application by bail to set aside proceedings in the original action and in the action against themselves, the proceedings may be intitled in both actions (*m*). Where a cause is removed into the Exchequer Chamber by writ of error, all affidavits in the Exchequer Chamber must be intitled in the cause in error, and not in the original action (*n*). And so on a writ of false judgment (*o*). It seems that the affidavits in support of a rule for a *procedendo* should not be intitled in the cause in the inferior court, but in the superior court only (*p*). An affidavit on a motion in ejectment, which has by mistake the name of the tenant in possession in the title instead of that of Richard Roe, is bad, and cannot be used, though it refers to a rule annexed, which has a correct title (*q*). Where there are both joint and separate demises, the title of

Prochein amy.

Application against attorney.

Motion to set aside bail-bond, &c.

Where cause removed by writ of error.

Procedendo.

In ejectment.

(*a*) Id.: *Phillips* v. *Hutchinson*, 3 Dowl. 23: *Cauley* v. *Smith*, 4 Dowl. 477.

(*b*) *Clark* v. *Martin*, 3 Dowl. 222: *Fletcher* v. *Lechmere*, 2 Dowl., N. S., 848; 5 M. & G. 265: *Engler* v. *Twysden*, 6 Scott, 580. See *Doe Jenks* v. *Roe*, 2 Dowl. 55, as to affidavit of service in ejectment, *post*, 1449.

(*c*) *Marshall* v. *Adams*, Bail Court, T. 1838, per *Coleridge*, J., 2 Jur. 944. In a *qui tam* action, it was considered sufficient to intitle the plea in the cause without adding *qui tam*, &c., after plaintiff's name. (*Dale* v. *Beer*, 7 East, 333).

(*d*) *Bland* v. *Dax*, 15 Law J., N. S., 1, Q. B.

(*e*) *Abrahams* v. *Taunton*, 1 Dowl. & L. 319.

(*f*) MS., E. 1814: *Simes* v. *Gibbs*, 6 Dowl. 310.

(*g*) *Simes* v. *Gibbs*, 6 Dowl. 310: *Stephens* v. *Hill*, 10 M. & W. 28; 1 Dowl., N. S., 669, S. C.

(*h*) *Finch* v. *Cocker*, 2 Dowl. 383; 2 C. & M. 412, S. C.: *Shaw* v. *Robinson*, 8 D. & R. 423; *ante*, 1448.

(*i*) *Roberts* v. *Giddins*, 1 B. & P. 337: *Kelly* v. *Wrother*, 2 Chit. Rep. 109.

(*k*) *Stride* v. *Hill*, 4 Dowl. 709: *Lines* v. *Chetwode*, Exch. MS., 16th Jan. 1839; 2 Tyr. 177. But see *Ham* v. *Philcox*, 1 Bing. 142; 7 Moore, 521, S. C., *contrà*. And see *Blackford* v. *Hawkins*, 7 Moore, 600.

(*l*) *Barlow* v. *Kaye*, 4 T. R. 688.

(*m*) *Pocock* v. *Cockerton*, 7 Dowl. 21. See *Bosanquet* v. *Graham*, 7 Jur. 831, Q. B.

(*n*) *Gandell* v. *Regier*, 4 B. & C. 862; 7 D. & R. 259, S. C.

(*o*) *Watson* v. *Walker*, 8 Bing. 315; 1 Moo. & Scott, 457, S. C.

(*p*) *Jameson* v. *Schonswar*, 1 Dowl. 175.

(*q*) *Doe Anderson* v. *Roe*, 5 Jur. 506, B. C.

PART VI.

the affidavit need not distinguish the joint from the separate (*p*). But an affidavit purporting to be sworn in a cause of "John Doe, on the demise *or* demises of R. D. N., Esq., and W. L. *v.* E. L.," (the cause was John Doe on the several demises, &c.), was held insufficient (*q*). Where the lessors of the plaintiff are described in the declaration to be executors, the affidavit of service need not, it seems, in stating the name of the cause,

Interpleader.

notice such character (*r*). On an application against a claimant under the Interpleader Act for costs, the affidavits should be intitled in the original action (*s*).

Where no cause in court, or a cause in another court.

But where there is no cause in court, the affidavits should not be intitled in any cause; otherwise they will not be allowed to be used (*t*). Thus, an affidavit to hold to bail, before 1 & 2 *Vict. c.* 110, must not have been intitled (*u*); and this is

Affidavit to hold to bail.

still the case if the affidavit be sworn before the writ of summons is sued out, which it may be (*v*). But if sworn after the writ of summons has been issued, then it ought to be intitled in the cause. Upon an application for a capias to hold to bail, it has been held, that the judge may receive an affidavit intitled in another court in another cause, which had been before used against the same defendant; for this is entirely a collateral proceeding, the capias not being process in the action (*x*). In moving for leave to enter up judgment on an old

Motion respecting warrant of attorney.

warrant of attorney, the affidavit may be intitled in a cause (*y*); but this is not absolutely requisite (*z*). So may an affidavit on an application for the delivering up of a warrant of attorney (*a*). On moving for a rule *nisi* for a *certiorari*, the affida-

Certiorari, &c.

vits must not be intitled in any cause (*b*). And the same in moving for a writ of prohibition (*c*), or a criminal information (*d*). In shewing cause against a criminal information, or

Criminal information.

a rule *nisi* for a writ of prohibition, it is optional to intitle them or not (*e*). Where a submission to arbitration is made a rule of court, and no action is pending, the affidavits in support of an application to set aside the award, or for an attachment for not performing it, need not be intitled (*f*), although

Arbitration.

the affidavits in shewing cause must (*g*). If affidavits used in a rule with respect to a matter of arbitration, where there is no cause in court, improperly introduce the words "plaintiff" and "defendant," after the names of the parties in the title of the affidavits, these words may be treated as surplusage (*h*). Where a cause is referred under an order of *Nisi Prius*, the

Attachment.

affidavits must be intitled in the action (*i*). The proceedings upon an attachment in a civil suit being upon the civil side of the court until the attachment is actually awarded, the affida-

(*p*) *Doe* v. *Ros*, 5 Dowl. 447: *Doe* v. *Montgomery*, 1 Dowl. & L. 695.
(*q*) *Doe Neville* v. *Lloyd*, 2 Dowl., N. S., 330; 13 Law J., N. S., 95, Q. B., S.C. And see *Doe* d. *Cousins* v. *Roe*, 7 Dowl. 53.
(*r*) *Doe Jenks* v. *Ros*, 2 Dowl. 55.
(*s*) *Ante*, 1227.
(*t*) See *Ex p. Evans*, *infra*.
(*u*) R. T., 37 G. 3.
(*v*) *Ante*, Vol. 1, 652, 653.
(*x*) *Langston* v. *Wetherall*, 14 M. & W. 104.
(*y*) *Sowerby* v. *Woodroffe*, 1 B. & Ald. 567: *Poole* v. *Robberds*, Id. 568, n.
(*z*) *Davis* v. *Stanbury*, 3 Dowl. 449: *Ex p. Gregory*, 8 B. & C. 409.
(*a*) *Thompson* v. *Vaux*, 5 Dowl. 691.
(*b*) *Ex p. Nokes*, 1 B. & C. 267.
(*c*) *Ex p. Evans*, 2 Dowl., N. S., 410.
(*d*) *R.* v. *Harrison*, 6 T. R. 69: *R.* v. *Robinson*, 6 T. R. 642.
(*e*) Id.; *Brandon* v. *Capp*, 9 Jur. 781; B. C., E. T. 1845.
(*f*) *Bainbrigge* v. *Houlton*, 5 East, 21.
(*g*) *Bevan* v. *Bevan*, 3 T. R. 601: *In re Houghton*, 2 Moo. & P. 482.
(*h*) *Re Imason* v. *Horner*, 8 Dowl. 651.
(*i*) *Doe Clarke* v. *Stilwell*, 6 Dowl. 396.

vits in applying for the rule *nisi* (*l*), and in shewing cause against it (*m*), must be intitled in the action; but after the rule is made absolute, all future affidavits (as upon an application to set aside the attachment, or the like) must be intitled "*The Queen* v. ——" (the party attached (*n*)); and in the case of an attachment against the sheriff, you generally add the name of the cause thus:—"*The Queen against the Sheriff of Middlesex, in a cause of J. N. against J. S.*;" though this is not, it seems, absolutely requisite (*o*).

Deponent's abode.

Deponent's Abode.]—By *R. H.*, 2 *W.* 4, *r.* 5, "the addition of *every* person making an affidavit shall be inserted therein." Therefore, the affidavit must state the true place of abode of the person making it (*p*), or the Court will not allow it to be used; or, in the case of an affidavit to hold to bail, will discharge the defendant on a common appearance (*q*). And it seems, that a defective addition to one of several deponents will render the whole affidavit inadmissible; though this is not free from doubt (*r*). But this rule does not extend to an affidavit made by a party in the cause, if he describe himself as such, as by the words "the above-named plaintiff," or "the above-named defendant," or the like (*s*). It is sufficient if the deponent describe himself as "of the city of London, merchant" (*t*); or as "of Bath, in the county of Somerset, Esquire" (*u*); or as "of Kennington, in the county of Surrey" (*v*); or as "of Lawrence Pountney, in the city of London" (*x*), without stating whether parish, place, or lane. So, where a deponent described himself as "late of Tyrone, in the county of Tyrone, in Ireland, but now in Dublin Castle," it was deemed sufficient (*y*). And where a foreigner, who had come to this country merely for temporary purposes, described himself as of his place of residence abroad, it was deemed sufficient (*z*). So, it is sufficient if an attorney's clerk state the place of business of his employer as his residence (*a*); or if a clerk describe himself of the office where he does business during the day, although he sleeps elsewhere at night (*b*); or if a person lately discharged from prison, but who sleeps there at night, describe himself as late of that prison (*c*). But a deponent describing himself as "clerk to the defendant's attorney," without stating any residence, is insufficient (*d*). So, if the deponent be a prisoner in

(*l*) *Wood* v. *Webb*, 3 T. R. 253: *Ethrington* v. *Kemp*, 1 Chit. 727, n.

(*m*) *Whitehead* v. *Firth*, 12 East, 165.

(*n*) *Rex* v. *Sheriff of Middlesex*, 7 T. R. 439, 527: *Whitehead* v. *Firth*, 12 East, 165: *Brown* v. *Edwards*, 2 Dowl. & L. 520.

(*o*) *Rex* v. *Sheriff of Middlesex*, 5 B. & C. 369; 8 D. & R. 149, *S. C.*

(*p*) See the prior rule in Q. B., R. M., 15 C. 2. See 4 Taunt. 154.

(*q*) *Jarret* v. *Dillon*, 1 East, 18.

(*r*) *R.* v *Carnarvonshire*, 5 N. & M. 364: *sed vide Nathan* v. *Cohen*, 3 Dowl. 370: *Ex p. Edmonds*, 5 Dowl. 702.

(*s*) *Shirer* v. *Walker*, 2 M. & G. 917; 3 Scott, N.R., 235; 9 Dowl. 667, *S. C.*: *Angel* v. *Ihler*, 5 M. & W. 163: *Brooke* v. *Farlar*, 5 Dowl. 361, C. P.: *Jackson* v. *Chard*, 2 Dowl. 469, Q. B.: *Poole* v. *Pembray*, 1 Dowl. 693; 3 Tyr. 387, Exch. *S. C.*: *Jervis* v. *Jones*, 4 Dowl. 610; 1 H. & W. 654. And see *Sharp* v. *Johnston*, 2 Bing. N. C. 246; 2 Scott, 407; 4 Dowl. 324, *S. C.*

(*t*) *Vassier* v. *Alderson*, 3 M. & Sel. 165.

(*u*) *Coppin* v. *Potter*, 4 Moo. & Scott, 272; 2 Dowl. 785, *S. C.*

(*v*) *Wilton* v. *Chambers*, 1 H. & W. 116. And see *Hunt's bail*, 4 Dowl. 272; 1 H. & W. 530, *S. C.*

(*x*) *Miller* v. *Miller*, 2 Scott, 117.

(*y*) *Steuart* v. *Gaverau*, 1 H. & W. 699.

(*z*) *Boutchet* v. *Kittoe*, 3 East, 154.

(*a*) *Alexander* v. *Milton*, 1 Dowl. 570; 2 C. & J. 424, *S. C.*: *Strike* v. *Blanchard*, 5 Dowl. 216: *Bottomby* v. *Bellchambers*, 4 Dowl. 26.

(*b*) *Haslop* v. *Thorne*, 1 M. & Sel. 103: *Anon.*, 2 Chit. Rep. 15: *Alexander* v. *Milton*, 2 C. & J. 424.

(*c*) *Sedley* v. *White*, 11 East, 528.

(*d*) *Daniels* v. *May*, 5 Dowl. 83. But see *Simpson* v. *Drummond*, 2 Dowl. 473: *Bottomby* v. *Bellchambers*, 4 Dowl. 26; 1 H. & W. 369, *S. C.*

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the custody of the keeper of the Queen's Prison, or of the sheriff, describing him as such will suffice (*e*). The residence stated must be the true one; therefore, a deponent cannot describe himself as *late* of a place where he has ceased to reside, when he actually resides at another place at the time of making the affidavit (*f*). Where the deponent described himself as of "Dorset-place, Clapham-road, Middlesex," and his true place of residence was Dorset-place, Clapham-road, Surrey, it was held bad (*g*). The Court have in some cases refused to try the real place of the deponent's abode upon an affidavit (*h*).

Deponent's degree.

Deponent's Degree.]—The rule of *H. T.*, 2 *W.* 4, *r.* 5, just noticed, requiring that the addition of every person making an affidavit shall be inserted therein, renders it necessary for the affidavit to state the rank or degree in life, or the profession or trade of the deponent, except, as we have just seen, in case the deponent is a party in the cause; and this addition must be stated with sufficient certainty. Merchant (*i*), manufacturer (*k*), "late clerk to" &c. (*l*), "managing clerk to" &c. (*m*), "agent and collector to *A. B.*, (the plaintiff), an hotel-keeper" (*n*), "attorney" or "agent of the above-named plaintiff in this cause" (*o*); or "process server" (*p*), is a sufficient addition. Describing a deponent as "of No. 21, Tokenhouse-yard, Lothbury, in the city of London, clerk to C. K. of the same place," not stating the profession of C. K., is sufficient (*q*). And an affidavit commencing "R. J., late of the city of W., victualler, but now of" &c., without any further addition, has been held sufficient (*r*). But "assessor" is not a sufficient description (*s*). Nor is "acting as managing clerk to" &c. (*t*): nor "articled clerk," without saying to whom or in what profession (*u*).

Addition, &c. of other parties.

It is not in general necessary to give any addition to any other party but the deponent (*x*). But the christian and surnames of parties ought in general to be inserted, if practicable (*y*).

Deponent's signature.

Deponent's Signature.]—Affidavits made in this country must be signed by the deponent, or, if he cannot write, he should make his mark. It is no objection that the signature is in a foreign character (*z*). An affidavit described deponent as "Edward Charles Pownall," the signature at the end was "Charles E. Pownall;" held no objection (*a*). Where an

(*e*) *Jervis* v. *Jones*, 1 H. & W. 654; 4 Dowl. 610, *S. C.*; *Sharp* v. *Johnston*, 2 Bing. N. C. 246; 4 Dowl. 324, *S. C.*

(*f*) *Sadler* v. *White*, 11 East, 529.

(*g*) *Collins* v. *Goodyer*, 4 D. & R. 44; 2 B. & C. 563, *S. C.*

(*h*) See Tidd, 9th ed., 179; 2 Smith, 207, *S. C.*; *Anon.*, 2 Leg. Obs. 382.

(*i*) *Vassier* v. *Alderson*, 3 M. & Sel. 165.

(*k*) *Smith* v. *Younger*, 3 B. & P. 520.

(*l*) *Simpson* v. *Drummond*, 2 Dowl. 473.

(*m*) Per *Littledale*, J., in *Graves* v. *Browning*, 6 Ad. & Ell. 805.

(*n*) *Short* v. *Campbell*, 3 Dowl. 467.

(*o*) *Luxford* v. *Groombridge*, 2 Dowl., N. S., 332: *Matthewson* v. *Bolstow*, 3 Dowl. & L. 327.

(*p*) *Phillips* v. *Basford*, 4 Jur. 52, B. C. See *Anon.*, 6 Taunt. 73. And see the cases as to the description of bail in the notice of bail, *ante*, Vol. 1, 742.

(*q*) *Cooper* v. *Foulkes*, 2 Scott, N. R., 200; 1 M. & Gr. 942; 9 Dowl. 46, *S. C.*

(*r*) *Angel* v. *Iliker*, 5 M. & W. 163.

(*s*) *Nathan* v. *Cohen*, 3 Dowl. 370; 1 H. & W. 107, *S. C.*

(*t*) *Graves* v. *Browning*, 6 Ad. & E. 805.

(*u*) *R.* v. *Reeve*, 4 Q. B. 211; 3 G. & D. 560, *S. C.*

(*x*) See *Waters* v. *Joyce*, 1 D. & R. 180.

(*y*) See *Reynolds* v. *Hamblin*, 4 B. & Ald. 536. But see *Howell* v. *Coleman*, 2 B. & P. 466.

(*z*) *Nathan* v. *Cohen*, *supra*.

(*a*) *Hands* v. *Clements*, 11 M. & W. 816; 1 Dowl. & L. 379; 12 Law J., N. S., 437, Exch., *S. C.*

affidavit is re-sworn, it need not be signed a second time (*h*). An affidavit sworn before a judge in Germany, and signed by the judge, but not by the deponent, has been held sufficient, it being sworn that such is the practice in Germany (*i*).

Jurat.

Jurat.]—The *jurat* is written at the foot of the affidavit, to the left of the page, and in general is in this form: "*Sworn at* ———, *this* ——— *day of* ———, 184–, *before me*, ———." But if the affidavit be made by two or more persons, their names must, though it be sworn before the Court or a judge (*k*), be severally written in the *jurat* (*l*); and the form in that case will be thus: "*The above-named deponents, A. B. and C. D., were severally sworn at* ———, *this* ——— *day of* ———, 184–, *before me*, ———." If the affidavit is sworn at the judge's chambers, the *jurat* is in this form: "*Sworn at my chambers, Rolls' Gardens, Chancery Lane, this* ——— *day of* ———, 184–, *before me*" (*m*).

Time and place of swearing.

The time of swearing the affidavit must be stated in the *jurat* (*n*). So must the place and county where it is sworn, if sworn before a commissioner (*o*), or abroad (*p*). The place may be stated by reference to a place mentioned in the body of the affidavit (*q*). Where no place was mentioned in the *jurat*, but the affidavit purported to be sworn before the Chief Justice of the King's Bench in Ireland, and to be signed by him, and the signature was verified here by affidavit, it was deemed sufficient to hold a defendant to bail (*r*).

"Before me."

If the affidavit is sworn before a commissioner, the words "before me" should be inserted in the *jurat*, though it seems that this is unnecessary where the affidavit is sworn before a judge at chambers (*s*).

When sworn before a commissioner.

If sworn before a commissioner, it should appear that the person before whom it is sworn is a commissioner of the court (*t*). If the affidavit is duly intitled in the court, it is sufficient in the *jurat* to describe the commissioner before whom it is sworn as "a commissioner, &c." (*u*); and "Sworn before me, J. E. S., by commission," was held sufficient (*x*). But merely stating

(*h*) *Liffin* v. *Pitcher*, 1 Dowl., N. S., 767.

(*i*) *In re Eady*, 6 Dowl. 615.

(*k*) *Lockington* v. *Atherton*, 6 Scott, N. R., 240.

(*l*) R. M., 37 G. 3, r. 1; 7 T. R. 89: R. T., 1 G. 4, Exch.: 6 Bing. 236: *Purdue* v. *Terrett*, 5 M. & G. 291; 6 Scott, N. R., 273, *S. C.*

(*m*) See *Hemsworth* v. *Brian*, 1 C. B. 135; 2 Dowl. & L. 844, *S. C.*: *Thomas* v. *Stanaway*, 2 Dowl. & L. 111, where defects in the jurat as to the place of swearing the affidavit before a judge, were held not material.

(*n*) *Doe* v. *Roe*, 1 Chit. Rep. 228: *Wood* v. *Stephens*, 3 Moore, 236: *Blackburn* v. *Allen*, 7 M. & W. 146. See *Hughes* v. *Broome*, 6 M. & Gr. 751; 2 Dowl. & L. 788; 7 Scott, N. R., 517, *S. C.*; *ante*, 1445.

(*o*) MS., E. 1814, Q. B.: *Rex* v. *Cockshaw*, 2 Nev. & M. 378: *R.* v. *West Riding of Yorkshire*, 3 M. & Selw. 493: *Boyd* v. *Straker*, 7 Price, 662: *Case* v. *Case*, 1 Dowl. & L. 698: *Thomas* v. *Stanaway*, 2 Dowl. & L. 111. See *Symmer* v. *Wason*, 1 B. & P. 105.

(*p*) *Walker* v. *Christian*, cor. *Bosanquet*, J., at chambers, 3rd April, 1835, after consultation with other judges: also in another case on same day. In the first case the affidavit was sworn in the Indies, in the latter at Boulogne; but in neither case did the affidavit state it.

(*q*) *Grant* v. *Fry*, 8 Dowl. 234. See *Rex* v. *Burn*, 7 Ad. & E. 190.

(*r*) *French* v. *Bellew*, 1 M. & Sel. 302.

(*s*) *Empey* v. *King*, 2 Dowl. & L. 375; 13 M. & W. 519, *S. C.*; *R.* v. *Blasham*, 2 Dowl. & L. 168; where it was held that the objection was not waived by lapse of time, and could not be cured by reference to a notice annexed to the affidavit.

(*t*) *Rex* v. *Hare*, 13 East, 189: *Howard* v. *Brown*, 1 Moo. & P. 22; 4 Bing. 393: *Frost* v. *Haywood*, 2 Dowl., N. S., 566.

(*u*) *Burdekin* v. *Potter*, 1 Dowl., N. S., 134; 9 M. & W. 13, *S. C.*; *Howard* v. *Brown*, 4 Bing. 394; 1 M. & P. 22, *S. C.*

(*x*) *Fairbrass* v. *Pettit*, 1 Dowl. & L. 622; 12 M. & W. 453, *S. C.*: *Hopkins* v. *Pledger*, 1 Dowl. & L. 119.

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him to be "a commissioner" is not sufficient (*z*). The *jurat* of an affidavit sworn before a commissioner, stating it to have been received "by virtue of a commission forth," &c., omitting the word "issued," has been held sufficient (*a*). Where, in an affidavit in the Exchequer, the commissioner described himself as a Master Extraordinary in the High Court of Chancery, it was held, that the affidavit could not be read (*b*); and an affidavit intitled in the Queen's Bench, but appearing to be sworn before a commissioner in the Exchequer only, cannot be used (*c*). Nor can an affidavit sworn in Ireland before a commissioner of the Irish Court of Queen's Bench (*d*).

By an illiterate person or marksman.

If the affidavit be sworn before a commissioner of the court by a person who from his signature appears to be illiterate, such commissioner shall certify in the *jurat* that the affidavit was read in his presence to the party making the same, and that such party seemed perfectly to understand the same, and that the party wrote his signature in the presence of the commissioner (*e*). In practice, this rule is extended to affidavits sworn before a judge, or in court. Where the affidavit was sworn before a commissioner, and the deponent made his mark, it was held that it should appear from the *jurat* that the mark was made (*f*). If the deponent is a marksman, it is not necessary for the party before whom the affidavit is made to make an affidavit.

Where deponent a foreigner.

Where an affidavit is made by a foreigner in the English language, an interpreter must be sworn by the officer taking the affidavit to interpret it truly, and the *jurat* should state that the interpreter was so sworn, and did interpret the affidavit. It is not, however, necessary that any affidavit should be made by the interpreter or the officer taking the affidavit; it is sufficient that the latter certifies by the *jurat* that such steps were taken (*g*). If an affidavit purports to be signed by a deponent, it will be no objection that it is signed in a foreign character; and there is no statement in the *jurat* to shew that the defendant is a foreigner, and that the writing in question is his signature (*h*). If the affidavit be in a foreign language, there must be another affidavit by an interpreter as to its translation and meaning (*i*).

Jurat should be signed by judge, &c.

The *jurat* should be signed by the judge, or commissioner, before whom it is sworn (*k*).

Erasure or interlineation in jurat.

The rule of *M. T.*, 37 *G.* 3 (7 *T. R.* 82, *Q. B.*), provides, "that no affidavit be read or made use of in any matter depending in this court, in the *jurat* of which there shall be any interlineation or erasure." A line drawn through two words

(*z*) *Hill* v. *Royston*, 7 Jur. 930, B. C.
(*a*) *Daly* v. *D'Arcy Mahon*, 6 Dowl. 192.
(*b*) *Frost* v. *Hayward*, 2 Dowl., N. S., 566; 10 M. & W. 673, *S. C.*
(*c*) *Shaw* v. *Perkin*, 1 Dowl., N. S., 306.
(*d*) *Griffin* v. *Smythe*, 8 Dowl. 490.
(*e*) R. E., 31 G. 3, Q. B.: 4 T. R. 284: R. T., 1 G. 4, Exch. See *Haynes* v. *Powell*, 3 Dowl. 599; 1 Chit. Rep. 680. It must be read over and explained by the commissioner, and not by a third party. (*R.* v. *Sheriff of Middlesex* in *Dicas* v. *Anthony*, 4 Dowl. 765). See the form, Chit. Forms, 203.
(*f*) *Wilson* v. *Blakay*, 9 Dowl. 332.
(*g*) *Rose* v. *Sellars*, 6 D. & R. 514; 4 B. & C. 356, *S. C.* And see *Marriott* v. *Jeffrey*, 1 Dowl. 41.
(*h*) *Nathan* v. *Cohen*, 3 Dowl. 370.
(*i*) It is no objection to an affidavit sworn before a foreign court, that it was taken in the foreign language, if translated, and the translation verified: and the oath may be administered in the foreign language if it be translated by an interpreter to the deponent. (*In re Bleb*, 6 Dowl. 515).
(*k*) *Bill* (or *Bell*) v. *Bamont*, 3 M. & W. 317; 9 Dowl. 810, *S. C.*

in the *jurat*, leaving them, however, perfectly legible, is an erasure within this rule, and vitiates the affidavit, though the omission or retention of the words would not vary the sense (*i*). So, striking out the date mentioned in the *jurat* with a pen, and introducing the right date, is an erasure within the meaning of the above rule (*k*). But the alteration of a figure in the date of an affidavit in the *jurat*, by writing one figure over another, is not an erasure or interlineation within the rule (*l*). And if the words "before me" in the *jurat* are struck out, and the words "by the court" introduced, it is not, it seems, within the rule (*m*). An erasure over the *jurat* does not vitiate it (*n*). Nor does the usual practice of totally erasing a *jurat*, and writing a fresh one underneath. Where part of the *jurat* of an affidavit was written on one side of the paper, and below it the words "a commissioner for taking affidavits in this court" were erased, and the remainder of the *jurat* was written on the other side of the paper, it was held that the affidavit was not vitiated thereby (*o*).

Effect of defective jurat.

An affidavit which has a defective *jurat* cannot be read. Where a rule is obtained upon an affidavit which is so defective, the Court will in general discharge the rule, with costs (*p*).

Amendment of jurat.

In many cases time has been refused to cure a defect in the *jurat* (*q*). Where a judge omitted to sign an affidavit to hold to bail, it was held that the omission could not be cured after the issuing of the *capias* (*r*). Where, however, the names of the deponents were omitted in the *jurat*, through the inadvertence of the judge's clerk, an amendment was allowed (*s*). And where an affidavit sworn before a commissioner omitted to state in the *jurat* the place at which it was sworn, leave was given to amend; and, in order to enable the party to do so, the rule was enlarged upon payment of the costs of the enlargement (*t*).

Before whom to be sworn.

Before whom to be sworn.]—Affidavits intended to be used in the course of any proceedings in the superior courts must be sworn either in the court in which the proceeding is pending, or before one of the judges of either of the Courts, at chambers or elsewhere (*u*), or before a commissioner of the court authorised to take affidavits by stat. 29 *C.* 2, *c.* 5 (*x*); or before a commissioner empowered to take affidavits in Scotland or Ireland, by the stat. 3 & 4 *W.* 4, *c.* 42, *s.* 42 (*post*, 1457); or, in case of an affidavit to hold to bail, before the officer who issued

Before judge, commissioner, &c.

(*i*) *Williams* v. *Clough*, 1 Ad. & E. 376. See *Houlden* v. *Fassen*, 6 Bing. 236; 4 Moo. & P. 127, *S. C.*

(*k*) *Chambers* v. *Barnard*, 9 Dowl. 557; 1 H. & W. 670, *S. C.*

(*l*) *Jacob* v. *Hungate*, 3 Dowl. 456, Exch.

(*m*) *Austin* v. *Grange*, 4 Dowl. 576.

(*n*) *Atkinson* v. *Thomson*, 2 Chit. Rep. 19. And see *Houlden* v. *Fassen*, 6 Bing. 236; 4 Moo. & P. 127, *S. C.*

(*o*) *Wills* v. *Dawson*, 2 Dowl., N. S., 465; 10 M. & W. 682, *S. C.*

(*p*) *Frost* v. *Hayward*, 2 Dowl., N. S., 566; 10 M. & W. 673, *S. C.*

(*q*) See *Anon.*, 2 Chit. Rep. 20: *R.* v. *Cockshaw*, 2 Nev. & M. 278. But see *Goodrick* v. *Furley*, 4 Dowl. 392: *R.* v. *Justices of Warwick*, 5 Dowl. 392.

(*r*) *Bill* v. *Bament*, 8 M. & W. 317.

(*s*) *Ex p. Smith*, 2 Dowl. 607. See *Wilson* v. *Blakey*, 9 Dowl. 352. See 2 Tyrw. Rep. 261.

(*t*) *Case* v. *Case*, 1 Dowl. & L. 698; 13 Law J., N. S., 52, Q. B., *S. C.*

(*u*) It has been already noticed, (*ante*, 1447), that an affidavit sworn before a judge of the superior courts is receivable in the court to which he belongs, though not intitled; and that it is receivable in any other of the courts, provided it be intitled in that other court.

(*x*) See *Rex* v. *Jones*, 2 Salk. 461: *Shaw* v. *Perkins*, 1 Dowl., N. S., 306; *ante*, 1447. The statute is extended to the Isle of Man by 6 G. 3, c. 50, s. 2.

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the process, or his deputy (*z*). It has been held, that, since the 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 4, it is no objection to an affidavit to ground an attachment against a witness for contempt, that it is sworn before a judge of a different court from that to which the contempt was shewn (*a*). A commission to take affidavits does not authorise the commissioner to administer an oath for the *vivâ voce* examination of a witness before an arbitrator (*b*). As to the clerk of the papers of the Queen's Prison being authorised to take the affidavits of prisoners within the prison, see *ante*, 9.

Before attorney in the cause or his clerk.

By a general rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 1, *s.* 3, "no affidavit of the service of process shall be deemed sufficient, if made before the plaintiff's own attorney, or his clerk." Also, by a prior rule, affidavits sworn before the attorney of the party on whose behalf they are to be read, cannot be read (*c*). And this extends to affidavits taken before attornies, as commissioners, in causes wherein they are concerned for the parties on whose behalf such affidavits are made, except where they are made for the purpose of holding the defendant to bail (*d*). And an affidavit made before a commissioner, who acts as the attorney of the defendant *before* an appearance is entered, cannot be used, for he is within the limit of the rule, as the attorney on the record (*e*). But to render the affidavit inadmissible in these cases, it must be clearly shewn, by affidavit (*f*), or by the admission of the party (*g*), that the attorney acted as such at the time of taking the affidavit; and it is not sufficient to shew that he is so at the time of making the objection (*h*). To come within this rule, the commissioner must be not merely the law adviser of the party generally, but his attorney in that particular business (*i*). This rule did not formerly extend to the attorney's clerk (*j*). So in the Common Pleas, if the agent in town were the attorney on the record, it was no objection to an affidavit of the party, that it was sworn before his own attorney in the country (*k*). But now, by a general rule of all the courts of *H. T.*, 2 *W.* 4, *r.* 1, *s.* 6, "where an agent in town, or an attorney in the country, is the attorney *on the record*, an affidavit sworn before the attorney in the country shall not be received; and an affidavit sworn before an attorney's clerk shall not be received in cases where it would not be receivable if sworn before the attorney himself; but this rule shall not extend to affidavits to hold to bail" (*l*). An affidavit sworn before the clerk to an attorney, who makes an application that his client may be admitted as a party to a cause, is not within the prohibition of this rule (*m*). The rule does not apply to proceedings on the Crown side of the Court of Queen's Bench (*n*).

(*z*) 12 G. 1, c. 29, Vol. 1, 644.
(*a*) *Phillips* v. *Drake*, 2 Dowl. 45.
(*b*) *Rex* v. *Hanks*, 3 Car. & P. 419, per *Gaselee*, *J.*
(*c*) R. E., 15 G. 2, r. 11, Q. B. And see R. E., 13 G. 2, r. 1, C. P.
(*d*) *Goodtitle* d. Pye v. *Baddiley*, 8 T. R. 638.
(*e*) *Kidd* v. *Davis*, 5 Dowl. 568.
(*f*) *Hodgson* v. *Walker*, Wightw. 62.
(*g*) *Haddock* v. *Williams*, 7 Dowl. 227.
(*h*) *Beaumont* v. *Dunn*, 4 Dowl. 394.
(*i*) *Williams* v. *Hockin*, 8 Taunt. 425.
(*j*) *Goodtitle* d. Pye v. *Baddiley*, 8 T. R. 636.
(*k*) *Read* v. *Cooper*, 5 Taunt. 88. And see Tidd, Pract., 9th ed., 404.
(*l*) See *Doe Pryse* v. *Rex*, 3 Dowl. 268.
(*m*) *Doe Grand* v. *Rex*, 5 Dowl. 488.
(*n*) *R.* v. *Mixer*, 1 Dowl., *N. S.*, 865. C. B., *Coleridge*.

Commissioner for taking affidavits in Scotland and Ireland.

By the 3 & 4 *W.* 4, *c.* 42, *s.* 42, a power is given of granting commissions to take affidavits in Scotland and Ireland, to be used in the superior courts of common law and equity at Westminster. And the enactment, after reciting that "it would be convenient if the power of the superior courts of common law and equity at Westminster to grant commissions for taking affidavits to be used in the said courts respectively should be extended," is as follows: "That the Lord High Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal, and the said courts of law and the several judges of the same, shall have such and the same powers for granting commissions for taking and receiving affidavits in Scotland and Ireland, to be used and read in the said courts respectively, as they now have in all and every the shires and counties within the kingdom of England and dominion of Wales, and town of Berwick-upon-Tweed, and in the Isle of Man, by virtue of the statutes now in force; and that all and every person and persons wilfully swearing or affirming falsely in any affidavit to be made before any person or persons who shall be so empowered to take affidavits under the authority aforesaid, shall be deemed guilty of perjury, and shall incur and be liable to the same pains and penalties as if such person had wilfully sworn or affirmed falsely in the open court in which such affidavit shall be intitled, and be liable to be prosecuted for such perjury in any court of competent jurisdiction in that part of the United Kingdom in which such offence shall have been committed, or in that part of the United Kingdom in which such person shall be apprehended on such a charge (*m*)." The Court of Exchequer in this country have, in several instances, before this act allowed an affidavit, sworn before a commissioner of the Court of Exchequer in Ireland, or a magistrate in Scotland, to be read (*n*).

Sworn abroad.

British consul.

It seems that an affidavit made in a foreign country before a mayor or other magistrate there, may be used in the courts here (*o*). But not so, an affidavit sworn before a British consul or vice-consul (*p*); not, at least, unless it be sworn that there was no mayor or other magistrate in the place (*q*). It may be sworn abroad in a foreign language, provided there be an affidavit verifying a translation of it (*r*).

Verification of signature, &c., where sworn abroad.

If an affidavit, intended to be used in the court, be sworn before a judge in Ireland or Scotland, the judge's signature to the *jurat* must be verified by an affidavit made in this country; but, if sworn before any other person, (except a commissioner authorised by the above act, 3 & 4 *W.* 4), or before any judge or other officer in a foreign country, not only his signature to the *jurat*, but also his authority to administer oaths and take

(*m*) See *Sharp* v. *Johnston*, 4 Dowl. 324; 2 Bing. N. C., 246; 2 Scott, 405; 1 Hodges, 298; 11 Leg. Obs. 117, 118, *S. C.*: *Wrenken* v. *Freood*, 11 Leg. Obs. 261: *Griffin* v. *Smythe*, 8 Dowl. 490.

(*n*) *Kilby* v. *Stanton*, 2 Y. & J. 75: *Ellis* v. *Sinclair*, 3 Y. & J. 273: *Watson* v. *Williamson*, 1 Dowl. 607: *Turnbull* v. *Moreton*, 1 Chit. 463, 721.

(*o*) *Dalmer* v. *Barnard*, 7 T. R. 251.

(*p*) *Williams* v. *Welch*, 15 Law J., N. S., 7, Q. B.: *Le Veux* v. *Berkeley*, 5 Q. B. 836; 2 Dowl. & L. 31; 13 Law J., N. S., 244, Q. B., *S. C.*; *Picardo* v. *Machado*, 4 B. & C. 985; 7 D. & R. 478, *S. C.*; *Ex p. Lady Hutchinson*, 1 Moo. & P. 559; 4 Bing. 606, *S. C.*: *Riddell* v. *Nash*, 8 Moore, 632: *In re Eady*, 6 Dowl. 615. See *Riddell* v. *Nash*, 8 Moore, 632. *In re Barber*, 4 Dowl. 640: *Re Pickeragill*, 6 Scott, N. R., 831.

(*q*) *Riddell* v. *Nash*, *supra*.

(*r*) *Re Eady*, 6 Dowl. 615.

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affidavits, must be verified in like manner (*r*), or by the certificate of a notary public (*s*), or, it would seem, of a British consul (*t*).

When to be sworn.

When to be sworn.]—As to when affidavits in support of a rule must be sworn, see *ante*, 1412; against a rule, *ante*, 1421; on moving for new trial, *ante*, 1340; to hold to bail, *ante*, 653, 665. Where an application to the Court is to be founded on an affidavit, such affidavit must be sworn and produced in court before the rule shall be drawn up, &c. (*u*). If it appear to have been sworn on a Sunday, it cannot be used (*x*).

When to be filed.

When to be filed.]—As to filing affidavits on motions, see *ante*, 1412. By rule of all the courts of *H. T.*, 1 *Vict.*, "all affidavits read before a judge of any of the said courts, or before a Master of the same, shall be filed with the Masters of the said courts, and be alphabetically indexed: such affidavits to be delivered to the said Masters, in order to be filed, four times in the year; that is to say, the last day of each term." In all other cases, if the affidavit be sworn in town, they must be filed with the Masters, as soon as used, whether the motion be granted or not, in order that they may be given in evidence, if necessary, on an indictment for perjury (*y*); but if sworn before a commissioner, in strictness they should be first filed with the Masters, and then copies taken of them, for the purpose of being used in court (*z*), which, however, is not attended to in practice. Affidavits used before the Master on taxation of costs cannot be read on shewing cause against a rule for reviewing the taxation, unless they are referred to in the rule; a notice that they will be used is not sufficient (*a*). If the opposite attorney, on demand (*b*) made, refuse to file the affidavits, or give a copy of them, the Court will interfere and compel him (*c*). Affidavits, when once filed, may be made use of by the opposite party, though the party who filed them may decline to use them (*d*).

Where application made to judge at chambers.

Affidavits in support of an application to a judge at chambers are filed with the judge's clerk, who returns them to the rule office on the last day of term. Where such affidavits are required to be produced before the ordinary time for returning them, the proper course is to give notice to the judge's clerk to that effect (*e*).

Where time limited by rule.

Also, as we have seen, *ante*, 1421, in all cases where a special time is limited in any rule, before which time an affidavit is required to be filed, no affidavit filed after that time shall be made use of in court, or before the Master, unless it shall appear to the satisfaction of the Court that the filing of such affi-

(*r*) See *Kench* v. *Ballou*, 1 M. & Sel. 302: *O'Mealy* v. *Newell*, 8 East, 364: *Dalmer* v. *Barnard*, 7 T. R. 251: *Ex p. Worsley*, 2 H. Bl. 275: *Pickards* v. *Machado*, 4 B. & C. 886; 7 D. & R. 478, *S. C.*

(*s*) *Ex p. Worsley*, 2 H. Bl. 275.

(*t*) See *In re Barber*, 4 Dowl. 640, per Tindal, C. J.; and *quære* as to the marginal note?

(*u*) R. H., 36 G. 3, r. 1; *ante*, 1412.

(*x*) *Doe Williamson* v. *Roe*, 3 Dowl. & L. 328; 15 Law J., N. S., 39, Q. B., *S. C.*

(*y*) *Rex* v. *Crossley*, 7 T. R. 315: *Johns* v. *Mills*, 14th Nov. 1832, K. B., MS.: 1 Dowl. 510, *S. C.*; *Ex p. Dicas*, 2 Dowl. 92: *Ex p. Elderton*, Id. 268.

(*z*) 29 C. 2, c. 2: R. M., 9 G. 2.

(*a*) *Cliffe* v. *Rooter*, 2 Dowl. 21.

(*b*) *Pilmore* v. *Hood*, 8 Dowl. 21.

(*c*) *Ex p. Dicas*, 2 Dowl. 92.

(*d*) *Price* v. *Hayman*, 7 Dowl. 47.

(*e*) *Needham* v. *Bristow*, 1 Dowl., N. S., 700.

davit within the time limited was prevented by inevitable accident.

Affidavits sworn in the country may be used without taking copies.

By rule of all the courts of *H. T.*, 1 *Vict.*, it is ordered, "that, on and after the fourth day of the present Hilary Term, all affidavits sworn before a commissioner in the country, or a judge of assize on the circuit, be read in the several Courts of Queen's Bench, Common Pleas, and Exchequer, or before any judge of the same, or any of the Masters thereof, in like manner as other affidavits, and without obliging the parties filing them to obtain copies of the same."

Copy of exhibit.

Where a defendant makes an affidavit at a judge's chambers identifying a document which is exhibited to him only, and not filed, he will be compelled to allow the plaintiff to take a copy of that document, although it is sworn to furnish a defence to the action (*f*). Where a plan has been filed in support of a motion, at the instance of a particular party, which has been disposed of, the Court will not allow that plan to be taken off the file at the instance of the same party, in order to enable him to make his defence to another proceeding (*g*).

Taking affidavit off file.

The Court will, under particular circumstances, either grant a rule for taking off the file an affidavit into which matters have been introduced, disclosed in professional confidence, or for preventing such portions of the affidavit from being read (*h*). Before the 6 & 7 *Vict. c.* 85, the Court would, in some cases, order an affidavit made by a person who had been convicted of an infamous crime to be taken off the file: but, perhaps, they would not now do so (*i*).

How long in force.

How long in Force.]—Age is, in general, no objection to an affidavit (*k*), unless the case is one in which the lapse of time affects the matters contained in it; as in the case of an affidavit of debt, which is only good for a year, it being presumed after that period that the debt is paid (*l*).

Defects, when aided, amended, &c.

Defects, when aided, amended, &c.]—Defects in affidavits are very rarely aided; but time is sometimes granted to cure a defect. As to when defects in affidavits to hold to bail are waived, see *ante*, *Vol.* 1, 702. Appearing and using affidavits in opposition to a rule do not waive an objection to the title of the affidavit on which the rule was moved (*m*). Two months' delay in making an objection is no waiver of it (*n*). If an affidavit be sworn before a party having no authority to receive it, it will be a nullity. If there is a defect in intitling affidavits produced in shewing cause against a rule, the Court will sometimes allow the rule to be enlarged, in order that the title may be amended (*o*). In a recent case, where a rule was obtained upon an affidavit erroneously intitled, the Court would not discharge it, but permitted the affidavit to be amended

(*f*) *Tebbutt* v. *Ambler*, 7 Dowl. 764.
(*g*) *Price* v. *Seeley*, 8 Dowl. 653.
(*h*) *Bury* v. *Clench*, 1 Dowl., N. S., 848, *per Coleridge*, J.
(*i*) See *Re Sawyer*, 2 Q. B. 271.
(*k*) *Wynne* v. *Wynne*, 2 Scott, N. R., 615: *Doe Clarke* v. *Stilwell*, 8 Ad. & E. 645; 3 Nev. & P. 701. But see *Burt* v. *Owen*, 1 Dowl. 691.
(*l*) *Ante*, Vol. 1, 665.
(*m*) *Clothier* v. *Ese*, 3 Moo. & Scott, 216; 2 Dowl. 731, *S. C.* See *Levy* v. *Duncombe*, 3 Dowl. 447.
(*n*) *Sharp* v. *Johnston*, 4 Dowl. 294. See *R.* v. *Blaxham*, 2 Dowl. & L. 168.
(*o*) *Anderson* v. *Ell*, 3 Dowl. 73: *Davis* v. *Skerlock*, 7 Dowl. 592.

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and re-sworn (*p*). But, in a more recent case, where an objection that affidavits were improperly intitled in a cause was raised on shewing cause against a rule granted upon them, the Court refused to allow the affidavits to be re-sworn, but discharged the rule (*q*). See *ante*, 1455, as to giving time to cure a defect in the *jurat*. Where a motion for a rule *nisi* is made upon certain affidavits, the party will not be allowed afterwards, when cause is shewn, to make use of any other affidavits made subsequently, at least without the leave of the Court, unless such additional affidavits be merely confirmatory of what was already sworn when the rule *nisi* was made (*r*); nor will he be allowed to make use of any other affidavits, made previously in the same cause, and already on the files of the Court, unless they be expressly specified in the rule *nisi* (*s*). Where a party obtained a rule *nisi* upon affidavits which were badly intitled, and, discovering his mistake, he applied to the Court for leave to take the affidavits off the file, and amend and re-swear them, the Court refused to allow such a course to be taken, on the ground that the affidavits would appear to have been sworn after the rule was drawn up, and also refused a fresh rule to be drawn up on amended affidavits, but suggested a new motion upon affidavits disclosing the circumstance of the error, giving no opinion, however, upon the validity or effect of such new motion (*t*). See further as to the amending of an affidavit, *ante*, 1455. It seems, that where a rule is discharged on a technical objection taken to an affidavit, without going into the merits, no costs are, in general, allowed (*u*), unless the defect be in the jurat (*v*). As to the Court not allowing a fresh application to be made where first discharged, upon the ground that it was made upon insufficient materials, see *ante*, 1426,

Making use of affidavits.

Discharging rule without costs for technical objection.

Making fresh application.

An affidavit cannot be made use of if altered after it is sworn (*x*).

(*p*) *Cooper* v. *Talbot*, 7 Scott, 345: *R.* v. *Warwickshire Justices*, 5 Dowl. 382: *Davies* v. *Skerlock*, 7 Dowl. 592. But see *Phillips* v. *Hutchinson*, 3 Dowl. 20.

(*q*) *Ex p. Evans*, 2 Dowl., N. S., 410. See *Wood* v. *Stephens*, 3 Moore, 236, *per Cur.* From which it would seem, that if the affidavit be re-sworn, it can only take effect from the date of the new jurat.

(*r*) See *ante*, 1412: *Sollaway* v. *Whorewood*, 2 Salk. 461.

(*s*) Per *Bayley*, J., MS., E. 1824. And see *Quelle* v. *Boucher*, 1 Scott, 203: 1 Dowl. 107, *S. C.*

(*t*) *Doe* v. *Tullett*, 1 Dowl. & L. 121: *Ex p. Evans*, 2 Dowl., N. S., 410: see ante, 1426.

(*u*) *Prendy* v. *Lovell*, 4 Dowl. 671, Exch.: *Harris* v. *Matthews*, 4 Dowl. 608: *Doe* v. *Lloyd*, 2 Dowl., N. S., 339: see ante, 1426. But see *Hoshkiteh* v. *Scriven*, 5 Dowl. 35.

(*x*) *Ante*, 1455.

(*x*) *Wright* v. *Strimmer*, 5 Dowl. 92.

PART VII.

ARBITRATION.

SECT. 1. *The Reference*, 1461 *to* 1469.
2. *Proceedings upon Reference, the Award, &c.*, 1469 *to* 1485.
3. *Setting aside the Award*, 1485 *to* 1507.
4. *Enforcing Performance of Award*, 1507 *to* 1515.

SECT. 1.

The Reference.

Where a Cause in Court, 1461.
Where no Cause in Court, 1463.
Alteration of Submission, 1466.
Revocation of Submission, &c., 1466.
Effect of Agreement to refer on Right to sue, 1469.

Where there is a Cause in Court.]—WHERE the matter intended to be submitted to arbitration is also the subject of an action pending in one of the superior courts at Westminster, and the defendant has been holden to bail, it is usual to wait until the cause is called on at *Nisi Prius*, and then take a verdict for the damages stated in the declaration, subject to the award of the person to whom the cause is to be referred: otherwise, the reference to arbitration would be a discharge of the bail (*a*). But if the defendant was not holden to bail, then the cause may be referred, at any time before trial, by judge's order or rule of court; or, when the cause is called on, by order of *Nisi Prius*, with or without a verdict being taken, as the parties shall judge proper. As to the sheriff, upon a trial before him, under the Writ of Trial Act, not being able to refer the cause so as to give power to alter the verdict and judgment, see *ante*, 411.

Where there is a cause in court.

Where an attorney agreed to refer a cause at *Nisi Prius*, without the consent or knowledge of his client, the Court refused to set aside the rule of reference on that account, even

Attorney has power to refer.

(*a*) Vol. 1, 796; 2 Saund. 72 b.

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although the application for that purpose was made previously to any proceedings being had before the arbitrator (*b*). But it would seem that a client would not be bound by his attorney's unauthorised agreement to refer a cause in an unusual manner (*c*).

Rule or order of reference, how obtained.

If the cause be referred at *Nisi Prius*, the leading counsel for both parties fix upon the arbitrator, indorse their briefs accordingly, and hand them to the clerk of *Nisi Prius*, or associate, in order that he may draw up the order of *Nisi Prius* from them (*d*). But if the cause is to be referred before trial, then let each party *get a motion-paper to that effect, signed by counsel; take them to one of the Masters, and draw up the rule* (*e*). *Or, by the attornies on both sides signing a consent, they may thereupon obtain a judge's order to the same effect* (*f*). *After obtaining the rule or order, you proceed as is directed in the next Section.* The rule should order that all proceedings in the action be stayed, otherwise it will not operate as a stay of proceedings (*g*). If the order contain a clause restraining the parties from bringing a writ of error, they are precluded from moving in arrest of judgment (*h*).

Amendment of order of reference.

Where all matters in difference in the cause were agreed to be referred, and the associate by mistake drew up the order of reference generally, as to all matters in difference between the parties, the Court refused to amend it, and said that the order of reference must be considered as a mere nullity, and the parties must go down again to trial (*i*). And an order of *Nisi Prius* was refused to be amended, according to the terms of a paper signed by counsel at the trial, the intention of the parties appearing, from their subsequent acts, to be in favour of the terms of the order (*k*).

Substitution of arbitrator when first unable to proceed.

Where a cause was referred at *Nisi Prius*, and a verdict taken subject to the award of a barrister as to the damages; the barrister afterwards declined proceeding in the reference, on the ground that his opinion had been previously taken by one of the parties relative to the matter in dispute; and the defendant thereupon refused to join in naming another arbitrator, insisting upon the matter being submitted to a jury: the Court, upon application, ordered, that, unless the defendant would consent to refer the damages to another arbitrator, judgment should be entered up, and execution issued for the damages given by the verdict (*l*). But where the arbitrator died, and another was substituted by consent, but afterwards objected to, the Court held that the death of the arbitrator without making his award had the effect of opening the cause, and that it might be re-tried (*m*). See further as to this, *post*, 1485.

(*b*) *Filmer* v. *Delmer*, 3 Taunt. 486. See *Biddell* v. *Dowes*, 6 B. & C. 255. See Vol. 1, 67.
(*c*) See *Ireson* v. *Carrington*, 2 D. & R. 207; 1 B. & C. 160, *S. C.*
(*d*) See form of order, Chit. Forms, 645.
(*e*) See form of rule, Chit. Forms, 647.
(*f*) See form of order, Chit. Forms, 648.
(*g*) R. T., 1 Anne, 2 Ld. Raym. 789.
(*h*) *Chevenes* v. *Brown*, 2 Dowl. & L. 708.
(*i*) *Rawstron* v. *King*, 5 Moore, 167.
(*k*) *Pearman* v. *Carter*, 2 Chit. 29. See *Hannam* v. *Jube*, 10 Jur. 928.
(*l*) *Woolley* v. *Clark*, 2 D. & R. 138; 1 B. & C. 68, *S. C.* See *Kirkus* v. *Hodgson*, 3 Taunt. 733; 3 Moore, 64, *S. C.*; *Ford* v. *Hopkins*, 1 Dowl. & L. 981.
(*m*) *Harper* v. *Abrahams*, 4 Moore, 3. As to the necessity of getting rid of the former verdict before re-trying, see *Hall* v. *Rouse*, 4 M. & W. 24; 6 Dowl. 686, *S. C.*; *post*, 1476.

SECT. I.

It may be necessary to mention in this place, that the arbitrator cannot (as far as relates to the action referred) award the payment of a greater sum than is laid as damages in the declaration, or than the amount of the verdict if a verdict has been taken. If the arbitrator should so award, judgment may, and should be, entered up for the amount of the damages or verdict; but if by mistake judgment is entered up for the sum awarded, the Court will allow an amendment (*n*). The Court will not, after a verdict taken for the damages laid in the declaration, allow the declaration to be amended, so as to enlarge these damages, even upon affidavit that a greater debt can be proved before the arbitrator (*o*). The arbitrator also should not award the defendant to pay a larger sum than claimed in the plaintiff's particulars of demand (*p*). But they are not necessarily before the arbitrator, even where the cause is referred at *Nisi Prius:* therefore, if it is intended to limit the plaintiff's demand to the amount claimed by the particulars, they should be brought before the arbitrator (*q*). If a cause, *and all matters in difference*, be referred, the arbitrator may award the defendant to pay to the plaintiff a larger sum than that for which the verdict is taken, &c., in respect of such matters in difference, for which the plaintiff would have a remedy under the award but not under the verdict (*r*).

Award as to cause cannot exceed damages laid in declaration.

Where there is no Cause in Court.]—Matters in difference between parties, which are not the subject of any action pending at the time, may be referred to arbitration in any of the three following ways:—1st, By mutual bonds or other deed or written agreement of submission, merely; 2ndly, By such bonds, deed, or agreement, containing also the parties' assent that such submission shall be made a rule of court (*s*); and, 3rdly, By parol agreement; in which case, however, the submission cannot be made a rule of court, even although the parties consent to it (*t*). The submission, if by deed, should be executed by the parties themselves, and not by their attornies, unless by virtue of a power of attorney. It is sometimes prudent to take a warrant of attorney as a collateral security to compel performance of an award; as, for instance, in the submission of a title to land; for if a party in possession be awarded to deliver possession of land to the other, the only mode by which the party can obtain possession is by ejectment; whereas, a warrant of attorney to confess judgment in ejectment, with a defeazance that no execution should be taken out, unless the arbitrator should, by his award, direct the defendant to yield possession, and he should neglect to do so on or before the day appointed by the award, would obviate the necessity of an ejectment in such a case, and would not put the opposite party in any worse condition (*u*).

Where no cause in court.

By deed or agreement.

By warrant of attorney.

Even one of two or more partners cannot bind the others

By person

(*n*) *Pearse* v. *Cameron*, 1 M. & Sel. 675; *Prentice* v. *Reed*, 1 Taunt. 151: *Bonner* v. *Charlton*, 5 East, 139.

(*o*) *Pearse* v. *Cameron*, 1 M. & Sel. 675: *Prentice* v. *Reed*, 1 Taunt. 151.

(*p*) *Kenrick* v. *Phillips*, 7 M. & W. 415; 9 Dowl. 308.

(*q*) *Kenrick* v. *Phillips*, *supra*.

(*r*) *Pearse* v. *Cameron*, *supra*.

(*s*) 9 & 10 W. 3, c. 15, s. 1. See form of bond, Chit. Forms, 649.

(*t*) *Ansell* v. *Evans*, 7 T. R. 1: *Godfrey* v. *Wade*, 6 Moore, 488.

(*u*) Bythewood's Conveyancing, Vol. 2, p. 639.

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without authority, &c.

by a submission to arbitration of matters arising out of the business of the firm (*x*), without a power of attorney authorising him to do so. And where a person signed a submission as attorney for another without a power authorising him to do so, and the arbitrator awarded that the attorney should pay a sum of money, the Court held that the attorney should perform the award, and that his principal was not bound by the submission (*y*). Also, where two persons bound themselves *jointly* and severally to perform an award, and the arbitrator awarded a sum to be paid by each, the Court held that both were jointly liable for each of the sums so awarded (*z*). On motion by an executor and trustee, under a will, to set aside an award under a submission entered into by himself and other trustees and other legatees, for the purpose of ascertaining the assets, and settling the accounts under the will: it was held, that it was no objection that certain married women who took interests under the will, which were affected by the award, were parties to the submission; nor that there were certain infant legatees who were not bound thereby, who were also interested; nor that the matters submitted affected the trust estate of married women and infants (*a*).

Several stamps, when required.

Where several underwriters on a policy agreed to refer the demand of the assured, it was holden, that, as they had a community of interest in the subject of the insurance, and were all underwriters on the same policy, one stamp for the submission and one stamp for the award were sufficient (*b*). So, if there are two memorandums relative to a reference, constituting only one agreement, one stamp is sufficient (*c*).

What submission may be made a rule of court.

The submission, in order that it may be made a rule of court, pursuant to a clause of consent for that purpose, (*post*, 1466), under stat. 9 & 10 *W.* 3, *c.* 15, *s.* 2 (*d*), must be in writing, for a parol submission cannot be made a rule of court, even by consent (*e*); also, it must be of some controversy or suit "for

(*x*) *Stead* v. *Salt*, 10 Moore, 389; 3 Bing. 101, *S. C.*: *Adams* v. *Bankart*, 1 C., M., & R. 681; 1 Gale, 48, *S. C.* See *Barnell* v. *Minot*, 4 Moore, 340.

(*y*) *Bacon* v. *Dubarry*, 1 Ld. Raym. 246; 1 Salk. 70, *S. C.*

(*z*) *Mansell* v. *Burridge*, 7 T. R. 352. See Barnes, 55.

(*a*) *Re Warner and others*, 2 Dowl. & L. 148. As to an assignee of an insolvent debtor deferring an action brought to recover a debt due to the insolvent, see *Sutcliffe* v. *Brooke*, 15 Law J., N. S., 18, Exch.

(*b*) *Goodson* v. *Forbes*, 1 Marsh. 525; 6 Taunt. 171, *S. C.*

(*c*) *Taylor* v. *Parry*, 1 Scott, N. R., 576; 1 M. & G. 604, *S. C.*

9 & 10 W. 3, c. 15, s. 2.

(*d*) That section enacts, that "it shall and may be lawful for all merchants and traders, and others, desiring to end any controversy, suit, or quarrel, controversies, suits, or quarrels, for which there is no other remedy but by personal action or suit in equity, by arbitration, to agree that their submission of their suit to the award or umpirage of any person or persons should be made a rule of any of his Majesty's courts of record which the parties shall choose, and to insert such their agreement in their submission, or the condition of the bond or promise, whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons; which agreement being so made and inserted in their submission or promise, or condition of their respective bonds, shall or may, upon producing an affidavit thereof made by the witness thereunto, or any one of them, in the court of which the same is agreed to be made a rule, and reading and filing the said affidavit in court, be entered of record in such court, and a rule shall thereupon be made by the said court, that the parties shall submit to, and finally be concluded by, the arbitration or umpirage which shall be made concerning them by the arbitrators or umpire, pursuant to such submission: and in case of disobedience to such arbitration or umpirage, the party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of court when he is a suitor or defendant in such court, and the court on motion shall issue process accordingly; which process shall not be stopped or delayed in its execution, by any order, rule, command, or process of any other court, either of law or equity, unless it shall be made appear on oath to such court, that the arbitrators or umpire misbehaved themselves, and that such award, arbitration, or umpirage was procured by corruption or other undue means."

(*e*) *Ansell* v. *Evans*, 7 T. R. 1: *Godfrey* v. *Wade*, 6 Moore, 488.

which there is no other remedy but by personal action or suit in equity." Therefore, the Court have refused to make a submission a rule of court, where part of the matter agreed to be referred (namely, an assault) had been made the subject of an indictment (*f*).

Form of submission, and what it includes.

The submission should distinctly specify the matter of controversy submitted; or, if stated generally, it should be "of all matters in difference between the parties" (*g*). Where an action is pending, it may be "of all matters in dispute in the cause between the parties," or "of all matters in dispute between the parties in the cause" (*h*); the former confining the submission to the matter of the suit then pending (*i*), the latter extending it to all matters in difference; and the costs being made to abide the event makes no difference (*k*). It is now more usual, in case of a general reference, to use the phrase "of all matters in difference between the parties:" and "of all matters in difference in the cause," where the action alone is referred. It has been holden, that a reference "of all matters in difference between the parties" does not preclude one of the parties from afterwards suing for a cause of action subsisting at the time of the reference, if such matter were not a matter in difference between the parties, nor laid before the arbitrator (*l*). But, in a case where the reference was "of all actions and causes of actions between the parties," and, after the award made, the party thereby ordered to pay a sum of money wished to deduct from it a sum due to him by the opposite party, and which had not been under the consideration of the arbitrators, the Court held that he could not do so; for the rule of reference was large enough to include that transaction, and it should have been discussed before the arbitrator (*m*). A submission to arbitration by an executor or administrator is not of itself an admission of assets (*n*); but it impliedly includes in it a submission of the question whether the executor have assets; and if the arbitrator award that he shall pay a sum of money, this is virtually an award that he has assets to that amount, and he must pay it (*o*). Where a verdict is taken subject to an award or certificate in the cause and of all matters in difference, the arbitrator is in the place of a jury, and, therefore, has power to find for the defendant only on the issues proved by him, though by the terms of the submission, if nothing be found due to the plantiff, a verdict is to be entered for the defendant (*p*). It has been holden that the right of real property cannot pass by a mere award (*q*); but it is clear

(*f*) *Watson* v. *M'Cullum*, 8 T. R. 520. See *R.* v. *Cotesbatch*, 2 D. & R. 265: *R.* v. *Bartlett*, 1 Nev. & P. 74; 5 A. & E. 619, *S. C.*: but see *Baker* v. *Townsend*, 7 Taunt. 422; 1 Moore, 120, 287. *S. C.*

(*g*) See *Charletun* v. *Spencer*, 3 Q. B. 693; 12 Law J., N. S., 23, Q. B., *S. C.*, where an agreement was construed to extend to a reference of all matters in dispute between the parties, notwithstanding a recital as to a particular difference. And see *Benson* v. *Heathorn*, 1 Y. & C., N. C. C., 326: *Re Warner and others*, 2 Dowl. & L. 148.

(*h*) *Smith* v. *Muller*, 3 T. R. 626.

(*i*) *Malcolm* v. *Fullarton*, 2 T. R. 644.

(*k*) 1d. 645; 2 Saund. 64, (7).

(*l*) *Rance* v. *Farmer*, 4 T. R. 146: *Thorpe* v. *Cooper*, 5 Bing. 129; 2 Moo. & P. 245, *S. C.*: *Seddon* v. *Tutop*, 6 T. R. 607.

(*m*) *Smith* v. *Johnson*, 15 East, 213: *Dunn* v. *Murray*, 9 B. & C. 780. And see *Martin* v. *Thornton*, 4 Esp. 180: *Shelling* v. *Farmer*, 1 Str. 646.

(*n*) *Pearson* v. *Henry*, 5 T. R. 6.

(*o*) *Worthington* v. *Barlow*, 7 T. R. 453: *Barry* v. *Rush*, 1 Id. 691.

(*p*) *Woolfe* v. *Cooper*, 6 Dowl. 617; 4 Bing. N. C. 449, *S. C.*: *Williams* v. *Moulsdale*, 7 M. & W. 134. Where it is necessary that the arbitrator should find on each issue separately, see *post*, 1488, 1494.

(*q*) 1 Ro. Abr. 242: *Marks* v. *Marriot*, 1 Ld. Raym. 115.

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that a conveyance or release of land may be awarded, if within the terms of the submission (*r*).

Clause of consent to make submission a rule of court.

The clause of consent in the submission, that it shall be made a rule of court, may be to this effect: that the parties do thereby "consent and agree that this their submission to the arbitration or umpirage above mentioned shall be made a rule of her Majesty's Court of Queen's Bench at Westminster, pursuant to the statute in such case made and provided." Where this clause mentioned only "the Court," without stating which court, the Court of Common Pleas allowed the submission to be made a rule of that court (*s*). And where the consent was, that the "award," instead of the "submission," should be made a rule of court, the Court held the mistake to be immaterial (*t*). But it seems, that, unless the word "award" has been used by mistake for "submission," it is otherwise (*u*). Also, where the clause was conditional, thus: "And *if* the obligor shall consent that this submission be made a rule of court, that then" &c., the Court held it to be sufficient (*x*). It seems, that the act only authorises making the submission a rule of one court, and not of more than one (*y*). It may be here mentioned, that it would seem, that an order of reference of a cause at *Nisi Prius* may be made a rule of court, although it does not contain a clause to that effect (*z*).

Alteration of submission, &c.

Alteration of Submission.]—After a submission by deed, a new arbitrator may be substituted in the place of one of the original arbitrators, by consent of both parties, without deed; and such appointment constitutes a new submission, not under seal, incorporating all the remaining provisions of the former submission (*a*). The remedy by action on the deed of submission would, however, be lost, unless the substitution were also by deed (*b*). And a recognizance to perform the award of B. is not forfeited by non-performance of the award of C., who by consent of the parties is substituted for B., by rule of court (*c*). The remedy in such cases is by attachment, or action on the award (*d*). The same principles seem to be applicable to other alterations. As to the amendment of a submission by rule of court, see *ante*, 1462. An arbitrator cannot alter the terms of the submission (*e*).

Revocation of submission, &c.

By leave of the court or judge.

Revocation of Submission, &c.]—After entering into the submission, and consenting that it should be made a rule of court, either party, before the act of 3 & 4 *W.* 4, *c.* 42, might revoke his submission by deed, at any time before the making of the award, and before the submission had actually been made a rule of court: and this, though the cause was referred by

(*r*) 3 Bl. Com. 16. See *Re Warner*, 2 Dowl. & L. 148.

(*s*) *Soillieux* v. *Herbst*, 2 B. & P. 444.

(*t*) *Pedley* v. *Westmacott*, 3 East, 603: *Ex p. Storey*, 2 Nev. & P. 667; 7 Ad. & El. 602, *S. C.*: overruling *Harrison* v. *Grundy*, 2 Str. 1178, *contra*.

(*u*) *Re Woodcraft* v. *Jones*, 9 Dowl. 536, per *Coleridge*, J.

(*x*) *Cheesly* v. *Baily*, 1 Ld. Raym. 674: 1 Salk. 72, *S. C.* See Chit. Forms, 649, 650.

(*y*) *Wimpenny* v. *Bates*, 2 C. & J. 329; 2 Tyr. 466, *S. C.*

(*z*) *Harrison* v. *Smith*, 1 Dowl. & L. 876.

(*a*) *Re Tunno*, 2 Nev. & M. 393.

(*b*) *Brown* v. *Goodman*, 3 T. R. 592: *post*, 1474, 1507.

(*c*) *R.* v. *Bingham*, 3 Y. & J. 101.

(*d*) *Evans* v. *Thomson*, 5 East, 189. *Re Tunno*, 2 Nev. & M. 393.

(*e*) *In Re Morphett, &c.*, 2 Dowl. & L. 967.

order of *Nisi Prius* (*f*); and if the arbitrator had afterwards proceeded and made his award, notwithstanding the revocation, the party would not have been liable to an attachment for a non-performance of it, (particularly if the arbitrator had had notice of the revocation before the award was made) (*g*); and the Court, upon application, would have set it aside (*h*), and could not have vacated the revocation (*i*). Where, indeed, it appeared doubtful whether the arbitrators had made their award previous or subsequent to their receiving notice of a deed of revocation, the Court of Common Pleas would not stay the proceedings, but left the party to plead such matter *puis darrein continuance* (*k*). The bond of submission, however, became forfeited by such revocation, and the obligee might have immediately sued upon it (*l*); or the Court might upon the rule, or upon the judge's order being made a rule of court (*m*), have ordered the party revoking to pay the other "such costs as the Court shall think reasonable and just," according to the terms of the rule or order (*n*). Where it appeared that the arbitrator's authority had been revoked merely on the ground that the party could not procure the attendance of a material witness before the arbitrator, the Court refused to make him pay costs (*o*). But now, by the 3 & 4 *W.* 4, *c.* 42, *s.* 39, it is enacted, "that the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of court, or judge's order, or order of *Nisi Prius*, in any action now brought, or which shall be hereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of his Majesty's courts of record, shall not be *revocable by any party* to such reference without the leave of the Court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator or umpire shall and may and is hereby required to proceed with the reference, notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the Court, or any judge thereof, may from time to time enlarge the time (*p*) for any such arbitrator making his award" (*q*). The statute applies to references of civil proceedings only (*r*). To bring a case within it, the reference must be complete; therefore the act does not apply to arbitrators appointed in pursuance of a clause in a deed, that all disputes shall be referred to the arbitration of two persons, who are directed to choose an umpire before they proceed, but which umpire has not been appointed (*s*). To induce the Court or a

3 & 4 W. 4, c. 42, s. 39.

(*f*) See *Rex* v. *Burridge*, 1 Str. 593. And see *Lowes* v. *Kermode*, 2 Moore, 38; 8 Taunt. 146, *S. C.*; *Green* v. *Pole*, 6 Bing. 443; 4 Moo. & P. 198, *S. C.*

(*g*) *Milne* v. *Gratrix*, 7 East, 608: *King* v. *Joseph*, 5 Taunt. 452.

(*h*) *Clapham* v. *Higham*, 7 Moore, 703; 1 Bing. 87, *S. C.*

(*i*) *Skee* v. *Coxon*, 10 B. & C. 483.

(*k*) *Lowes* v. *Kermode*, 2 Moore, 30; 8 Taunt. 146, *S. C.* And see *Dicas* v. *Jay*, 6 Bing. 519; 2 Moo. & P. 448, *S. C.*

(*l*) *Warburton* v. *Storr*, 4 B. & C. 103.

(*m*) See *Aston* v. *George*, 2 B. & Ald. 395; 1 Chit. Rep. 200, *S. C.*

(*n*) See *Skee* v. *Coxon*, 10 B. & C. 483: *Morgan* v. *Williams*, 2 Dowl. 123.

(*o*) *Aston* v. *George*, 2 B. & Ald. 395; 1 Chit. Rep. 200, *S. C.*

(*p*) See *post*, 1473.

(*q*) See form of order permitting revocation, Chit. Forms, 652: and order, &c., for enlarging the term, Id. 656.

(*r*) *Rex* v. *Bardell*, 1 Nev. & P. 74; 5 Dowl. 238; 5 Ad. & Ell. 619, *S. C.*: *Watson* v. *M'Cullum*, 8 T. R. 520.

(*s*) *Bright* v. *Downell*, 4 Dowl. 756; 1 T. & G. 576, S. C.

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judge to allow a party to rescind his submission, strong grounds must be laid before them (*t*). Where, by an order of *Nisi Prius*, all matters in difference in a cause were submitted to arbitration, with liberty to the arbitrator to reserve questions for the opinion of the Court on certain points of law which had been raised at the trial, evidence was offered before the arbitrator to which the defendant objected; the arbitrator thought the objections weighty, but refused to decide upon them, and declared his intention to receive the evidence, stating that he should raise on his award such objections to it as appeared to him, on consideration, to be important, but he declined pledging himself to raise any objection in particular; the Court refused to allow the defendant to revoke his submission, though he stated that the admission of the evidence would make many additional meetings necessary, and cause great expense; and though the objections to the evidence might be well founded (*u*). The Court or judge will not revoke the submission without hearing both parties (*x*); or, after the arbitrator has made his award (*y*).

Revocation by death, bankruptcy, &c.

Besides this mode of revocation already mentioned, the authority of the arbitrator may be impliedly revoked by the death of either party before the award is actually made (*z*). Even where a verdict is taken subject to an award, the death of either party after verdict and before award made, is a revocation (*a*). Where, by the terms of the reference, the arbitrators were to make *and publish* their award in writing, ready to be delivered to the parties in difference before a certain day, it was held, that the execution of the award by the arbitrators was a sufficient publication for the purpose of making it valid in the lifetime of the plaintiff, who died after the execution, but before any notice of the award being made was given to either party to the reference (*b*). But the death of a party, as above, will not operate as a revocation if the submission contains an express stipulation to the contrary (*c*); and such a stipulation may be inserted with effect in an order of reference or rule of court (*d*), or where a verdict is taken subject to an award (*e*). It seems very questionable whether an award made after the death of one of several parties on one side of a reference is void (*f*). Where differences arose be-

(*t*) *James* v. *Attwood*, 7 Scott, 841: *Re Woodcroft* v. *Jones*, 9 Dowl. 538.

(*u*) *Scott* v. *Vaneandau*, 1 Q. B. 102; 4 P. & D. 725, *S. C.*

(*x*) *Clark* v. *Stocken*, 2 Bing. N. C. 651; 3 Scott, 90; 5 Dowl. 32; 2 Hodges, 1, *S. C.*

(*y*) *Phillips* v. *Ingram*, 3 Dowl. 669.

(*z*) *Cooper* v. *Johnson*, 2 B. & Ald. 394. And see *Bristow* v. *Binns*, 3 D. & R. 184: *Lowes* v. *Kermode*, 2 Moore, 30; 8 Taunt. 146, *S. C.*: *Dowse* v. *Coxe*, 10 Moore, 272; 3 Bing. 20, *S. C.*: *Edmunds* v. *Cox*, 2 Chit. Rep. 432.

(*a*) See *Toussaint* v. *Hartop*, 7 Taunt. 571; 1 Moore, 287; Holt, 335; nom. *Anon.*, 1 Chit. Rep. 187, n. *a.*, *S. C.* And see *Tyler* v. *Jones*, 4 D. & R. 749; 3 B. & C. 144, *S. C.*: *Macdougall* v. *Robertson*, 2 Y. & J. 11; 1 Moo. & P. 147, *S. C.* But see *Bowyer* v. *Taylor*, 3 D. & R. 610 a.

(*b*) *Brooke* v. *Mitchell*, 6 M. & W. 473; 8 Dowl. 392, *S. C.*, but not *S. P.*

(*c*) See *Biddell* v. *Dowse*, 6 B. & C. 255: *Clarke* v. *Crofts*, 4 Bing. 143; 12 Moore, 349, *S. C.*. *Lewin* v. *Holbrook*, 11 M. & W. 110; 2 Dowl., N. S., 991, where the arbitrator refused to proceed after the death of one of the parties, and the Court refused to compel him to do so.

(*d*) *Macdougall* v. *Robertson*, 1 Moo. & P. 147; 2 Y. & J. 11, *S. C.*: *Prior* v. *Hembrow*, 8 M. & W. 873.

(*e*) *Toussaint* v. *Hartop*, 7 Taunt. 571; 1 Moore, 287, *S. C.* And see *Biddell* v. *Dowse*, 6 B. & C. 255: *Clarke* v. *Crofts*, 12 Moore, 349; 4 Bing. 143, *S. C.*: *Wrighton* v. *Rywater*, 6 Dowl. 359. See also *Re Hare, Milne, and Haswell*, 8 Scott, 367; 8 Dowl. 71; 6 Bing., N. S., 188, *S. C.*

(*f*) *Re Hare, Milne, and Haswell*, 8 Scott, 367. See Watson on Awards, p. 37: *Lewin* v. *Holbrook*, *supra*. As to the executor of one of several parties upon one

tween the owners of a ship and the freighters, (the latter having distinct interests in the cargo), and it was agreed between them that the matters in difference should be referred to arbitration, it was holden, that the death of one of the freighters before award made, only affected the award as to him, and was no revocation as to the others (*g*). The marriage of a feme sole party, after submission and before award made, is in like manner a revocation of the arbitrator's authority (*h*). But it seems, that the bankruptcy of either party is not so (*i*), and this, whether the submission be by order of *Nisi Prius*, or otherwise (*k*). Where a cause was referred by order of *Nisi Prius*, and pursuant to the terms of such order the defendant paid to the arbitrator 3,500*l.*, to be paid out by him to such of the parties as he should think fit, the Court, under the circumstances, considered that he held such sum of money as a stakeholder between the parties, and, therefore, that the bankruptcy of the defendant, before the making of the award, did not entitle his assignees to claim the same (*l*). It would seem also, that the insolvency of a party to a submission does not operate as a revocation of it (*m*).

Effect of agreement to refer on right to sue.

Effect of Agreement to refer on Right to Sue.]—An agreement to refer matters in difference to arbitration does not oust the courts of law or equity of their jurisdiction, and the party thereto may commence proceedings notwithstanding (*n*); though he might be subject to a cross action if he has refused to enter into such arbitration. And if a reference be pending, and it has been agreed that it shall operate as a stay of proceedings, it may be made the subject of an application to the court for staying the proceedings until an award is made (*o*). But after the award is made it is binding upon the parties, and the Courts can then only determine whether it is a good award or not (*p*).

side of a reference being liable to contribute towards the costs of the reference incurred after the death of his testator, see *Prior* v. *Hembrow*, 8 M. & W. 873.

(*g*) Per three Justices, MS., H. 1820.

(*h*) *Charsley* v. *Winstanley*, 5 East, 266: *M'Cure* v. *O'Ferrall*, 8 Clarke & Fin. 30. And see *Marsh* v. *Wood*, 9 B. & C. 659, 661.

(*i*) *Hemsworth* v. *Brian*, 1 C. B. 131; 2 Dowl. & L. 844, *S. C.*: *Taylor* v. *Shuttleworth*, 8 Scott, 565; 6 Bing., N. C., 277: 8 Dowl. 281, *S. C.*: per *Erskine*, J., and *Maule*, J.: *Taylor* v. *Marling*, 2 Scott, N. R., 374; 2 M. & G. 55, *S. C.*, per *Tindal*, C. J., and *Coltman*, J.: *Andrews* v. *Palmer*, 4 B. & Ald. 250: *Haswell* v. *Thorogood*, 7 B. & C. 705: *Snook* v. *Hellyer*, 2 Chit. 43: *Gibson* v. *Carruthers*, 8 M. & W. 321. See *Marsh* v. *Wood*, 9 B. & C. 659: *Ex p. Kemshead*, 1 Rose, 149: *Dod* v. *Herring*, 1 Russ. & Myl. 153; 3 Sim. 143.

(*k*) *Andrews* v. *Palmer*, *supra*: *Taylor* v. *Marling*, *supra*, per *Bosanquet*, J.

(*l*) *Taylor* v. *Marling*, *supra*.

(*m*) See *Hobbs* v. *Ferrars*, 8 Dowl. 779: *Rolfe*, B., inclined to think that it did, *S. C.*

(*n*) *Thompson* v. *Charnock*, 8 T. R. 139: *Hill* v. *Hollister*, 1 Wils. 129: *Tattersall* v. *Groote*, 2 B & P. 131: *Street* v. *Rigby*, 6 Ves. jun. 815: *Harris* v. *Reynolds*, 9 Jur., Q. B., 908.

(*o*) *Ante*, 1205.

(*p*) See *Cleworth* v. *Pickford*, 7 M. & W. 321.

Sect. 2.

Proceedings upon Reference—The Award, &c.

Proceedings upon the Reference, 1470.
Enlargement of Time for making Award, 1473.
Umpire, 1476.
The Award, 1478.
Costs, 1480.
Arbitrator's Authority, how determined, 1485.

Part VII.

Proceedings upon the reference.

Swearing witnesses.

Proceedings upon the Reference.]—It is usual to have those persons sworn who give evidence before the arbitrator. For this purpose, before the recent act of 3 & 4 *W.* 4, *c.* 42, if the cause was referred at *Nisi Prius*, and the witnesses were in court, *each attorney wrote down the names of his witnesses, together with the name of the cause, upon a piece of paper, and gave it to the crier of the court, who would thereupon swear the witnesses* (*p*). *In other cases, the like memorandum was made, stating also whether the persons to be sworn were parties in the cause, or only witnesses. It was taken to the judge's chambers, or to the Court at Westminster, and the judge's clerk had the witnesses sworn, and gave a memorandum to that effect, signed by the judge.* This course may still be pursued; but it is more usual to have the witnesses sworn before the arbitrator, under the 3 & 4 *W.* 4, *c.* 42, *s.* 41. By that enactment, it is provided, "that when in any rule or order of reference, or in any submission to arbitration containing an agreement that the submission shall be made a rule of court, it shall be ordered or agreed that the witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrator or umpire, or any one arbitrator, and he or they are hereby authorised and required, to administer an oath to such witnesses, or to take their affirmations in cases where affirmation is allowed by law instead of oath; and if upon such oath or affirmation any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly." A provision in the order of reference, that the witnesses shall be examined upon oath, "to be taken before me" (the judge) "or some other judge of the Court of Exchequer, or before a commissioner," does not exclude the power of the arbitrator to administer an oath under this act (*q*). But the Court, or a judge, have still a concurrent jurisdiction to swear witnesses examined before an arbitrator (*r*). If the witnesses or parties be examined without being sworn, yet, if no objection on that account be

(*p*) See form of this memorandum for the *first*, Chit. Forms, 653.
(*q*) *Hodsoll* v. *Wise*, 4 M. & W. 536; 7 Dowl. 15, S. C.
(*r*) *James* v. *Atwood*, 5 Bing. N. C. 688; 7 Scott, 841, S. C.

made before the arbitrator, the Court will not set aside the award (*s*).

Obtaining appointment from the arbitrator.

The next step is to obtain an appointment from the arbitrator. If the cause have been referred at *Nisi Prius, get the order of Nisi Prius from the associate, if the cause was tried at the assizes; or from the clerk of Nisi Prius, if it were tried in London or Middlesex. Then get an appointment in writing from the arbitrator, as to the time and place the parties and their witnesses are to attend before him* (*t*)*; and make a copy of the order of Nisi Prius and appointment, and serve it on the opposite attorney: it is usual, also, at the same time, to inform him if you purpose to attend by counsel.* If the cause were referred by rule of court, *draw up the rule with one of the Masters; or, if by judge's order, draw up the order, as already mentioned; get an appointment from the arbitrator* (*t*)*; and serve a copy of the rule or order and appointment, as above directed.* In all other cases, a notice of the time and place appointed by the arbitrator will be sufficient (*u*). Care must be taken that it be ordered by the rule that all proceedings in the cause be stayed; otherwise the reference will be no stay of proceedings (*v*).

Statement of case, witnesses, &c., to.

Frequently, each party furnishes the arbitrator with a statement of his case, and a list of the witnesses he intends to produce. If briefs have been made out, and the arbitrator be a gentleman of the profession, this is usually done by delivering to him one of the briefs on each side.

Compelling attendance of witnesses.

Before the recent statute, there was no mode or power of compelling the attendance of a witness before an arbitrator, even when he had engaged to attend (*w*). But now, by the 3 & 4 *W.* 4, *c.* 42, *s.* 40 (*x*), "when any reference has been made by any such rule or order, or by any submission containing such agreement as aforesaid (*y*), it shall be lawful for the Court by which such rule or order shall be made, or which shall be mentioned in such agreement, or for any judge, by rule or order to be made for that purpose, to command the attendance and examination of any person to be named, or the production of any documents to be mentioned, in such rule or order; and the disobedience of any such rule or order shall be deemed a contempt of court, if, in addition to the service of such rule or order, an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire, before whom the attendance is required, shall also be served, either together with or after the service of such rule or order: provided always, that every person whose attendance shall be so required, shall be entitled to the like conduct-money, and payment of expenses and for loss of time, as for and upon attendance at any trial; provided also, that the application made to such Court or judge for such rule or order shall set forth the county where such witness is residing at the time, or satisfy such Court or judge that such

(*s*) *Ridout* v. *Pye*, 1 B. & P. 91.

(*t*) See the forms, Chit. Forms, 655.

(*u*) See *R.* v. *Morphett*, 2 Dowl. & L. 967; where, under circumstances, it was held, that one of the parties not having had notice of a meeting, was not sufficient for setting aside the award.

(*v*) R. T., 1 Anne; 2 Ld. Raym. 789.

(*w*) *Wansall* v. *Southwood*, 4 M. & R. 389.

(*x*) This enactment does not extend to courts of equity: *Hall* v. *Ellis*, 9 Sim. 530, V. C.

(*y*) *Ante*, 1467.

PART VII.

person cannot be found; provided also, that no person shall be compelled to produce, under any such rule or order, any written or other document that he would not be compelled to produce at a trial, or to attend at more than two consecutive days, to be named in such order." Independently of this enactment as to the production of documents, where a defendant submitted all matters in difference to arbitration, and the arbitrators required him, in pursuance of a power given to them for that purpose, to produce certain books and papers, and an attachment was moved for against him for not producing them, the Court held, that he could not, by *affidavit*, bring before the Court the question, whether those books related to matters in difference between the parties or not, though it was expressly sworn that the books merely related to old accounts which had been long settled, and which it had been agreed between them should form no part of the reference, because, by the general terms of the submission of all matters in difference, it was left to the discretion of the arbitrator to say what were matters in difference and what were not (*z*). *Where it is requisite to resort to the above compulsory proceeding, the course is for the attorney of the party desiring the attendance of the witness to lay before a judge at chambers a memorandum, signed by the attorney, stating the existence of the reference, that the witness, or the production of the document, is material, and annexing or inserting a copy of the appointment of the arbitrator; and upon which the judge will make his order* (*a*) *for the attendance of the witness. Or a motion may be made to the Court, and a rule obtained, absolute in the first instance* (*b*), *for the attendance of the witness and production of the document. An appointment in writing of the time and place of attendance, in obedience to the rule or order signed by the arbitrator, or, if more than one, by one at least of the arbitrators, should be obtained* (*a*). *A copy of the order or rule and appointment should then be served upon the witness, a reasonable time before that appointed for the attendance, the originals being at the same time shewn to him, and a sum sufficient for his expenses and loss of time being paid or tendered to him at the same time.* If the witness do not comply with the rule or order and appointment, he may be proceeded against as guilty of a contempt of court (*c*). In case of a reference at *Nisi Prius*, the witness will not be subject to an attachment, unless the order of *Nisi Prius* has been regularly drawn up (*d*).

The hearing and examination of witnesses, parties, &c.

At the time appointed, the arbitrator hears the parties, or their counsel or attornies, and hears the evidence, in the same order as at a trial at *Nisi Prius*. There is a clause, however, in the rule and order of reference, authorizing the arbitrator to examine the parties themselves, on oath, if he thinks fit; and this has been holden to empower him to examine the plaintiff to a point upon which no other evidence could be adduced on the other side (*e*). It is entirely in his discretion whether he will examine them in support of their own case, or against it, or not (*f*). It is also in his discretion whether

(*z*) *Arbuckle* v. *Price*, 4 Dowl. 174.
(*a*) See Chit. Forms, 655.
(*b*) *In re Guarantie Society, &c.*, 1 Dowl. & L. 907, C. P.
(*c*) See *post*, Pt. 8.
(*d*) *Curtis* v. *Bligh*, B. C., M. 1839; 3 Jur. 1152.
(*e*) *Warne* v. *Bryant*, 5 D. & R. 301; 3 B. & C. 590, S. C.
(*f*) *Scales* v. *East London W. W. Co.*, 1 Hodg. 91: *Wells* v. *Banaber*, 9 M. & W. 451; 1 Dowl., N. S., 343, S. C.

he will examine them on oath (*g*). If the submission to arbitration be "so that the witnesses be examined on oath," affidavits cannot be read; and if they are, the award may be set aside (*h*). The arbitrator may proceed in the absence of one of the parties, if it appear that he has wilfully absented himself; but not without (*i*). When a party during the progress of an arbitration objects to the admissibility of evidence, and, upon its being received by the arbitrator, rejects the authority of the arbitrator, and refuses to attend subsequent meetings, the arbitrator may proceed *ex parte*, and make his award upon *ex parte* evidence (*k*). Private communications ought on no account to be made to an arbitrator by a party previously to the making of his award (*l*). The mode of conducting the reference must in general be left to the arbitrator.

Privilege from arrest.

As to the privilege of the parties, their attornies, and witnesses, from arrest while attending the reference, see *ante, Vol.* 1, 687.

Enlargement of time for making it. By arbitrator.

Enlargement of Time for making Award.]—If it be necessary that the time limited for making the award should be enlarged, *the arbitrator may enlarge it as a matter of course, if a power be given him for that purpose in the submission or order.* The mode of enlargement in this case depends entirely upon the terms of the submission or order (*m*). The enlargement is considered as part of the original submission (*n*). Where an arbitrator enlarges the time for making his award until a particular day, the time is to be construed as inclusive of that day (*o*). The fact of enlargement need not be stated in the award, but it is convenient to do so to obviate the necessity of an affidavit of the fact (*p*). Notice should be given to the parties of the enlargement, or, as it seems, the Court will not grant an attachment for disobedience to the award (*q*). Such notice may, it seems, be given by parol at the time of serving the award on the defendant, and demanding its performance (*r*). As to the umpire enlarging the time, see *post*, 1478.

By consent of parties.

If no such power was given, but the parties on both sides *consent* to the time being enlarged, then, if the cause be referred at *Nisi Prius*, or by a judge's order, or if the submission contain a clause of assent that it be made a rule of court, the time is enlarged thus:—*Move to make the order or submission a rule of court; draw up the rule with the Masters, and serve a copy of it on the opposite attorney; get motion-papers (to enlarge the time for making the award) signed by the counsel of each party, and counsel will hand them in court, through the usher, to one of the Masters, who will thereupon draw up the rule* (*s*); *then get another appointment on the rule from the arbi-*

(*g*) *Smith* v. *Goff*, 3 Dowl. & L. 47.
(*h*) *Banks* v. *Banks*, 1 Gale, 46.
(*i*) *Gladwin* v. *Chilcote*, 9 Dowl. 550. See *Harvey* v. *Shelton*, 13 Law J., N. S., 486: *Bignall* v. *Gale*, 9 Dowl. 631: *Re Morphett*, 2 Dowl. & L. 967; *post*, 1497.
(*k*) *Scott* v. *Vansandau*, 8 Jur. 1114, Q. B.
(*l*) *Harvey* v. *Shelton*, 13 Law J., N. S., 486, R.
(*m*) See *Reid* v. *Fryatt*, 1 M. & Sel. 1: *Davies* v. *Vass*, 15 East, 97: *Payne* v. *Deakle*, 1 Taunt. 509: *Barrett* v. *Parry*, 4 Id. 658. A submission by which an award is to be made on or before the —— day of —— , or any other day to which the submission may be enlarged, is a general authority to be executed in a reasonable time: *Macdougall* v. *Robertson*, 2 Y. & J. 11; 1 Moo. & P. 147, *S. C.* See as to a plea of no award in a reasonable time, *Curtis* v. *Potts*, 3 M. & Sel. 145.
(*n*) *Re Smith* v. *Blake*, 8 Dowl. 130, per *Coleridge*, J.; see *post*, 1504, 1508.
(*o*) *Kerr* v. *Jeston*, 1 Dowl., N. S., 538.
(*p*) *George* v. *Lousley*, 8 East, 13.
(*q*) *Hilton* v. *Hopwood*, 1 Marsh. 66.
(*r*) *Doddington* v. *Ballward*, 7 Dowl. 640; 7 Scott, 733; 5 Bing., N. C., 591.
(*s*) See form of rule, Chit. Forms, 666.

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trator, and serve a copy of this rule and appointment on the opposite attorney. Where the cause is referred under a rule of court, and the parties thus consent to the enlargement, *get the motion-papers signed by counsel* (*t*); *draw up the rule, and serve a copy of the rule and appointment, as above directed.*

In all other cases of consent, a consent in writing by the parties will be sufficient (*u*), unless the submission was by deed, in which case the consent must be by deed, if it be intended to retain the remedy by action on the original deed (*x*). And even where the submission is by deed, an agreement to enlarge, indorsed, (and stamped with an agreement stamp), will be sufficient to make an award within the enlarged time enforceable by attachment (*y*). The time may also be enlarged by altering, re-executing, and re-stamping the arbitration bonds (*z*). An enlargement, in general terms, virtually incorporates all the terms of the original submission, and among the rest, the agreement that the submission should be made a rule of court (*a*). See *ante*, 78, a case where it was held, that an attorney was discharged from his undertaking to pay what should be awarded to be paid by his client by the time for making the award being enlarged.

By the Court or a judge.

If no such power was given to the arbitrator, and one of the parties would not consent to the enlargement of the time, then, previously to the 3 & 4 *W.* 4, *c.* 42, *s.* 39, there was no mode of enlarging the time; and this is still the case where the submission is not by rule of court, judge's order, or order of *Nisi Prius*, and does not contain a consent to make it a rule of court. Now, however, by that act (*b*), in case of reference by rule of court, order of *Nisi Prius*, judge's order, or by submission containing an agreement that it shall be made a rule of court, a power is given to the Court or a judge to enlarge the time for making the award. The enactment is general, and extends to all cases of arbitration under the mode of submission mentioned in the act (*c*): and it seems that the time may be thus enlarged, whether the arbitrator's authority has been revoked or not (*c*); and, whether the submission contains a power (*d*) to enlarge the original term or not (*e*); and even after the time limited by the submission for making the award has elapsed (*f*). It would seem, that the parties submitting, by stipulating expressly that no award is to be made after the period mentioned in the submission, cannot deprive the Court or a judge of the jurisdiction given by this enactment. *The application for this enlargement should be made by motion to the Court, (the rule in the first instance being to shew cause), or by summons before a judge* (*g*). An *ex parte* rule

(*t*) See *Halden* v. *Glascock*, 5 B. & C. 340: *Dickins* v. *Jarvis*, Id. 528.

(*u*) See *Evans* v. *Thomson*, 5 East, 189. See the form, Chit. Forms, 656.

(*x*) *Brown* v. *Goodman*, 3 T. R. 592, n.: *Greig* v. *Talbot*, 2 B. & C. 185, 188: *Ree* v. *Bingham*, 3 Y. & J. 101, 113; *ante*, 1465; *post*, 1507.

(*y*) *Evans* v. *Thomson*, 5 East, 189; per *Bayley*, J., 2 B. & C. 185.

(*z*) *Watkins* v. *Philpotts*, M'Clel. & Y. 393.

(*a*) *Evans* v. *Thomson*, 5 East, 189; *ante*, 1473.

(*b*) *Ante*, 1467.

(*c*) *Burley* v. *Stevens*, 1 M. & W. 126; 4 Dowl. 770; 1 Gale, 374, *S. C.*; *Re Salkeld* v. *Slater*, 12 Ad. & E. 767; 4 P. & D. 732, *S. C.*

(*d*) *Parbury* v. *Newnham*, 7 M. & W. 378; 9 Dowl. 288, *S. C.* But see *Doe* v. *Powell*, 7 Dowl. 539, (a wrong decision): *Lambert* v. *Hutchinson*, 3 Scott, N. R. 221; 2 Man. & G. 858, *S. C.*

(*e*) *Potter* v. *Newman*, 2 C., M., & R. 742; 1 T. & G. 29; 4 Dowl. 504; 1 Gale, 373, *S. C.*

(*f*) *Parbury* v. *Newnham*, *ubi supra.*

(*g*) For the summons and order, see Chit. Forms, 657.

or order would be bad (*h*). Where one party to a reference obtained a rule calling upon the other to consent to the arbitrator proceeding with the reference, *Patteson*, J., discharged it with costs, considering such an application not to be within the meaning of the above enactment (*i*).

Mode of enlargement by arbitrator.

A power to enlarge must be strictly pursued; therefore, if, by the order of *Nisi Prius*, or the judge's order, a power is given to the arbitrator to enlarge the time for making the award, until such ulterior day as he shall appoint in writing under his hand, to be indorsed on that order, and the Court or a judge thereof shall order, it is necessary, at all events before making the award, if not before the time limited for making the enlargement, to obtain a judge's order ratifying that enlargement, otherwise the award would be bad (*k*). In a somewhat similar case, however, it was held, that the judge's order might be obtained after enlargement by the arbitrator (*l*). A general power to enlarge is sufficiently exercised by appointing a subsequent day for a meeting in the presence of the parties (*m*).

Proceedings where enlargement has been omitted.

An objection that the time for making an award has not been duly enlarged, is waived by proceeding in the reference with a knowledge of that fact (*n*). In some cases, where a verdict has been taken, subject to an award as to the amount of damages, and the arbitrator has accidentally let the day pass without making his award, and the defendant will not consent to the time being enlarged, the Court will grant liberty to the plaintiff to enter up judgment and issue execution forthwith for the whole amount of the verdict, unless the enlargement be consented to (*o*). In a case where a verdict was taken for the plaintiff for damages, subject to the award of an arbitrator, and the arbitrator having omitted to make the award within the period limited by the reference, without any fault on the part of the defendant, the Court refused to allow judgment to be entered for the plaintiff, and held that the cause must go down to trial again (*p*). Where, upon a cause coming on to be tried, a verdict was taken for the plaintiffs, subject to an order of reference, but by reason of obstacles wilfully presented by the plaintiffs, (who were trustees), and their *cestui que trust*, the order was rendered abortive, the Court, at the instance of the plaintiffs, they being only trustees, and infants being interested in the action, granted a new trial, upon the terms of payment of the costs of the day of the former trial by the plaintiffs, and the payment by the plaintiffs and *cestui que trust* of the costs incurred by the defendants in the several motions made in the Court (*q*). But some of these cases were decided before the passing of the stat.

(*h*) *Clarke* v. *Stocken*, 2 Bing., N. C., 651; 3 Scott, 90; 5 Dowl. 32; 2 Hodges, 1, *S. C.*

(*i*) *Doe* v. *Powell*, 2 Dowl. 539.

(*k*) *Wrason* v. *Walls*, 10 B. & C. 107: *vice versâ*, *Leggett* v. *Finlay*, 6 Bing. 255; 3 M. & Sel. 629. See *Davison* v. *Gauntlett*, 4 Scott, N. R., 290; 1 Dowl., N. S., 198; 3 M. & G. 540, *S. C.*

(*l*) *Reid* v. *Fryatt*, 1 M. & Sel. 1.

(*m*) *Burley* v. *Stevens*, 4 Dowl. 770.

(*n*) *Benwell* v. *Hinxman*, 3 Dowl. 500; 1 C., M., & R. 935, *S. C.*: *Lawrence* v. *Hodson*, 1 Y. & J. 16: *Re Hick*, 8 Taunt. 694: *Matson* v. *Trower*, R. & M. 17: *Leggett* v. *Finlay*, 3 Moo. & P. 629: 6 Bing. 255, *S. C.*: *Hallett* v. *Hallett*, 7 Dowl. 389; 5 M. & W. 25; *post*, 1476, 1501.

(*o*) *Taylor* v. *Gregory*, 2 B. & Adol. 774: *Wilkinson* v. *Time*, 4 Dowl. 37. See *Porch* v. *Hopkins*, 1 Dowl. & L. 681.

(*p*) *Hale* v. *Phillips*, 2 Moo. & Scott, 167; 9 Bing. 89, 158, *S. C.*: *Doe* v. *Saunders*, 3 B. & Ad. 783, where there was negligence: *Hooper* v. *Abrahams*, 4 Moore, 3, where the arbitrator died. And see *Evans* v. *Davies*, 3 Dowl. 786.

(*q*) *Morgan* v. *Miller*, 8 Scott, 266.

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3 & 4 *W.* 4, *c.* 42, and others, though after, before it was settled that the Court, and a judge, have so extensive a power under that act to enlarge the time for making an award, as it appears they now have, (see *ante*, 1474); and, therefore, perhaps, now the better course, in such cases as the above, to adopt, would be to apply to the Court, or a judge, to enlarge the time for the arbitrator to make his award. In some cases, where a verdict has been given, the verdict (though not entered on the record) must be got rid of before the cause can be tried again; and a second verdict obtained before the first is got rid of, is irregular (*r*). The proper course in such cases is, to apply to the Court for leave to re-try at the next assizes, notwithstanding the former verdict (*s*).

No enlargement necessary in case of certificate.

It may be here observed, that where a verdict is taken, subject to the certificate of an arbitrator as to the amount, with or without an order of *Nisi Prius*, he is not confined to the time before the return of the jury process, but may certify at any time, and no enlargement is necessary (*t*).

Umpire. What and when appointed, &c.

Umpire.]—Where a matter is referred to two or more arbitrators, it is usual to provide in the submission, that if the arbitrators shall not agree upon their award before a time therein specified, an umpire shall be appointed, by whose award the parties shall abide. This umpire is either named in the submission, (which is much the preferable mode), or the arbitrators are therein given a power to appoint one generally. In the latter case, the arbitrators may appoint the umpire at any time before or after the time limited for them to make their award, provided it be before the time limited for the umpire to make his umpirage (*u*); and they may do so even before they have themselves entered upon an examination of the matter referred to them, even though the submission only give power to appoint in case of disagreement (*x*). Where, by the terms of the reference, the arbitrators were to appoint an umpire previously to their entering on the consideration of the matters referred, and to make their award before a certain day, or such time as they and the umpire, or any two of them, should appoint; and the arbitrators, before appointing an umpire, enlarged the time for making their award, and afterwards held a meeting at which the parties attended; the Court of Common Pleas held, that the parties, being aware of these facts, and having afterwards attended, could not now make any objection on the ground of the enlargement of the time having been made before the appointment (*y*). If one arbitrator requires more evidence to be laid before him, and the other does not, this is a sufficient disagreement to warrant the appointment or interference of the umpire, if they have such power of appointment (*z*).

(*r*) *Hall* v. *Rouse*, 4 M. & W. 24; 6 Dowl. 656, S. C.

(*s*) Per *Alderson*, B., Id. 28: *Baker* v. *Cresswell*, 1 Hodges, 189.

(*t*) *Salter* v. *Yates*, 5 Dowl. 291: *Tomes* v. *Hawkes*, 2 Per. & D. 248: 10 Ad. & E. 32, S. C.: *Cremer* v. *Chart*, 10 Jur. 671.

(*u*) *Harding* v. *Watts*, 15 East, 556: *Smailes* v. *Wright*, 3 M. & Sel. 550. See *Sprigens* v. *Nash*, 5 M. & Sel. 193: *Re Hick*, 8 Taunt. 694.

(*x*) *Roe Wood* v. *Doe*, 2 T. R. 644: *Bates* v. *Cook*, 9 B. & C. 407. But see *Reynolds* v. *Gray*, 1 Ld. Raym. 222: 1 Salk. 70, S. C.

(*y*) *Re Hick*, 8 Taunt. 694. And see *Matson* v. *Trower*, R. & M. 17: *Lascelles* v. *Hodgson*, 1 Y. & J. 16: *Leggett* v. *Finlay*, 3 Moo & P. 629; 6 Bing. 255, S. C.: *Cudliffe* v. *Walters*, 2 M. & Rob. 232.

(*z*) *Cudliffe* v. *Walters*, 2 M. & Rob. 232.

Must not be appointed by lot.

The appointment of the umpire must not be decided by chance; and where the umpire was chosen by lot, the Court set aside the award on that account (*a*). But, under particular circumstances, such an appointment has been held good, where it was employed to decide between two equally eligible persons (*b*). And it would be so if the parties assented to it, with a knowledge of all the circumstances under which the choice was made (*c*); but not otherwise (*d*). A consent by the attorney's clerks on both sides is not sufficient (*e*). No stamp is requisite to the appointment of the umpire (*f*).

How far arbitrators may act after appointing an umpire.

Although the office of arbitrator is, in general, determined by the appointment of the umpire (*g*), yet, if the arbitrators appoint an umpire who refuses to act, they may afterwards appoint another (*h*); or, if they join with the umpire in his umpirage, it is only surplusage, and will not vitiate the instrument (*i*). It follows, however, from the fact of the arbitrator's authority being determined by the appointment of an umpire, that the award cannot properly be made in part by the arbitrators, and as to the other part by the umpire (*k*), unless, indeed, there be an express provision for the purpose (*l*). A statement in an award "that the arbitrators had considered the decision of the umpire," would not make it bad if they did not consult him (*m*).

Examination of witnesses, &c., by.

The general rule is, that the umpire should examine the witnesses, &c., himself (*n*); but if no objection be made by either of the parties, he may receive the evidence from the arbitrators (*o*). Where an umpire refuses, on express request, either to rehear evidence given before the arbitrators, or to examine new witnesses, the Court will set aside the award (*p*). And the not insisting on this objection at the time of the making of the award does not amount to a waiver of it (*p*). The objection, however, may be waived, though, to prevent the award being set aside on this account, clear proof must be given of the waiver (*q*).

Umpirage must be made within limited time.

The umpirage, like the award, must be ready to be delivered within the time limited for it. Where, by deed of arbitration, dated the *1st of June*, the arbitrators were to make their award on or before the *1st of October*, with power, in case they should not agree in making their award within the time, to appoint an umpire, and his award to be binding, so as it were made within *six* months after the date of his appointment; and the arbitrators appointed an umpire within the time allowed to

(*a*) *Ford* v. *Jones*, 3 B. & Ad. 248; 10 Law J. 104, *S. C.*; *Young* v. *Miller*, 4 D. & R. 263; 3 B. & C. 407, *S. C.*; *Wells* v. *Cooke*, 2 B. & Ald. 218; *Re Cassell*, 9 B. & C. 624; *R.* v. *Hodson & Drury*, 7 Dowl. 569; *Re Vinnikum*, 5 Jur. 72, B. C.

(*b*) *Neale* v. *Ledger*, 16 East, 51.

(*c*) *Re Tunno*, 5 B. & Ad. 488.

(*d*) *Jamieson* v. *Binns*, 4 Ad. & E. 945; *In re Greenwood*, 1 Per. & D. 461; 9 Ad. & E. 699, *S. C.*

(*e*) *Re Hodson & Drury*, 7 Dowl. 569.

(*f*) *Routledge* v. *Thornton*, 4 Taunt. 704. See the form, Chit. Forms, 656.

(*g*) *Reynolds* v. *Gray*, 1 Ld. Raym. 222; 1 Salk. 70, *S. C.* And see *Mitchell* v. *Harris*, 1 Ld. Raym. 671; 1 Salk. 71, *S. C.*; 2 Saund. 133 a.

(*h*) See *Oliver* v. *Collings*, 11 East, 367; *Trippitt* v. *Eyre*, 3 Lev. 265, per three Justices, *contra* C. J.

(*i*) *Bates* v. *Cook*, 9 B. & C. 407; *Beck* v. *Sargent*, 4 Taunt. 232; *Soulsby* v. *Hodgson*, 1 W. Bl. 463. And see generally, 2 Saund. 133, n. (7).

(*k*) *Tollit* v. *Saunders*, 9 Price, 612.

(*l*) Per *Wood*, B., *Tollit* v. *Saunders*, 9 Price, 619. See *Heatherington* v. *Robinson*, 7 Dowl. 192.

(*m*) *Harlow* v. *Read*, 3 Dowl. & L. 203.

(*n*) *Re Salkeld* v. *Slater*, 12 Ad. & E. 167; 4 P. & D. 732, *S. C.*

(*o*) *Hall* v. *Laurence*, 4 T. R. 589; *post*, 1498: *Re Tunno*, 2 Nev. & M. 328: *Twogood* v. *Twogood*, 1d. 335, n.: *Re Jenkins and wife, &c.*, *infra*.

(*p*) *Re Jenkins & wife, &c.*, 1 Dowl., N.S., 276: *Re Salkeld* v. *Slater*, 12 Ad. & E., 767; 4 P. & D. 732, *S. C.*; *post*, 1498.

(*q*) *Re Salkeld* v. *Slater*, *supra*; *post*, 1499.

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them, who made his umpirage within six *calendar*, but not within six *lunar* months of his appointment, the Court held that the umpirage was ill made (*r*). If an umpire is to make his award within a certain time, to be calculated from a certain day, such day is to be excluded from the calculation (*s*).

Enlargement of time by umpire.

In a case where the arbitrators were to make an award by 20th August, or such other day as they should appoint, and in case they disagreed an umpire was to decide by the 20th September, or such other day as he should appoint; the arbitrators enlarged their time to the 1st November, and in October gave the umpire notice of their being unable to agree; the umpire had previously (on 17th September) enlarged his time to December, in which month he made his award; and the Court held, that such award was good, inasmuch as the power of enlargement by the umpire was not suspended, until, by the final disagreement of the arbitrators, he became empowered to decide upon the case; and that the *non*-agreement of the arbitrators was sufficient to authorise his interference to enlarge his time: the Court also held, that notice of the enlargement by the umpire was sufficiently given to the defendant by a verbal intimation at the time of serving the award, and demanding performance; and that the non-agreement of the arbitrators, so as to authorise the umpire to interfere, was sufficiently notified by its appearing on the face of the award (*t*).

The Award.

The Award.]—No precise form of words is necessary to constitute an award: it is sufficient if the arbitrator express by it a decision upon the matter submitted to him. A mere proposal or recommendation, however, is not sufficiently decisive (*u*). Where an enlargement has been made, the omission to recite it is no objection to the award (*x*). And the same of a view which the submission required the arbitrator to take (*y*). An untrue recital in the award is not binding on the Court (*z*). Though the order of reference direct the witnesses to be sworn, it need not be stated that the evidence upon which the arbitrator acted was given upon oath (*a*). If all matters in difference be referred, it need not be formally stated in the award that the arbitrator has adjudicated on every matter in difference (*b*). If the arbitrator is empowered by the submission to give a certificate for costs under the 3 & 4 *Vict. c.* 24, *s.* 2, the certificate should be made in the award itself (*c*). The requisite contents of the award will be found noticed, *post*, 1488, &c., when treating of the grounds upon which an award may be set aside.

Form of.

Execution of by arbitrators.

Where a matter is referred to the determination of two or more arbitrators, it seems the award should be executed by all at the same time, and in the presence of each other (*d*). Where caause was referred to three arbitrators, with a power to them,

(*r*) *Re Swinford*, 6 M. & Sel. 226.
(*s*) *Re Higham*, 9 Dowl. 203. See *ante*, 131.
(*t*) *Doddington* v. *Bailward*, 7 Dowl. 640; 7 Scott, 733, *S. C.*
(*u*) *Lock* v. *Vulliamy*, 5 B. & Ad. 600. See *Ferguson* v. *Norman*, 4 Bing. N. C. 58.
(*x*) *George* v. *Louslay*, 8 East, 13.
(*y*) *Spence* v. *Eastern Counties Railway Co.*, 7 Dowl. 697.
(*z*) *Price* v. *Popkin*, 10 Ad. & E. 143, per *Denman*, C. J.
(*a*) *Hannen* v. *Jube*, 10 Jur. 926, B. C.
(*b*) *Re Brown and Croydon Canal Company*, 9 Ad. & E. 522; 1 P. & D. 391, *S. C.*
(*c*) *Spain* v. *Cadell*, 8 M. & W. 129; 9 Dowl. 745, *S. C.*; *post*, 1492.
(*d*) *Stalworth* v. *Inns*, 13 M. & W. 466; 2 Dowl. & L. 428. See *Little* v. *Newton*.

or any two of them, to make an award, an award made by two of them was held good, it appearing that the third had notice of the meetings, &c. (*e*). Where an award was to be made by three arbitrators, or any two of them, and the award purported on the face of it to be made by all three, but was executed by two only, the third having refused to sign it when requested to do so, it was held that the award was good as the award of the two (*f*).

Publication of.

When the award is made, the arbitrator gives notice to the attornies of the parties that it is ready for delivery, and that each of them may have his part on the day therein specified, on payment of the expenses. An award is only considered as published within the meaning of the stat. 9 & 10 *W.* 3, *c.* 15, *s.* 2, and within the meaning of the rule, which has been laid down by the courts by analogy to the terms of that statute, for regulating the time for making an application to set aside an award, from the time of giving this notice; but, so far as the arbitrator is concerned, so as to determine his authority, it would seem that an award is deemed published from the time of its execution (*g*). This notice is so considered to be the publication of the award, though the expenses, on payment of which the arbitrator by such notice informs the parties they may have the award, are unreasonable (*h*). When an award purports and is attested to be published on a certain day, the Court will presume it to have been published on that day, without any positive affidavit to that effect (*i*).

Alteration of.

After the award is delivered (*k*), or after notice given by the arbitrator of its being ready (*l*), or it would seem after it is executed (*m*), no mistake in a material part of it, as in the calculation of figures, or in the sum awarded, &c., can be corrected (*n*), unless with the consent of both the parties (*o*); but it seems that a mistake in an immaterial part may (*p*). An alteration of the award by the arbitrator after his authority is at an end, is the same as if made by a stranger, and the award, if legible, will stand as it originally was (*q*). He cannot, after the award is made, give any certificate for costs (*r*).

Stamp.

The award is engrossed on 35*s.* stamp paper, and signed by the arbitrator in the presence of a witness. If it contain, however, thirty common law sheets, or upwards (of seventy-two words each), it requires an additional stamp of 25*s.* for every fifteen sheets above the first fifteen (*s*). It is usual to make out the award on stamped paper for the party in whose favour it is made, and to give copies merely, upon unstamped paper,

2 Scott, N. R., 509; 9 Dowl. 437: *Re Templeman and Reed*, 9 Dowl. 962.

(*e*) *Dalling* v. *Matchett*, Willes, 215.

(*f*) *White* v. *Sharp*, 12 M. & W. 712; 1 Dowl. & L. 1030; 1 C. & K. 348, *S. C.*

(*g*) *Brooke* v. *Mitchell*, 6 M. & W. 477; 8 Dowl. 392, *S. C.*

(*h*) *M'Arthur* v. *Campbell*, 5 B. & Ad. 518: *Brooke* v. *Mitchell*, 6 M. & W. 477, per *Parke*, B., and *Alderson*, B. But see *Mussellbrook* v. *Dunkin*, 2 Moo. & Scott, 740; 9 Bing. 605; 1 Dowl. 722, *S. C.*

(*i*) *Doe Clarke* v. *Stilwell*, 3 Nev. & P. 701; 8 Ad. & E. 645, *S. C.*

(*k*) *Irvine* v. *Elmon*, 8 East, 54.

(*l*) *Henfree* v. *Bromley*, 6 East, 309.

(*m*) *Brooke* v. *Mitchell*, *supra*.

(*n*) See *Ward* v. *Deem*, 3 B. & Ad. 234: *Hall* v. *Alderson*, 2 Bing. 476.

(*o*) *Re p. Cuerton*, 7 D. & R. 774.

(*p*) *Trew* v. *Burton*, 1 C. & M. 533. And see what is an immaterial part, Id.

(*q*) *Henfree* v. *Bromley*, 6 East, 309. See *Trew* v. *Burton*, 1 C. & M. 533.

(*r*) *Geeves* v. *Gorton*, 15 M. & W. 186.

(*s*) 55 G. 3, c. 184. See *Goodson* v. *Forbes*, 6 Taunt. 178; 1 Marsh. 525, *S. C.*: *Boyd* v. *Emerson*, 4 Nev. & M. 99. What is an award within the act, see *Jebb* v. *M'Kiernan*, 1 M. & M. 240: *Carr* v. *Smith*, 7 Jur. 600, Q. B. See a case where the accounts of a partnership were referred: *Goodyear* v. *Simpson*, 15 M. & W. 16. As to the consequences of a wrong stamp, see *post*, 1497.

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to the others; unless the latter require originals signed and stamped as above mentioned (*s*). Where it was sought to draw up a rule for an attachment for non-performance of an award, it was held that it was competent for the officer of the court to object to the absence of a stamp on the award, and therefore to refuse to draw up the rule (*t*).

Certificate of amount of damages instead of award.

Sometimes, however, to save the expense of the stamp and the award, a verdict is taken, subject merely to the certificate of an arbitrator as to the amount (*u*). And this certificate may be given even after the assizes, and after the return of the process (*v*), though no order of *Nisi Prius* has been obtained (*x*). Where a cause is thus referred at *Nisi Prius*, the officer of the court keeps the record, and enters the verdict finally according to the arbitrator's award (*y*).

Costs.

Costs.]—Where there is *no cause in court*, the award as to costs depends entirely upon the terms of the submission; if the submission give the arbitrator no authority as to costs, he cannot award them (*z*). But where authority is given to him upon that subject, he may order either party to pay the costs, or each to pay a moiety, unless the submission require that the costs abide the event. Or if the award be silent as to costs, each party must pay his own costs, and the costs of the reference, equally.

Where no cause in court.

Where a cause in court.

Where there is *a cause in court*, the award as to the costs of the *reference*, depends upon the terms of the rule or order under which the cause is referred; and if the rule or order give the arbitrator no authority as to costs, he cannot award them (*a*). Where three actions, in one of which an infant was the plaintiff, were referred, and the costs of the reference and award were to be in the discretion of the arbitrator, it was held that he might award them to be paid by the infant (*b*).

Costs of reference.

But if, by the rule or order of reference, the costs *generally* are to abide the event, this includes the costs of the reference, as well as the costs of the cause (*c*). Generally, the costs of the reference are not costs in the cause (*d*). But where a verdict is taken subject to a certificate, it is otherwise (*e*). Where a cause is referred, and the order of reference is silent as to costs, the arbitrator has power over the costs of the action, but not over the costs of the reference (*f*). If each party be ordered to repay a moiety of the costs of the reference, one of them may pay the entire sum, in order to get the award from the arbitrator; and he may afterwards have the same reme-

(*s*) See forms of Awards, Chit. Forms, 657 to 662.

(*t*) *Hill* v. *Slocombe*, 9 Dowl. 339.

(*u*) *Salter* v. *Yeates*, 5 Dowl. 291, per *Parke*, B.

(*v*) *Salter* v. *Yeates*, 5 Dowl. 291.

(*x*) *Tomes* v. *Hawkes*, 2 Per. & D. 948; 10 Ad. & E. 39, *S. C.*

(*y*) *Kenrick* v. *Phillips*, 7 M. & W. 415, per *Alderson*, B.

(*z*) See *Chandler* v. *Fuller*, Willes, 64: *Bell* v. *Bolton*, 2 Chit. Rep. 157: *Firth* v. *Robinson*, 1 B. & C. 277. See *Kenrick* v. *Davies*, 5 Dowl. 693.

(*a*) *Firth* v. *Robinson*, 1 B. & C. 277: *Chandler* v. *Fuller*, Willes, 64: *Strutt* v. *Rogers*, 7 Taunt. 213; 2 Marsh. 594, *S. C.* See *Grove* v. *Cox*, 1 Taunt. 165: *Mackintosh* v. *Blyth*, 1 Bing. 269; 8 Moore, 211, *S. C.*

(*b*) *Proudfoot* v. *Boyle*, 15 M. & W. 198.

(*c*) *Wood* v. *O'Kelly*, 9 East, 436.

(*d*) *Brown* v. *Nelson*, 13 M. & W. 337; 2 Dowl. & L. 405; 14 Law J., N. S., 62, Exch., *S. C.*: *Treguning* v. *Attenborough*, 1 Dowl. 225; 5 Moo. & P. 483; 7 Bing. 733, *S. C.* See *Mackintosh* v. *Blyth*, 8 Moore, 211; 1 Bing. 269, *S. C.*: *Taylor* v. *Gordon*, 1 Dowl. 730: *Firth* v. *Robinson*, 1 B. & Cres. 277.

(*e*) *Brown* v. *Nelson*, *supra*, per *Pollock*, C. B.: *Mackintosh* v. *Blyth*, *supra*.

(*f*) *Firth* v. *Robinson*, 1 B. & Cres. 277: *Chandler* v. *Fuller*, Willes, 64; Roll. Arbitr. (K.) 13: *Whitehead* v. *Firth*, 12 East, 167: *Bell* v. *Bolton*, 1 Chit. Rep. 157; *Bradley* v. *Tunstow*, 1 B. & P. 34.

dy against the other, if he refuse to repay his moiety, as he would have for the non-performance of any other part of the award (*f*). In practice, however, in order to obviate all questions upon this point, it is usual, in the award, to order the party in whose favour the award is made to pay the entire costs of the award in the first instance, and then that the other party shall repay him a moiety of them (*g*). As to the costs of the *action*, the arbitrator may order either party to pay them, although no express authority is given to him upon that subject by the rule or order of reference (*h*). But, if, by such rule or order, the costs are "to abide the event," the arbitrator cannot exercise any discretion in the awarding of them, or even in fixing their amount (*i*), unless such discretion be necessary for properly adjudicating upon all the matters referred (*k*); and the party who would have been entitled to ordinary (*l*) costs if the action had proceeded, is entitled to them under the award (*m*), and to the same amount, and under the same circumstances; and, therefore, if the defendant, from the amount of the damages awarded, would have been entitled to enter a suggestion on the roll under a court of conscience act, if a verdict for the same amount had been given, he shall be entitled to costs under the award; and the same where the plaintiff is awarded no more than what is paid into court (*n*). And where a plaintiff in trespass or case would be entitled only to as much costs as damages, he shall have no more under the award (*o*). The arbitrator need not notice the costs of the cause where they are to abide the event (*p*). In such a case, if the award amount to a legal termination of the suit, each party is, in general, entitled to costs on the issues on which he succeeds (*q*). If, on the other hand, it do not amount to a legal termination of the suit, and be partly in favour of one party and partly of the other, neither is, in general, entitled to costs (*r*). If the costs of the action are to abide the event of the award, the defendant is entitled to the general costs of the cause, if he succeed on a plea going to the whole cause of action, though the other issues are directed to be entered for the plaintiff with damages (*s*). In some cases, where several actions are referred, the submission provides that the costs shall abide the event of each (*t*). It

Costs of action.

Costs allowed

(*f*) *Hicks* v. *Richardson*, 1 B. & P. 93: *Stokes* v. *Lewis*, 2 Smith, 12.

(*g*) This is of use for another purpose, viz. to secure to the arbitrator his costs of the award. As to an arbitrator's remedy for his costs, see *post*, 1484.

(*h*) *Roe Wood* v. *Doe*, 2 T. R. 644: *Firth* v. *Robinson*, 1 B & C. 277. See *Lewis* v. *Harris*, 4 D. & R. 129; 2 B. & C. 620, *S. C.*: *Rigby* v. *Okell*, 7 B. & C. 57.

(*i*) *Kendrick* v. *Davis*, 5 Dowl. 693. See *Emsworth* v. *Brain*, 2 Dowl. & L. 844, where the costs were to abide "the result."

(*k*) *Reeves* v. *M'Gregor*, 9 Ad. & E. 576; 1 Per. & D. 372, where an action at law and a suit in equity were referred, and the costs were "to abide the event," and it was held that the event meant the ultimate and general event, and not that the costs of each suit should abide the event as regarded that suit.

(*l*) See *Gurney* v. *Buller*, 1 B. & A. 670: *Holder* v. *Raith*, 4 Nev. & M. 466.

(*m*) See *Highgate Archway Company* v. *Nash*, 2 B. & Ald. 597: *Boodle* v. *Davies*, 4 Nev. & M. 788.

(*n*) *Dawson* v. *Garrett*, 2 Dowl. 624.

(*o*) *Swinglehurst* v. *Altham*, 3 T. R. 138, 139: *ante*, 1364, 1370. See upon this subject generally, Hullock, 417 to 432; Watson on Awards, 89: *Finlayson* v. *M'Leod*, 1 B. & Ald. 663: *Pratt* v. *Hillman*, 6 D. & R. 481: *Rigby* v. *Okell*, 7 B. & C. 57: *Stratton* v. *Green*, 1 Moo. & Scott, 668; 8 Bing. 437, *S. C.*: *Spiry* v. *Webster*, 2 Dowl. 46.

(*p*) *Jupp* v. *Grayson*, 1 C., M., & R. 523: *Grayson* v. *Jupp*, Id.: *Spiry* v. *Webster*, 2 Dowl. 46: *Ward* v. *Hall*, 9 Dowl. 610: *Emsworth* v. *Brian*, *supra*.

(*q*) *Danbury* v. *Rickman*, 1 Scott, 564. See *ante*, 1376, 1381.

(*r*) *Yates* v. *Knight*, 2 Bing. N. C. 277.

(*s*) *Rees* v. *Clifton*, 12 Law J., N. S., 265, Q. B.; 2 Dowl., N. S., 983, *S. C.*

(*t*) *Jones* v. *Powell*, 6 Dowl. 483. See *Rennie* v. *Mills*, 5 Bing., N. C., 949.

by particular statutes.

should be observed, however, that the award does not of itself entitle the party in whose favour it is made to costs allowed by particular statutes, on verdict, nonsuit, or other specified modes of termination of the suit, unless the arbitrator has and exercises the power of ordering the suit to be terminated in that particular mode (*u*). Therefore, a defendant in replevin is not entitled to double costs, under 11 *G.* 2, *c.* 19, on an award made in his favour in pursuance of a reference before issue joined (*x*). And the Court cannot award costs to a defendant where the plaintiff, on a reference before issue joined, has been awarded an amount less than that for which he had arrested the defendant (*y*). It seems doubtful whether the 19th section of the 5 & 6 *Vict. c.* 122, applies to a case referred to arbitration (*z*). By the submission the parties may agree that the arbitrator shall be in the same situation, and have the same powers that a judge has under the 3 & 4 *Vict. c.* 24, *s.* 2; and if so agreed, the arbitrator must, in all substantial matters, follow the rules laid down in the statute for the guidance of the judges (*a*). The Court will not interfere to control the discretion of an arbitrator who has refused to certify under this enactment, having power so to do (*b*). As to certifying where less than 20*l.* is awarded, that the cause was a proper one to be tried before a judge, see *ante*, 1395; *post*, 1483. An arbitrator, to whom a cause is referred with all the powers of a judge at *Nisi Prius*, cannot give a certificate for the costs of a special jury, after he has published his award, without providing for them therein (*c*).

Arbitrator certifying under 3 & 4 Vict. c. 24, &c.

Costs on abortive reference.

Where the cause goes off upon an ineffectual arbitration, and is afterwards tried, costs are allowed as upon a *remanet* (*d*). But where a cause was referred at *Nisi Prius*, and the award thereon was afterwards set aside, and the cause tried again, it was held, that the party ultimately succeeding was not entitled to the costs of the first trial (*e*). And where a cause was referred *before* trial, and the reference proving abortive, the cause was afterwards tried, it was held that the successful party was not entitled to the costs of the reference as costs in the cause (*f*).

Taxation of the costs awarded.

Lastly, as to the *taxation* of the costs awarded:—If the arbitrator has not awarded a gross sum for costs, but costs generally, with or without any express direction as to their being taxed by the Master, *move to make the order or submission a rule of court; draw up the rule with one of the Masters, and get an appointment from him at the foot of it; give the usual one day's notice of taxation; serve a copy of the rule and appointment on the opposite attorney; and at the time appointed attend before*

(*u*) Per *Littledale*, J., *Holder* v. *Reith*, 4 Nev. & M. 465.

(*x*) *Gurney* v. *Buller*, 1 B. & A. 670. See *Barnard* v. *Moss*, 1 H. Bl. 107.

(*y*) *Holder* v. *Reith*, 4 Nev. & M. 465.

(*z*) *Higginson* v. *Brandhurst*, 1 Dowl. & L. 490; *ante*, 1107.

(*a*) *Spain* v. *Cadell*, 8 M. & W. 189; 9 Dowl. 745; see *ante*, 1364. The arbitrator should, immediately upon making the award, insert his certificate therein. *S. C.* See *Angus* v. *Redford*, 11 M. & W. 69.

(*b*) *Bury* v. *Dunn*, 1 Dowl. & L. 141; 12 Law J., N. S., 351, B. C., *S. C.* The Court also in this case refused to send back the award to be reconsidered and amended under a clause for that purpose.

(*c*) *Gosse* v. *Garton*, 15 M. & W. 168.

(*d*) *Burchell* v. *Bullamy*, 5 Burr. 2694; Sayer, Costs, 179, *S. C.*; Tidd, 9th ed. 833. And see *Sankey* v. *Pearis*, 3 Dowl. 373: *Brown* v. *Clark*, 12 M. & W. 25: *Morgan* v. *Miller*, 8 Scott, 208, where infants were interested.

(*e*) *Wood* v. *Dunnun*, 5 M. & W. 87. *ante*, 1344.

(*f*) *Doe Davies* v. *Morgan*, 4 M. & W. 171.

the Master, who will tax the costs and mark them on the rule. It would appear, that the arbitrator should assess the costs of an action in an inferior court, for there may be no proper officer to tax them (*f*). Where the arbitrator awarded the costs of the reference, but did not specify the sum, the Court of Common Pleas held, that it might be ascertained by the prothonotary (*g*); and where the sum was specified, that Court held, that it was examinable by the officer of the court, who might reduce it if he thought it exorbitant (*h*). But if the costs are to be in the discretion of the arbitrator *who is to ascertain the same*, the arbitrator is bound to ascertain and determine them (*i*). The costs may be taxed before the time for setting aside the award has elapsed (*k*). But if the reference was by order of *Nisi Prius*, and a verdict has been taken subject to the award of the arbitrator, it seems, from a decision of the Common Pleas, that it is otherwise (*l*). If the arbitrators award the defendant to pay the plaintiff his costs of suit, to be taxed by the proper officer before a particular day, it is the *defendant's* business to have them taxed before that day (*m*); and if he do not, the plaintiff may, it seems, proceed to have them taxed *ex parte* (*n*). When the arbitrator directs that the costs of the cause shall be taxed by the proper officer, they should be taxed according to the *postea* (*o*). Even where the cause is referred before the issue is actually made up, the rule of *H. T.*, 2 *W.* 4, *r.* 74, as to deducting costs of the issue found for the opposite party, must be observed on the taxation of costs (*p*). Where a cause is referred at *Nisi Prius*, and less than 20*l.* is awarded, the costs must be taxed on the lower scale, unless there be an express provision to the contrary in the submission (*q*). Care should therefore be taken to insert in the submission a provision that the arbitrator may certify that the cause was proper to be tried before a judge. Indeed, even in a case where such a clause was inserted, and the arbitrator certified, but the judge died before the certificate was made known to him, the Court of Queen's Bench held, that they had no power to order full costs (*r*). An application to review the taxation should be made promptly (*s*).

Apportionment of costs.

Where the arbitrator awarded that the amount of the costs to be taxed should be paid, one third part thereof by the plaintiff, and the other two-third parts thereof by the defendant, the plaintiff's taxed costs were 68*l.*, and the defendant's 45*l.*; the Court considered the sum to be paid by the defendant to the plainiiff, was the sum of 30*l.* 6*s.* 8*d.* (*t*).

(*f*) *Winter* v. *Garlick*, 1 Salk. 75. See *Addison* v. *Gray*, 2 Wils. 293: *Fox* v. *Smith*, Id. 268: *Hanson* v. *Liversedge*. 2 Vent. 242, 243.

(*g*) *Barrett* v. *Parry*, 4 Taunt. 658.

(*h*) *Fitzgerald* v. *Graves*, 5 Taunt. 342: *Miller* v. *Robe*, 3 Id. 461: cor. *Tenterden*, C. J., at chambers, 8 Marsh. 1832. See *Dorsett* v. *Gingell*, 3 Scott, N. R., 179.

(*i*) *Morgan* v. *Smith*, 9 M. & W. 427; 1 Dowl., N. S., 617. The party entitled to the costs being willing to waive them, the award was set aside only as respected the costs of the reference and the award.

(*k*) *Little* v. *Newton*, 2 Scott, N. R., 159; 1 M. & G. 976, *S. C.*

(*l*) *Hobdell* v. *Miller*, 2 Scott, N. R., 163.

(*m*) *Chandler* v. *Fuller*, Willes, 62: *Bigland* v. *Kelton*, 12 East, 438.

(*n*) *Sadler* v. *Robins*, 1 Camp. 253.

(*o*) *Allenby* v. *Proudlock*, 5 Nev. & M. 636.

(*p*) *Daubus* v. *Rickman*, 1 Scott, 564; 1 Hodges. 75, *S. C.*

(*q*) *Wallen* v. *Smith*, 5 M. & W. 159; 7 Dowl. 394, *S. C.*: *Lund* v. *Hudson*, 1 Dowl. & L. 236: *Elleman* v. *Williams*, 2 Dowl. & L. 46.

(*r*) *Astley* v. *Joy*, 1 Per. & D. 460; 9 Ad. & E. 702. See *ante*, 1395: see *Webber* v. *Lee*, 1 Dowl. & L. 585, where the court refused to refer it back to the arbitrator to certify.

(*s*) *Bagnall* v. *Gale*, 1 Dowl., N. S., 497; 4 Scott, N. R., 570. See *ante*, 1395.

(*t*) *Walton* v. *Ingram*, 5 Jur. 462, C. P. See *Day* v. *Harris*, 1 Dowl., N. S., 353.

PART VII.

Extent of arbitrator's power over costs within the submission.

We have already noticed, *supra*, when the costs must be ascertained by the arbitrator, and when they may be taxed by the proper officer of the Court. It may be here observed that an arbitrator cannot award costs to be taxed by any person except the proper officer of the superior court; for this would be a delegation of the authority: the taxation of costs by the Master being a ministerial act, but in any other person a judicial act (*x*). An arbitrator cannot award any other costs than the common costs between party and party, unless he is expressly authorised so to do (*y*); and of course, where the arbitrator awards costs to be taxed by the Master, such costs will be taxed as between party and party, and not as between attorney and client (*z*). Where a cause was referred by order of *Nisi Prius*, and by the order the costs of the cause were to abide the event of the award, and the costs of the special jury which had been obtained on the motion of the defendant, and of the reference, were to be in the discretion of the arbitrator, the Court held, that the arbitrator had only the power of allowing the costs of the special jury as costs in the cause, if the party who moved for the same were to succeed; and, therefore, that, after awarding a verdict for the plaintiff, he could not award that he should pay the costs of the special jury (*a*). Where a submission is made under an order of *Nisi Prius*, the arbitrator may award costs subsequent to the order: but not so where the submission is by bond (*b*). An error as to costs does not necessarily vitiate the award (*c*).

Costs caused by revocation, default of parties, &c.

As to liability to pay costs caused by a revocation of the arbitrator's authority, default of parties, &c., see *ante*, 1467. In a case where a rule was made absolute for setting aside an award on the ground that the arbitrator had wrongfully proceeded *ex parte*, *Coleridge*, J., refused to make it part of such rule that the party not attending before the arbitrator should pay costs to the other party, under the usual clause in the order of reference, that if either party was guilty of wilful delay he should pay such costs as the Court should direct, saying, "it must be the subject of a separate motion, so as to give the defendant" (the party not attending) "an opportunity of answering the statement made against him" (*d*).

Arbitrator maintaining an action for his fees, &c.

It may be here noticed, that an arbitrator may recover costs of the award, if there has been an *express* promise to pay them (*e*); but, it seems, he cannot do so upon an implied promise (*f*). The Court has no general jurisdiction over arbitrators, as to the amount of fees charged by them, whether the reference be under a rule of court or not (*g*), nor over those of the attorney who prepares the award (*g*). It seems doubtful whether their going before the Master, and submitting

(*x*) *Knott* v. *Long*, 2 Stra. 1025; Cas. temp. Hardw. 181, *S. C.*

(*y*) *Whitehead* v. *Firth*, 12 East, 167: *Barker* v. *Tobson*, 2 Bla. Rep. 953: *Marder* v. *Cox*, Cowp. 127: *Seccombe* v. *Babb*, 6 M. & W. 129; 8 Dowl. 167, *S. C.*: *Bartle* v. *Musgrove*, 1 Dowl., N. S., 325. If he do so, and the costs be so taxed, the court should be moved to set aside the award, not to review the taxation (*S. C.*) But see *Hartnall* v. *Hill*, 1 Forest's R. 73.

(*z*) *Pratt* v. *Salt*, Cas. temp. Hardw. 161.

(*a*) *Finlayson* v. *M'Leod*, 1 B. & Ald. 663. See *Geeves* v. *Gorton*, 1 B. where it was held that the arb certificate for the costs of a spe was given too late.

(*b*) Tidd's Pract. 888, 8th ed. 45; Barnes, 58.

(*c*) *Altcheson* v. *Cargey*, 9 Moo

(*d*) *Gladwin* v. *Chilcote*, 9 Dowl

(*e*) *Hoggins* v. *Gordon*, 3 Q. B. 4

(*f*) *Hoggins* v. *Gordon*, *supra* v. *Warne*, 4 Esp. 47: *Burroughes* 1 Dowl. 48.

(*g*) *Dossett* v. *Gingell*, 3 Scot 79; 2 M. & G. 870, *S. C.*

demand to his taxation, would subject them to such jurisdiction. A clear intention so to do, must at all events be shewn (*h*).

Arbitrator's Authority, how determined.]—The arbitrator, as soon as he has made his award, is *functus officio*, and cannot afterwards alter it in any material part (*i*). So, if he do not make his award within the time limited by the rule, order, or submission, or within the enlarged time, (if the time have been enlarged), any award made by him afterwards will be void (*j*). So, in general, but not necessarily, by the appointment of an umpire (*k*), or by an express revocation of the submission (*l*), or by an implied revocation of it (*m*), the authority of the arbitrator is determined. Arbitrator's authority, how determined.

SECT. 3.

Setting aside the Award.

In what Cases.

1. *Where the Arbitrator has not pursued the Submission, or has in any other respect exceeded his Authority*, 1486.
2. *Where the Award is uncertain or ambiguous*, 1489.
3. *Where the Award is not Final, either by reason of not deciding all the Matters referred, or otherwise making subsequent Proceedings necessary*, 1492.
4. *Where the Award is inconsistent*, 1496.
5. *Where the Award is illegal*, 1497.
6. *Where the Proceedings were irregular or fraudulent*, 1497.
7. *Where the Arbitrator has misconducted himself*, 1498.
8. *Where it appears on the face of the Award that the Arbitrator has mistaken the Law*, 1499.
9. *Where the Award is bad in a Part not separable from the Residue*, 1500.

Who may apply to set aside the Award, and how Objections may be Waived, 1501.

How and within what Time, 1502.

Costs of Application, 1506.

Referring back Matters to Arbitrator, 1506.

In what Cases.]—It may be necessary to premise, that the Court will not enter into an examination of the merits, upon an application to set aside an award (*n*), unless it appear manifestly from the merits that the arbitrators have acted disho- In what cases. In general.

(*h*) *Dossett* v. *Gingell*, 3 Scott, N. R., 179; 2 M. & G 870, S. C.
(*i*) *Ante*, 1479.
(*j*) *Post*, 1486.
(*k*) *Ante*, 1477.
(*l*) *Ante*, 1466.
(*m*) *Ante*, 1468.
(*n*) *Lucas* v. *Wilson*, 2 Burr. 701: *Anderson* v. *Coxeter*, 1 Str. 301: *Williams* v. *Moulsdale*, 7 M. & W. 134: *Phillips* v. *Edwards*, 1 Dowl. & L. 463: *post*, 1499.

PART VII.

nestly or corruptly (*o*); for the parties having chosen to substitute the decision of an arbitrator for that of a judge and jury, must abide by his determination in matters of law as well as of fact (*p*). Nor will the Court set aside the award on the ground of the arbitrator having decided contrary to law (*q*); and this, though the arbitrator be not a barrister (*r*), unless the mistake appear on the face of the award, or upon the face of another paper delivered with it (*s*). But every ground for relief against an award, in a court of equity, is equally available in a court of common law (*t*). It may be added, that the courts at Westminster have no authority to set aside an award made in an action depending in the Court of Common Pleas at Lancaster, and referred by order of *Nisi Prius* (*u*).

Not where the award is void or doubtful.

The Court will not set aside an award absolutely void—for instance, one made after the submission has been revoked—unless it is capable of being enforced by execution without suit (*x*). Also, where there is a doubt as to the validity of an award, the Court will not set it aside, nor grant an attachment, but will leave the party to his action, unless where it is capable of being enforced without suit (*y*). The Courts are generally desirous of sustaining an award (*z*). As to the defence to an action on a defective award, see *post*, 1508.

Defects for which an award will be set aside.

The following are the most usual defects for which an award may be set aside:—

1st. That the Arbitrator has not pursued the Submission, or has in any other respect exceeded his Authority:—

Submission must be pursued.

If the award do not pursue the submission in every material point, the Court will set it aside (*a*). Therefore, if the submission be to perform the award of the arbitrators *and* their umpire, it would seem that an award by the arbitrators only is bad (*b*). And where the reference was to the award of two named persons, and of such persons as they should nominate before they proceeded to act, or of a majority of them, in case they could not unanimously agree:—*Coleridge*, J., held, that no award of two could be good, until the third had had a full opportunity of joining in it, and had declared his dissent from it, or withdrawn from the reference (*c*). If the award be not made and delivered, or be ready for delivery, by the time limited in the submission, and according to the terms of it, or within the enlarged time, (when the time has been properly

When not made by proper party.

When not made in time.

(*o*) 1 Saund. 327 d; *post*, 1498.

(*p*) See *Sharman* v. *Bell*, 5 M. & Sel. 504: *Richardson* v. *Nourse*, 3 B. & Ald. 237: 1 Chit. Rep. 674, *S. C.*: *Price* v. *Price*, 9 Dowl. 334: *Archer* v. *Owen*, 9 Dowl. 341.

(*q*) *Wade* v. *Malpas*, 2 Dowl. 638: *Campbell* v. *Twemlow*, 1 Price, 81: *Wilson* v. *King*, 2 Dowl. 638, n. And see further, *post*, 1499: *Hardy* v. *Ringrose*, 1 H. & W. 185.

(*r*) *Huntig* v. *Ralling*, 8 Dowl. 679: *Ashton* v. *Poynter*, 3 Dowl. 201: *Jupp* v. *Grayson*, Id. 199; 1 C., M., & R. 523, *S. C.*: *Perryman* v. *Steggall*, 2 Id. 726; 3 Moo. & Scott, 93, *S. C.*, overruled by *Ashton* v. *Poynter*, 3 Dowl. 201.

(*s*) *Kent* v. *Estob*, 8 East, 18: *post*, 1499.

(*t*) *Rex* v. *Wheeler*, 3 Burr. 1259.

(*u*) *Phemley* v. *Isherwood*, 12 M. & W. 190.

(*x*) *Doe Turnbull* v. *Brown*, 5 B. & C. 383: *Hobbs* v. *Farrars*, 8 Dowl. 779. And see *Manser* v. *Hester*, 3 B. & Ad. 900.

(*y*) *Richardson* v. *Nourse*, 3 B. & Ald. 237: *Burley* v. *Stevens*, 4 Dowl. 770: *Re Rice and others*, 8 Scott, 371; 8 Dowl. 71. *Tindal*, C. J.: *Hobbs* v. *Farrars*, *supra*. *Taylor* v. *Shuttleworth*, 8 Scott, 377; 8 Dowl. 289, *S. C.*

(*z*) See *Re Templeman and Reed*, 9 Dowl. 966, per *Coleridge*, J.

(*a*) *Henderson* v. *Williamson*, 1 Str. 116.

(*b*) *Heatherington* v. *Robinson*, 7 Dowl. 192.

(*c*) *Re Templeman* v. *Reed*, 9 Dowl. 966. *ante*, 1478.

enlarged), any award made afterwards, without the consent of all parties, will be bad (*d*). So it is bad if the arbitrator delegate his authority: as an award that a party shall put certain premises in repair to the satisfaction of *A. B.*, or the like (*e*). So the award is bad, if the submission be to several arbitrators, and they do not thereby give their *joint* judgment upon every matter submitted to them (*f*); or if one of them delegate his authority to another (*g*). Also an award, whereby the arbitrator assumes to reserve a power over future differences, and which power is not given him by the award, is bad (*h*); as an award that a party shall execute conveyances to be settled by such counsel or solicitor as he (the arbitrator) shall appoint (*i*). If a cause be referred, it seems the arbitrator cannot direct a verdict to be entered, unless a power has been given him for that purpose (*k*). Under a reference of all matters in difference, an arbitrator has no right to state facts for the opinion of the Court, unless there is a special direction given to him so to do (*l*). Nor does an authority to enter a verdict authorise him to enter a *stet processus* (*m*). An arbitrator to whom a cause is referred, with power to direct how the verdict shall be entered, has no authority to arrest the judgment (*n*). Where the arbitrator is "to determine what he shall think fit to be done by either of the parties," he is not bound to direct affirmatively that something shall be done, unless he shall so think fit (*o*). If the arbitrator decide upon more matters than are submitted to him, the award is bad. Thus, if a cause only be referred, the arbitrator cannot decide upon other matters in difference between the parties (*p*). If by the terms of the submission he has to determine the boundaries of certain lands, and he enters into the question of title, and decides upon it, or the like, the award will be bad (*q*). And the same if he decide upon mat-

Delegating authority.

Reserving power over future differences.

Power to order verdict to be entered.

To state facts for opinion of Court.

To enter a stet processus.

To arrest judgment.

Determining what arbitrator shall think fit to be done.

Deciding on matters not submitted.

(*d*) See *Marks* v. *Marriott*, 1 Ld. Raym. 115: *Freeman* v. *Barnard*, Id. 247; 1 Salk. 69; 2 Id. 45, *S. C.*: *Brown* v. *Vawser*, 4 East, 584: *Henfree* v. *Bromley*, 6 East, 310: *Re Higham*, 9 Dowl. 203: *Re Morphett*, 2 Dowl. & L. 967, where it was held that the arbitrators had no power to limit the time for making the award.

(*e*) *Tomlin* v. *Mayor, &c., of Fordwick*, 5 Ad. & El. 147: *Tandy* v. *Tandy*, 9 Dowl. 1044.

(*f*) *Little* v. *Newton*, 2 Scott, N. R., 509; 9 Dowl. 437, *S. C.*: *Re Templeman and Reed*, 9 Dowl. 962, per *Coleridge*, J. For the purpose of enabling them so to give their joint judgment, they should communicate and agree together before signing the award, *S. C.*

(*g*) *Little* v. *Newton*, *supra*.

(*h*) *Manser* v. *Heaver*, 3 B. & Adol. 295; Com. Dig. Arbitrament (E. 15).

(*i*) *Tandy* v. *Tandy*, 9 Dowl. 1044.

(*k*) *Cock* v. *Gent*, 13 M. & W. 364: *Hawkyard* v. *Storks*, 2 Dowl. & L. 936: *Hutchinson* v. *Blackwell*, 1 Moo. & Scott, 513; 8 Bing. 331; 1 Dowl. 267, *S. C.*: *Jackson* v *Clark*, 1 M'Clel. & Y. 200: *Donlan* v. *Brett*, 4 Nev. & M. 854: *Hayward* v. *Phillips*, 1 Nev. & P. 288: *Doe Body* v. *Cox*, 15 Law J., Q. B., 317, where the Court held that the arbitrator had no authority to direct judgment to be entered up. See *post*, 1500.

(*l*) *Barret* v. *Wilson*, 1 C., M., & R. 586; 3 Dowl. 220, *S. C.*: *Bradbee* v. *Christ's Hospital*, 2 Dowl., N. S., 164; 5 Scott, N. R., 79, where facts were stated for the opinion of the Court; and under particular circumstances it was held, that it was not necessary for the arbitrator to decide finally as to the amount of damages to be recovered, and to direct how the judgment should be entered up. See *Scott* v. *Vansandau*, 8 Jur. 1114, Q. B., where the arbitrator raised objections for the opinion of the Court, and made an hypothetical adjudication, and the award was held good. And see *Re Wright* v. *Cromford Can. Comp.*, 1 Q. B. 98; 4 P. & D. 730. But see *Wood* v. *Hotham*, 5 M. & W. 674. If there is such a direction it is not compulsory on him (*S. C.*). When the arbitrator has power to report specially to the Court, he should not state the evidence in order that the Court may judge what are the facts, but he should state the facts, in order that the Court may decide any question of law arising thereupon: *Jephson* v. *Hawkins*, 2 Scott, N. R., 605; 2 M. & G. 366, *S. C.*

(*m*) *Hunt* v. *Hunt*, 5 Dowl. 442: *Ward* v. *Hall*, 9 Dowl. 610, per *Coleridge*, J.

(*n*) *Angus* v. *Redford*, 11 M. & W. 69; 12 Law J., N. S., 180; 2 Dowl., N. S., 735, Exch., *S. C.*

(*o*) *Angus* v. *Redford*, *supra*.

(*p*) *Atkinson* v. *Jones*, 1 Dowl. & L. 225.

(*q*) See *Doe Lord Carlisle* v. *Bailiff of Morpeth*, 3 Taunt. 378. See *Price* v. *Pop-*

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ters abandoned by the parties (*r*). So, if there be a submission of a particular difference, and there are other things in controversy, and a general release is awarded, the award is bad, at least *pro tanto;* but it must be shewn that there were such other matters to avoid the award (*s*). Where, by an order of reference, the costs of the cause were to abide the event of the award, and the arbitrator decided the suit in favour of the defendant, and ordered the plaintiff on a certain day to pay him those costs; it was held that the award was good, as the defendant was not deprived of any right which he possessed to recover the costs at an earlier date (*t*). In one case an award was held good, which ordered an infant to pay costs (*u*). In general, where a cause in which several issues are joined is referred, the arbitrator should find for the plaintiff or the defendant specifically on each issue (*x*). Where a cause is referred, it is not necessary that the arbitrator should find for the plaintiff or defendant in the very words of the issue; it is sufficient if he decide substantially the question in dispute (*y*). It is sufficient if he find in the words of the issue: he need not find in express terms for plaintiff or defendant (*z*). An award made in favour of a person who is a stranger to the submission is bad, unless it is for the advantage of one who is a party to it (*a*); and the same, of course, if made against a stranger. In one case it was held, that the arbitrator had not exceeded his authority in directing a payment to be made to the wife of a party to the reference, who was also a party to same (*b*). Where an arbitrator awarded payment of a debt, which did not accrue until after the parties had entered into the submission, the Court set aside the award (*c*): they, however, will not presume that fact; it must be proved (*c*). So, if a party bring an action for the arrears of an annuity, a reference of the cause, and even of all matters in difference, will not give the arbitrator power to award to the plaintiff the value of the annuity (*d*). But if the submission give the arbitrator power to order and

Awarding how costs to be paid when they are to abide event.

Ordering infant to pay costs.

Finding where several issues.

Finding in words of issue.

Making award in favour of a stranger.

Directing payment to wife of party.

Awarding payment of debt not accrued.

kin, 2 Per. & D. 304: *Malcolm* v. *Fullarton*, 2 T. R. 645. The arbitrator may inquire into matters dehors the matters referred, if it is necessary for the purpose of adjudicating upon the matters preferred: *Eastern Counties Railway Company* v. *Robertson*, 1 Dowl. & L. 498; 6 Scott, N. R., 802, *S. C.*

(*r*) *Hooper* v. *Hooper*, 1 M'Clel. & Y. 509. See *Bird* v. *Comper*, 4 Dowl. 148.

(*s*) *Hill* v. *Thorn*, 2 Mod. 309. See *post*, 1500.

(*t*) *Cockburn* v. *Newton*, 9 Dowl. 676.

(*u*) *Proudfoot* v. *Polle*, 3 Dowl. & L. 594.

(*x*) See *post*, 1494.

(*y*) *Wykes* v. *Shipton*, 3 Nev. & M. 240. See *post*, 1494.

(*z*) *Allen* v. *Lowe*, 4 Q. B. 66; 3 G. & D. 395, *S. C.*

(*a*) *Bedam* v. *Clarkson*, 1 Ld. Raym. 123: *Ecclestade* v. *Maliard*, Cro. El. 4; 5 Co. 78: *Bretton* v. *Prat*, Cro. El. 758: *Bird* v. *Bird*, 1 Salk. 74: *Fisher* v. *Pimbley*, 11 East, 188: *Ingram* v. *Milnes*, 8 East, 445. And see 1 Ro. Abr. 249, pl. 15. But in *Re Skeete*, (7 Dowl. 618), *Williams*, J., seems to have been of opinion, that an award of a sum of money to be paid to a stranger was good under the circumstances, though his lordship held that it could not be enforced by attachment, upon the application of the stranger. See *Re Warner and others*, 2 Dowl. & L. 148, where an award directing conveyances to be executed by a stranger to the submission was held good.

(*b*) *Wynne* v. *Wynne*, *infra*.

(*c*) *Banfil* v. *Leigh*, 7 Dowl. 175: *Re Morphett*, 2 Dowl. & L. 967; *post*, 1494. See *Brown* v. *Watson*, 8 Scott, 395; 6 Dowl. 22, *S. C.*, where it was held that the arbitrators had rightly taken into their consideration a demand which was accruing at the time of the submission: but this was by reason of the particular terms of the reference. *Wynne* v. *Wynne*, 3 Scott, N. R., 435; 4 M. & G. 253, *S. C.*, where an action of replevin brought in respect of a distress for an annuity was referred; and by reason of the particular terms of the reference, it was held that the arbitrator had not exceeded his authority in dealing with the arrears of the annuity accruing after the cause of action arose. And see *Re Brown & Croydon Canal Company*, 1 P. & D. 391; 9 Ad. & E. 522, *S. C.*

(*d*) *Taylor* v. *Shuttleworth*, 2 Scott, N. R. 374; 8 Dowl. 281, *S. C.*, per *Tindal*, C. J.

determine what he shall think fit to be done by the parties respecting the matters in dispute, and one matter in dispute before the arbitrator is, that the defendant has not given security for the annuity, as he has agreed to do, the arbitrator may award the defendant to pay to the plaintiff the value of the annuity (*e*). Where a set-off was pleaded, and by a judge's order all matters in difference, including the *claim* of defendant in his set-off in the said action, were referred, it was held that the arbitrator had properly taken the set-off into consideration as a matter in difference, though not payable until after the date of the action and judge's order (*f*). An arbitrator who had authority to decide on what terms a partnership agreement should be cancelled, directed, amongst other things, that one of the partners should have all the debts due to the firm, and should, if necessary, sue for them in the name of his late partner: it was held, that in authorising one of the parties to sue in the name of the other, the arbitrator had not exceeded his authority (*g*). Where the sufficiency of a title is referred, the arbitrator exceeds his authority by awarding a conveyance with a bond of indemnity (*h*). So, on a reference as to rent, the arbitrator cannot award a power of distress unless expressly authorised (*i*). Where upon a submission of all matters in difference, by partners, the arbitrator awarded that the partnership should be dissolved, the award was held good (*j*). And where the question submitted was, whether *A.* or *B.* had the right to the tithes of certain lands, an award of undivided moieties to both was held good (*k*). Where there was an agreement for a lease of a coal-mine for sixty-three years, from the 1st May, 1801, the lessee to be allowed three years from that time for winning the colliery, without payment of rent; and an arbitrator, being authorised to give such directions for a lease, according to the terms of the agreement, as he should think fit, directed a lease for sixty-three years, from the 1st May, 1804: it was held, that he had exceeded his authority, and that the award was consequently bad (*l*). See *Baxter* v. *Hozier* (*m*), as to an arbitrator's power, where an action of account was referred. As to an arbitrator not being able to award as damages a larger sum than the damages laid in the declaration, &c., in respect of a cause referred, see *ante*, 1463. As to arbitrator's power over costs, see *ante*, 1480.

Authorising one partner to sue in name of other.

Bond of indemnity.

Power of distress.

Moiety to each.

Directions as to lease.

Action of account.

Award not to exceed damages in declaration.

Costs.

Where the part in which the arbitrator has exceeded his authority is distinct and separable, the award may stand good for the rest, (*post*, 1500).

Part bad separable from residue.

2nd. That the Award is uncertain or ambiguous:—

If there be any uncertainty in a material part of the award, at least if it do not contain certainty to a common intent (*n*),

2. That the award is uncertain or ambiguous.

(*e*) *Taylor* v. *Shuttleworth*, *supra*.
(*f*) *Petch* v. *Fountain*, 7 Scott, 441; 5 Bing., N. C., 442, *S. C.*, nom. *Petch* v. *Conlan*, 7 Dowl. 426.
(*g*) *Burton* (or *Burt*) v. *Wigmore* (or *Wigley*), 1 Bing. N. C. 665; 1 Hodges, 81; 1 Scott, 610. *S. C.*: *Round* v. *Hatton*, 10 M. & W. 668; 2 Dowl., N. S., 446.
(*h*) *Rose* v. *Boards*, 3 Nev. & P. 382. But see *post*, 1495, and cases there cited, as to where an arbitrator may award a bond to be given.
(*i*) *Pascoe* v. *Pascoe*, 3 Bing., N. C., 898.
(*j*) *Green* v. *Waring*, 1 W. Bl. 475.
(*k*) *Prosser* v. *Goringe*, 3 Taunt. 426.
(*l*) *Bonner* v. *Liddell*, 1 B. & B. 80.
(*m*) 7 Scott, 250.
(*n*) *Hawkins* v. *Calclough*, 1 Burr. 274.

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Instances of awards bad for uncertainty.

it is bad (*l*). An award that a sum of 230*l.* is due to the plaintiffs, and that out of the said sum the defendants should pay the arbitrators 93*l.* for the costs of the agreement of reference and their award, and for their charge, trouble, and attendance, and for costs in certain actions mentioned in the reference, has been held uncertain, for not specifying the sum to be appropriated to each object (*m*). And under a submission in a dispute, as to a building contract, of all claims, &c., as to alleged defects, extra work, and deductions for omissions, *and* to ascertain what balance might be due in respect of extras and omissions, an award of 246*l.* generally to the builder was held bad for uncertainty (*n*). Upon a reference to a surveyor of a cause and all matters in difference, an award that defendant had over-paid plaintiff 34*l.*, was held insufficient to entitle the plaintiff to enforce the award by attachment (*o*). Where a cause and all matters in difference were referred, the award was held bad for uncertainty, for not awarding to what amount the plaintiff was entitled to recover in respect of the action, so that it might be ascertained whether the costs should be taxed on the higher or lower scale (*p*). On the other hand, in an action against an executor, where the arbitrator found a certain sum due to the plaintiff on the balance of accounts, and awarded that the defendant should pay it out of assets on a given day: this was held to be sufficiently certain, without stating expressly that the defendant had assets to that amount (*q*). Where an action of trespass was referred by order of *Nisi Prius*, the defendant had pleaded not guilty and a justification, and the arbitrator awarded, "that, as the defendant had not proved his plea, the verdict for the plaintiff ought to stand," *Coleridge*, J., held the award sufficient (*r*). And, where a verdict for 50*l.* damages was taken at *Nisi Prius*, subject to a certificate, and the arbitrator certified that a verdict ought to be entered for the plaintiff on the first, and for the defendant on the second issue, which covered the whole cause of action, but omitted to give any directions in express terms as to vacating the verdict as to the damages, *Patteson*, J., inclined to think the certificate sufficient (*s*). Where a plaintiff makes several claims against a defendant, and the defendant makes others against the plaintiff, if an arbitrator to whom the cause is referred finds that the plaintiff had no cause of action, his award is, in that respect at least, sufficiently certain (*t*). An award that *A.* or *B.* shall do an act is void for uncertainty (*u*). Where an award ordered that the defendant should do one or other of two things, in the alternative, it was holden that the award was good, if either of the things were capable of being performed (*x*). If the award direct an act to be done, it should point

Instances to the contrary.

Award in alternative.

Should be

(*l*) See *Tipping* v. *Smith*, 2 Str. 1024: *Ferguson* v. *Norman*, 4 Bing. N. C. 52.

(*m*) *Robinson* v. *Henderson*, 6 M. & Sel. 276.

(*n*) *In re Rider*, 3 Bing. N. C. 874.

(*o*) *Thornton* v. *Hornby*, 1 Moo. & Sc. 48; 8 Bing. 13, *S. C.*

(*p*) *Lund* v. *Hudson*, 1 Dowl. & L. 236; 12 Law J., N. S., 365, Q. B. See *Taylor* v. *Shuttleworth*, *infra*, n. (*s*): *Crosbie* v. *Holme*, 10 Jur. 139, B. C.

(*q*) *Love* v. *Honeybourne*, 4 D. & R. 814. And see *Doe Williams* v. *Richardson*, 4 Taunt. 697: *ante*, 1465.

(*r*) *Archer* v. *Owen*, 9 Dowl. 341.

(*s*) *Nadder* v. *Batts*, 1 Dowl. & L. 704.

(*t*) *Hayllar* v. *Ellis*, 6 Bing. 255; 3 Moo. & P. 553, *S. C.*; *Dickins* v. *Jarvis*, 5 B. & C. 528.

(*u*) *Lawrence* v. *Hodgson*, 1 Y. & J. 6. And see *Edgell* v. *Dedimore*, 11 Moore, 541; 3 Bing. 634, *S. C.*

(*x*) *Simmonds* v. *Swaine*, 1 Taunt. 549.

specific as to manner of doing act.

out the manner of doing it in a specific manner, so as that it may be strictly obeyed; and, therefore, an award, that a party should put up certain grates, without stating of what price and quality, is bad (*y*). And where, on the trial of a cause, a verdict was taken for 3,000*l.*, subject to a reference, the arbitrator to direct a verdict for plaintiff or defendant as he should think proper, *and determine all matters in difference* except as to costs, the arbitrator directed a verdict to be entered for the plaintiff, (not saying for how much), and that defendant should at a time and place named pay plaintiff or his attorney 260*l.*: the award was held bad for uncertainty (*z*). Where a cause in which there were several issues was referred at *Nisi Prius*, the costs to abide the event, and the arbitrators found for the defendant on two of the issues, neither of which covered the entire cause of action, and for the plaintiff on the others, but omitted to award damages, the award was held bad, it being impossible to ascertain from it which way the arbitrator meant to find (*a*). A *primâ facie* uncertainty or want of conclusiveness in an award does not vitiate it, if it be capable of being rendered certain or conclusive; and the award may be bad or good, according to the event (*b*). Thus, where a sum of money was ordered to be paid within a certain time from the date of the award, and the award bore no date, it was holden to be sufficiently certain (*c*). So, where a bond was ordered to be delivered up to be cancelled within a certain time from the date of it, without stating the date, it was considered sufficient (*d*). So, where an action on a money bond, and all matters in difference, were referred to an arbitrator, and he directed a verdict to be entered for the plaintiff generally, it was held sufficient, although he did not state for what amount (*e*). And where a verdict was taken for the plaintiff, subject to a reference of the cause and all matters in difference, the arbitrator having power to vacate the verdict or reduce the damages, and he awarded that the plaintiff was entitled to demand of the defendant 90*l.*, in respect of the causes of action, and that the defendant was entitled to set off 35*l.* in respect of his journeys, &c., mentioned in the plea of set-off, and that the defendant should deliver up certain securities to the plaintiff: it was held, that the award sufficiently ascertained the amount for which the verdict was to be entered (*f*). So, in the common cases of

Where arbitrator omitted to award damages to plaintiff.

Award good if it can be rendered certain.

(*y*) *Price* v. *Popkin*, 2 Per. & D. 304; 10 Ad. & E. 139: *Stonehewer* v. *Farrar*, 9 Jur. 213, Q. B., H. T. 1845.

(*z*) *Mortin* v. *Burge*, 4 Ad. & E. 973; 6 Nev. & M. 201, *S. C.* See *Taylor* v. *Shuttleworth*, 8 Scott, 565; 8 Dowl. 281, *S. C.*; where an award was held good, though it did not distinguish how much was to be paid by the defendant in respect of the cause, and how much in respect of the matters in difference. See *Taylor* v. *Marling*, 2 Scott, N. R., 374. See *Lund* v. *Hudson*, *supra*; *Hemsworth* v. *Brian*, 2 Dowl. & L. 844.

(*a*) *Wood* v. *Duncan*, 7 Dowl. 91; *post*, 1493, 1494.

(*b*) *Aitcheson* v. *Cargey*, 13 Price, 639; 2 B. & C. 170; 2 D. & R. 222, *S. C.* See *Waddle* v. *Downman*, 12 M. & W. 562; 1 Dowl. & L. 560; where the arbitrator awarded that the defendant should pay to the plaintiff for certain iron, according to the *market price* of pig iron, and it was held that the award was not bad for uncertainty, in omitting to state the time and market at which the price of the iron was to be ascertained.

(*c*) *Armitt* v. *Breame*, 1 Salk. 76; 2 Ld. Raym. 1076, *S. C.*

(*d*) *Bell* v. *Gipps*, 2 Ld. Raym. 1141.

(*e*) *Cayme* v. *Watts*, 3 D. & R. 224. And see *Cargey* v. *Aitcheson*, 2 B. & C. 170; 2 D. & R. 222; 13 Price, 639, *S. C.*; *Dicas* v. *Jay*, 5 Bing. 281; 2 Moo. & P. 448, *S. C.*

(*f*) *Platt* v. *Hall*, 2 M. & W. 391. And see *Smith* v. *The Eastning Railway Co.*, 6 Dowl. 190: *King* v. *Earl of Dundonald*, 5 Dowl. 589.

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costs, where their amount is not ascertained by the award, still this circumstance does not render the award bad for uncertainty; the maxim in these and the like cases being, "*Id certum est quod certum reddi potest;*" and in such cases the Master or other officer of the Court shall tax them (*g*). But the arbitrator should assess the costs of an action in an inferior court, for there may be no proper officer in such court to tax them (*h*).

3. That it does not finally settle all the matters referred.

3rd. That the Award is not final, either by reason of not deciding all the matters referred, or otherwise, making subsequent proceedings necessary:—

Mere suggestion bad.

Deciding on all matters in difference.

The award must be a final and conclusive settlement of all the matters referred; otherwise it will be bad (*i*). Therefore an award, which is no more than a mere suggestion or undecided opinion, is bad (*k*). So, where several matters are submitted, and the arbitrator omits to decide on one or more of them (*l*); or where all matters in difference are submitted, and the arbitrator omits to decide as to some one matter which has been pointed out to him (*m*), or makes a defective award as to it (*n*), the Court will set aside the award. Therefore, where all matters in difference in a cause between parties in an action against two defendants were referred to arbitration, and the arbitrator refused to adjudicate upon the subject of four checks drawn by one of the defendants alone, on the ground that it was not a matter in difference between the parties to the reference, it was held, that the award was bad as not being final (*o*). And where the declaration contained counts on a promissory note and an account stated, and the arbitrator found that plaintiff had a good cause of action on the promissory note, but made no adjudication on the other issue, the award was held bad (*p*). And the same where the arbitrator adjudicated on the issues joined, but omitted to award damages on a new assignment, on which there was judgment by default (*q*); and where an action in which there was a plea of set-off, and *all matters in difference* were referred, and the arbitrator directed a general verdict to be entered for the defendant, the Court set aside the award, it not stating how much the plaintiff was indebted to the defendant in respect of the set-off (*r*). But where a cause and all matters in difference were referred, the costs to abide the event, as upon a trial and final judgment, to

(*g*) See *Cargey* v. *Aitcheson*, 2 D. & R. 222; 2 B. & C. 170, *S. C.*; *Dudley* v. *Nettlefold*, 2 Stra. 737: *Fox* v. *Smith*, 2 Wils. 267. In *Barrett* v. *Parry*, (4 Taunt. 658), the point was raised, but not decided.

(*h*) *Winter* v. *Garlick*, 1 Salk. 75: *Addison* v. *Gray*, 2 Wils. 293, See *ante*, 1482.

(*i*) See *Tipping* v. *Smith*, 2 Str. 1094: *Cargey* v. *Aitcheson*, 2 D. & R. 222; 2 B. & C. 170, *S. C.*; 2 Bing. 199, *S. C.*, in error: *Doe Turnbull* v. *Brown*, 5 B. & C. 394: *Manser* v. *Heaver*, 2 B. & Ad. 295: *Plummer* v. *Lee*, 2 M. & W. 495; 5 Dowl. 755, *S. C.*

(*k*) *Lock* v. *Vulliamy*, 5 B. & Ad. 600. See *Ferguson* v. *Norman*, 4 Bing., N. C., 52.

(*l*) *Re Robson*, 1 B. & Ad. 723: *Randall* v. *Randall*, 7 East, 80: *Bradford* v. *Bryan*, Willes, 269: *Price* v. *Popkin*, 2 Per. & D. 304: *Hewitt* v. *Hewitt*, 1 Q. B., 110; 4 P. & D. 578, *S. C.*

(*m*) *Price* v. *Popkin*, 2 Per. & D. 304: *Stone* v. *Phillips*, 6 Dowl. 247.

(*n*) *Mitchell* v. *Staveley*, 16 East, 58.

(*o*) *Samuel* v. *Cooper*, 4 Nev. & M. 558; 1 Harr. & W. 86, *S. C.* And see *Phipps* v. *Ingram*, 3 Dowl. 668.

(*p*) *Gisburne* v. *Hart*, 7 Dowl. 402; 5 M. & W. 50, *S. C.*

(*q*) *Wykes* v. *Shipton*, 8 Ad. & E. 843, n.

(*r*) *Fenton* v. *Dimes*, Q. B., T. T. 1846. See *Williamson* v. *Moultsdale*, 7 M. & W. 134. The award would have been good if the only matter referred had been how the issues in the cause were to be found. (*S. C.*). And see *Maloney* v. *Stacking*, 2 Dowl., N. S., 122.

be entered up by the successful party, the arbitrator awarded that the plaintiff had no cause of action, and that he should pay defendant a sum of money, but added that it was not intended to prevent plaintiff recovering on a certain agreement signed by the defendant, but only that at *present* he had no cause of action, the award was held sufficiently final (*r*). So, where, by an order of *Nisi Prius*, an action at law and all matters in difference between the parties at law and in equity, including a Chancery suit, were referred to an arbitrator, who by his award ordered that a sum of money should be paid to the plaintiff in the action, and that the bill in Chancery should be dismissed, and that all proceedings thereon should utterly cease and determine; the Court of Queen's Bench held, that the suit in equity, and all matters in difference in that suit, and all matters in difference between the parties, were thereby finally determined; although one of the matters in dispute in the Chancery suit was brought before the arbitrator as a matter in difference between the parties, and was not otherwise disposed of than by the ending of the Chancery suit (*s*). And where a cause was referred to an arbitrator, who was to settle all matters in difference between the parties at law and in equity, so that he made his award by a certain day, (with power of enlargement), to be delivered to the parties, or, if either of them should be dead, to their personal representatives: the arbitrator was to be at liberty to make *one or more awards at his discretion:* at the time of this submission two equity suits were pending, in which the parties to the action, and also certain infants, were concerned; before any award was made, one of the parties to the equity suits died: the arbitrator, by his award, ordered a verdict to be entered for the plaintiff, damages 500*l.*; and also that the defendant should pay to the plaintiff 350*l.* for *grievances not included* in his declaration: it was held, first, that the award was sufficiently final, although it did not dispose of the equity suits; secondly, that the circumstance of infants being parties to those suits did not invalidate it; thirdly, that the arbitrator's authority was not revoked by the death of one of the parties; and, lastly, that the award of 350*l.* was sufficiently certain (*t*). So, where one of the parties admits the claim of the other, but seeks to reduce the balance by a set-off, it is sufficient for the award to find a sum due to one party or the other, without noticing the set-off (*u*). So, where on a reference of a cause, the costs to abide the event, the arbitrator finds for the defendant on a plea which covers *the whole* cause of action, it is no objection to the award, that, on other issues, he finds for the plaintiffs without damages (*x*). It would seem, from several cases, that it should appear upon the face of the award, that all matters referred have been adjudicated upon; though this is still an open point. Where a cause *and all matters in differ-*

Should appear from award that all matters were determined.

(*r*) *Harding* v. *Forshaw*, 4 Dowl. 761: *Cockburn* v. *Newton*, 9 Dowl. 676; 2 M. & G. 899; 3 Scott, N. R. 261, S. C.

(*s*) *Pearse* v. *Pearse*, 9 B. & C. 484.

(*t*) *Wrightson* v. *Bywater*, 6 Dowl. 359. See *Re Warner & Others*, 2 Dowl. & L. 148.

(*u*) *Brown* v. *Croydon Canal Company*, 1 Per. & D. 391; 9 Ad. & E. 522, S. C.

(*x*) *Warwick* v. *Cox*, 1 Dowl. & L. 966: *Savage* v. *Ashwin*, 4 M. & W. 530. In fact he should so find; see *Rose* v. *Clifton*, 12 Law J., N. S., 265, B. C.; *contra*, if the plea covers only part: *Wood* v. *Duncan*, 7 Dowl. 91.

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ence were referred to an arbitrator, and by his award he merely directed a verdict to be entered in favour of the plaintiff for one entire sum, it was held bad as not being final (*y*). So, where an action of ejectment on several demises was referred, and the arbitrator awarded that the plaintiff was entitled to a certain part of the land sought to be recovered, which he set out by metes and bounds, the award was held bad on the face of it for want of finality, because it did not appear that the remaining part of the premises had been taken into consideration, and also because it did not state on which of the demises the plaintiff had succeeded; and it was also doubted (but not decided) whether it ought not to have awarded nominal damages (*z*). It may be added, that it has been decided that no other matters in difference than those decided on will be intended by the Court, unless they have been made known to the arbitrator before he made his award (*a*). Where a cause is referred, in which there are several issues, and the costs of *the cause* are to abide the event of the award, the arbitrator should find upon each issue, so as to enable the officer to tax the costs for the party in whose favour each issue has been found (*b*). It is not necessary for the arbitrator to find specifically upon each issue; if it can be clearly inferred from the award in which way each of the issues has been found, it is sufficient (*c*). And where, to a declaration consisting of three *indebitatus* counts, there were pleas of *non assumpsit*, tender, set-off, and payment, upon which issues were joined; the cause having been referred at *Nisi Prius*, the costs of the cause to abide the event of the award, the arbitrator found on the first, third, and last issues, for the plaintiff, and on the second issue for the defendant; it was held, that this was a sufficient finding, and that it was not necessary that there should be a distinct finding on the issues raised by the plea of *non assumpsit* upon each separate count of the de-

Finding on each issue where costs to abide event.

(*y*) *Goode* v. *Burcher*, 5 Dowl. 127. This would be good if the *cause only* were referred, though there were several causes of action. (See *Bird* v. *Cooper*, 4 Dowl. 148). And even where a cause and all matters in difference were referred, an award, "after hearing allegations on each side," that defendant should pay plaintiff a sum of money in discharge of all demands in the cause, was held sufficiently final, it not being shewn that anything remained unadjudicated upon. (*Day* v. *Bonnin*, 3 Bing. N. C. 219). See *Brown* v. *Croydon Canal Company*, 9 Ad. & E. 522; 1 Per. & D. 391: *Wyatt* v. *Curnell*, 1 Dowl., N. S., 327: *Gray* v. *Gwennap*, 1 B. & Ad. 106: *Dunn* v. *Warters*, 9 M. & W. 293: See *Wynne* v. *Edwards*, 12 M. & W. 708; 1 Dowl. & L. 976, *S. C.*, where two actions were referred, and both were held to be sufficiently determined in favour of the plaintiff.

(*z*) *Doe Madkins* v. *Horner*, 3 Nev. & P. 344; 8 Ad. & E. 235, *S. C.*; *Doe Starling* v. *Hiller*, 12 Law J., N. S., 166, Q. B.; 2 Dowl., N. S., 694, *S. C.*

(*a*) *Ingram* v. *Milnes*, 8 East, 445. See *Smith* v. *Johnson*, 15 East, 13: *Pinkerton* v. *Caslon*, 2 B. & Ald. 704: *Day* v. *Bonnin*, 3 Bing., N. C., 219: *Perry* v. *Mitchell*, 12 M. & W. 792; 2 Dowl. & L. 452, *S. C.*: *England* v. *Davison*, 9 Dowl. 1058: *Duke of Beaufort* v. *Welch*, 10 Ad. & E. 527.

(*b*) *Kilburn* v. *Kilburn*, 13 M. & W. 671; 2 Dowl. & L. 33: *Bourke* v. *Lloyd*, 10 M. & W. 550; 2 Dowl., N. S., 452: *Brooks* v. *Parsons*, 1 Dowl. & L. 691. See *Waddle* v. *Downman*, 12 M. & W. 562; 1 Dowl. & L. 560, where, by reason of the terms of the order, it was held, that the arbitrator was not bound to find upon each issue. See also *England* v. *Davison*, 9 Dowl. 1057: *Stonehewer* v. *Farrar*, 9 Jur. 203, Q. B.: *Doe Starling* v. *Hiller*, 2 Dowl., N. S., 694: *Pearson* v. *Archbold*, 11 M. & W. 477: *Norris* v. *Daniel*, 4 M. & Scott, 383; 2 Dowl. 798; 10 Bing. 507, S. C.: *Williamson* v. *Locke*, 2 Dowl. 782: *Dibden* v. *Marquis of Anglesey*, 10 Bing. 563: *Re Leaning & Fearnley*, 5 B. & Ad. 463: *Wykes* v. *Shipton*, 3 Nev. & M. 240: *Duckworth* v. *Harrison*, 4 M. & W. 432; 7 Dowl. 71. As to taxing costs where several issues, see H., 2 W. 4, r. 74; *ante*, 1378; and as to what are distinct issues, see *ante*, 1376, 1378.

(*c*) *Kilburn* v. *Kilburn*, *supra*; *Williamson* v. *Lock*, *supra*. In *England* v. *Davidson*, *supra*, the rule for setting aside the award was ordered to be discharged, upon the defendant, in whose favour the award was made, paying the costs of the rule, and allowing the costs of the issues upon which the arbitrator had not expressly found to be taxed for the plaintiff. See *Maloney* v. *Stockley*, 2 Dowl., N. S., 122.

claration (*d*). But, where only the costs of the reference and award are to abide the event, it is not necessary for the arbitrator to find upon each issue, unless requested so to do (*e*). And, where a cause in which issues in fact and in law upon a demurrer to one of defendant's pleas were joined, was referred, and the costs of the cause and the reference were to abide the event, and the arbitrator awarded a general verdict to be entered for the defendant, it was held, that it was not necessary for the arbitrator to assess contingent damages on the demurrer, neither party having requested him to do so, but acted as if the matter had not been submitted to him (*f*). And where a declaration contains several counts, and before plea pleaded the cause is referred, the arbitrator is not bound to find specifically upon each count (*g*). Where the defendant was ordered to pay the plaintiff a sum of money, unless within twenty-one days he should exonerate himself by affidavit from certain payments, &c., in which case he was to pay a less sum; the award was holden bad (*h*). So, where the award ordered, amongst other things, that the defendant should do certain work, and that the plaintiff should be at liberty to produce evidence before the arbitrator of the insufficiency of the work at any time within two months, the Court held that part of the award bad (*i*). So, where the award was, that the defendant should beg the plaintiff's pardon, in such manner and place as the plaintiff should appoint, it was holden bad; for the manner and place, which were the most material circumstances, were yet to be determined (*k*). And an award of mutual releases, and nothing else, was held bad (*l*). But where the parties bound themselves to abide by the opinion of counsel on the construction of a statute, and the counsel gave his opinion in favour of one of the parties, it was held that this opinion was final and conclusive, notwithstanding it also recommended that the printed statute should be compared with the Parliament roll before the matter should be settled (*m*). If the award be ineffective,—as, if upon a submission for a partition between tenants in common, the arbitrator award their several portions, but omit to order deeds of conveyance to be executed, so as to vest the several allotments in their respective owners,—the award is bad (*n*). An award that one of the parties should pay a sum of money to the other on a future day, in full of all demands, is sufficiently final (*o*). And an award that one should give the other his promissory note for a certain sum, is good, being the same as awarding payment at a future day (*p*). So is an award that one shall be bound in a bond to another (*q*),

Where something remains to be done or determined.

Award ineffective.

Awarding payment at a future day, or note or bond to be given.

(*d*) *Adam* v. *Rowe*, 15 Law J., N. S., 223, Q. B.

(*e*) *Duckworth* v. *Harrison*, 7 Dowl. 71. See *Rennie* v. *Mills*, 7 Scott, 276.

(*f*) *Cooper* v. *Langdon*, 9 M. & W. 60.

(*g*) *Bearup* v. *Peacock*, 2 Dowl. & L. 850; 14 M. & W. 149, *S. C.*; *Crosbie* v. *Holmes*, 10 Jur. 139.

(*h*) *Padley* v. *Goddard*, 7 T. R. 73.

(*i*) *Manser* v. *Heaver*, 3 B. & Ad. 295.

(*k*) *Glover* v. *Barrie*, 1 Salk 71. See *Ross* v. *Clifton*, 9 Dowl. 356.

(*l*) *Freeman* v. *Bernard*, 12 Mod. 130.

(*m*) *Price* v. *Hollis*, 1 M. & Sel. 105.

(*n*) *Johnson* v. *Wilson*, Willes, 248.

(*o*) *Squire* v. *Grevett*, 2 Ld. Raym. 961: *Robinet* v. *Cobb*, 3 Lev. 188.

(*p*) *Booth* v. *Garnett*, 2 Str. 1082.

(*q*) *Cooke* v. *Whorwood*, 2 Saund. 337; 2 Lev. 6. But an award that one shall give the other a bond for such a sum, with such sureties as the other shall approve, is bad: *Brown* v. *Watson*, *supra*; per *Tindal*, C. J.: *Thirsby* v. *Heibot*, 3 Mod. 272; 1 Show. 82: Carth. 159: Com. Dig. Arb. F. 15. And so is an award that one shall find a surety to enter into a bond: *Cooke* v. *Whorwood*, *supra*.

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as in a bond of indemnity in respect of certain debts (*r*). So an award that the defendant should execute a covenant to indemnify the plaintiff against all costs, damages, and expenses, which should happen by means of any further proceedings in an action begun at the instance of the defendant, was held good (*s*). But, an award that one shall give the other a bond for such a sum, with such sureties as the other shall approve, is bad (*t*). And so is an award, that one shall find a surety to enter into a bond (*u*). Where the award was, that an action pending between the parties should be discontinued, and that each should pay his own costs, it was considered sufficiently final, being in effect an award of a *stet processus* (*x*). Where a cause, upon its coming on for trial, and all matters in difference were referred, *with power for the arbitrator to enter a nonsuit*, who directed such to be done, the Court held that the arbitrator ought to have finally determined upon the matters litigated between the parties (*y*).

Award that action be discontinued, &c.

Where arbitrator has power to enter a nonsuit.

4. That award is inconsistent.

4th. That the Award is inconsistent:—

If one part of an award be inconsistent with another, it will be bad: as, where the arbitrator awarded that A. should pay B. 100*l.*, and both should give general releases, and that at a subsequent time B. should pay A. 20*l.*, the award was held bad (*z*). But, an award that the defendant should pay to the plaintiff 50*l.* towards the costs of the cause and reference, and the plaintiff should pay his own and the defendant's costs of the same, has been held not to be inconsistent (*a*). And where an arbitrator awarded a verdict to be entered for the plaintiff on all the issues joined in a cause, assessing the damages generally, the Court held, that the fact of one of the issues being joined on a plea of set-off did not make the award bad (*b*). And, where a cause and all matters in difference were referred, the costs to abide the event, and the arbitrator found several of the issues inconsistently, as, for instance, he found that the defendant did not promise to perform certain work, that he did perform part of such work, and that he did not perform other part of it, the Court held the award good, regarding the finding on all the issues after the first as hypothetical, and only for the purpose of distributing the costs (*c*). Where an arbitrator found two pleas, which went to the whole cause of action, for the defendant, but other pleas for the plaintiff, and gave the

(*r*) *Brown* v. *Watson*, 1 Scott, 396; 8 Dowl. 22, *S. C.* But see *Maule*, J.'s, judgment in the former report of this case, from which it seems that he was of opinion, that an arbitrator has no right to award a bond, except for payment at a day certain, of a sum for which he might have awarded a money payment. And see *Ross* v. *Boards*, 8 Ad. & E. 290; *ante*, 1489.

(*s*) *Phillips* v. *Knightley*, 2 Str. 903.

(*t*) *Brown* v. *Watson*, *supra*; per Tindal, C. J.: *Thirsby* v. *Helbot*, 3 Mod. 272; 1 Show. 82; Carth. 159, *S. C.*

(*u*) *Cook* v. *Whorwood*, 2 Saund. 337.

(*x*) *Blanchard* v. *Lilly*, 9 East, 497. And see *Jackson* v. *Yabsley*, 5 B. & Ald. 848.

(*y*) *Wild* v. *Holt*, 9 M. & W. 161.

(*z*) *Storke* v. *De Smeth*, Willes, 66. See *Figes* v. *Adams*, 4 Taunt. 632: *Ames* v. *Milward*, 8 Id. 367; 2 Moore, 713, *S. C.*

(*a*) *Seecombe* v. *Babb*, 6 M. & W. 129; 8 Dowl. 167, *S. C.*

(*b*) *Hobden* v. *Miller*, 2 Scott, N. R., 165.

(*c*) *Duke of Beaufort* v. *Welch*, 10 Ad. & E. 527. See *Cooper* v. *Langdon*, 9 M. & W. 60; 1 Dowl., N. S., 392; 10 M. & W. 785, *S. C.*; *Warwick* v. *Cox*, 12 M. & W. 774: *Maloney* v. *Stockley*, 2 Dowl., N. S., 122: *Doe Oxenden* v. *Cross*, per Denman, C. J., 10 Ad. & E. 197.

plaintiff 7*s.* damages, *Wightman*, J., seemed to think that the damages might be rejected as surplusage (*d*).

5 That it is illegal.

5th. That the Award is illegal:—

If the arbitrator award any of the parties to do an act which is illegal, the award is so far bad (*e*). And if a sum awarded appear on the face of it to have arisen out of an illegal transaction, the award will be bad *pro tanto* (*f*). It seems, however, that the award will not be held bad, merely because it contravenes some rule of practice (*g*). And where the award was written on a wrong stamp, the Court refused to set it aside upon that account; although such a circumstance would be a good answer to any application made to enforce it (*h*). And it seems, that if a sum of money be awarded to be paid on or before a certain day, which happens to be a Sunday, it will not make the award bad (*i*). Where an action was brought on a contract, and the cause and all matters in difference were referred, it was held that an award made in pursuance of such reference were not necessarily a nullity, because the contract upon which the action was brought was illegal (*k*). An award made upon a submission of all matters in difference by executors, respecting the estate of the deceased, and the principal legatees taking an account of the estate, generally directing its administration and awarding that one of the parties shall pay the legacy duty, is not void (*l*).

6. That the proceedings were irregular or fraudulent.

6th. That the Proceedings were irregular or fraudulent:—

If there has been any irregularity in the proceedings—as if no notice of the meeting (*m*), or of attendance by counsel (*n*), was given to the party against whom the award was made, or the like, the Court will set aside the award (*o*); and the same if the arbitrator proceeded *ex parte* in the absence of one of the parties, and a reasonable excuse be shewn for his nonattendance (*p*). The Court will not, however, set aside the award on the ground that the order of reference has been improperly obtained; the application in that case should be to set aside the order of reference itself, and should be made within a reasonable time after it was obtained (*q*). If the sheriff refer a cause sent to be tried before him under the Writ of Trial Act, and give a power to the arbitrator to alter a verdict given by the jury, the Court will set aside any verdict and judgment entered up

(*d*) *Ross* v. *Clifton*, 12 Law J., N. S., 265, B. C.; see *ante*, 1493.

(*e*) See *Alder* v. *Savill*, 8 Taunt. 454: *Turner* v. *Swainson*, 1 M. & W. 572, where the award directed an act to be done on another party's land. But it may be good for all but the illegal part, *semble*, see *Doddington* v. *Bathurst*, 7 Dowl. 640; 7 Scott, 733, S. C.

(*f*) *Aubert* v. *Maize*, 2 B. & P. 371. See *Steers* v. *Lashley*, 6 T. R. 61: *post*, 1500.

(*g*) See *Re Badger*, 2 B. & Ald. 691: *Berrington* v. *Southall*, 4 Price, 232. See however, *Broadhurst* v. *Dartington*, 2 Dowl. 38.

(*h*) *Preston* v. *Eastwood*, 7 T. R. 95.

(*i*) *Hobden* v. *Miller*, 2 Scott, N. R., 163.

(*k*) *Taylor* v. *Marling*, 2 Scott, N. R., 383, per *Tindal*, C. J.

(*l*) *Re Warner*, 2 Dowl. & L. 148; 13 Law J., N. S., 370, Q. B., S. C.

(*m*) *Anon.*, 1 Salk. 71. See *Hobbs* v. *Ferrars*, 8 Dowl. 779: *Bignall* v. *Gale*, 3 Scott, 108.

(*n*) *Whatley* v. *Morland*, 2 Dowl. 249. For it is not reasonable that one party should have the advantage of counsel and the other not. (Per *Bayley*, B., Ibid.)

(*o*) *Anon.*, 1 Salk. 71.

(*p*) *Gladwin* v. *Chilcote*, 9 Dowl. 550; *ante*, 1473.

(*q*) *Sackett* v. *Owen*, 2 Chit. R. 39.

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in pursuance of such reference, but not the award (*r*). As to an irregularity in the appointment of an umpire, see *ante*, 1477.

Impeaching testimony of witness.

An award will not be set aside although the affidavits in support of the application disclose strong imputations upon the testimony of a material witness, who was examined before the arbitrator (*s*).

7. That the arbitrator has misconducted himself.

7th. That the Arbitrator has misconducted himself, &c.:— If the arbitrator has been guilty of any misconduct in the course of the proceedings, the Court will set aside the award (*t*), (if the submission can be made a rule of court), or a court of equity may in some cases afford relief; but such misconduct will not, it seems, afford any defence to an action or attachment (*u*). Where an arbitrator refuses to examine witnesses, or to receive evidence, the Court will sometimes set aside the award (*x*); and this, though he thought that he had sufficient evidence without examining the witnesses. But where he refused to examine a witness because he thought him inadmissible, the Court refused to set aside an award (*y*); and they would not set aside the award in a case where the arbitrator refused to examine a party in the cause who could have contradicted a witness (*z*). Where the arbitrator, after closing the examination, refused to call another meeting, and made his award, the Court refused to set aside the award, although the defendant's attorney swore that he was in possession of evidence which would have repelled that upon which the award was founded (*a*). So, where the umpire received the evidence from the arbitrators without examining the witnesses, the Court held, that the award was not bad on that account, if the umpire had not been requested to examine them (*b*). The Court have refused to set aside an award upon the ground that the arbitrator has admitted an incompetent witness (*c*); and the same where he received improper evidence (*d*). And it seems to be now settled that the arbitrator is to judge as to the competency of the witnesses and evidence (*e*), and that a mistake in either of these respects is no ground for setting aside the award. Where one of the defendant's witnesses was examined by the

Arbitrator refusing to examine witnesses.

Arbitrator admitting improper evidence, &c.

(*r*) *Wilson* v. *Thorpe*, 6 M. & W. 721: *Harrison* v. *Greenwood*, 3 Dowl. & L. 356. And see *ante*, 411.

(*s*) *Scales* v. *East London Water Works Company*, 1 Hodges, 91: *Pilmore* v. *Hood*, 8 Scott, 180.

(*t*) See *Lucas* v. *Wilson*, 2 Burr. 701: *Anon.*, 1 Salk. 71: *Braddick* v. *Thomson*, 8 East, 344: *Gratebrook* v. *Davis*, 5 B. & C. 534: *Brazier* v. *Bryant*, 10 Moore, 587; 3 Bing. 167, *S. C.*; 9 & 10 W. 3, c. 15, s. 3. The misconduct need not be such in the bad sense of the word. See *Phipps* v. *Ingram*, 3 Dowl. 670: *Re Hall* v. *Hinds*, 3 Scott, N. R., 250, where the arbitrator had made a plain gross mistake in casting up figures, and the Court set aside the award, considering such carelessness to amount to *misconduct* on the part of the arbitrator. This, however, is an extreme case. See *Phillips* v. *Edwards*, 1 Dowl. & L. 463; 12 M. & W. 309: *Hagger* v. *Baker*, 2 Dowl. & L. 850; 14 M. & W. 9, *S. C.*

(*u*) See 2 Saund. 327: *Brazier* v. *Bryant*, 3 Bing. 167.

(*x*) See *Phipps* v. *Ingram*, 3 Dowl. 669: *Morris* v. *Reynolds*, 2 Ld. Raym. 867; 1 Salk. 73, *S. C.*: *Hewlett* v. *Laycock*, 2 C. & P. 574: *Samuel* v. *Cowper*, 1 H. & W. 80.

(*y*) *Campbell* v. *Twemlow*, 1 Price, 81.

(*z*) *Scales* v. *East London Water Works Company*, *supra*.

(*a*) *Ringer* v. *Joyce*, 1 Marsh. 404. But see *Doddington* v. *Hudson*, 4 Bing. 384; 1 Moore, 163, *S. C.*

(*b*) *Hall* v. *Lawrence*, 4 T. R. 589. See *Re Turner*, 5 B. & Adol. 488.

(*c*) *Perriman* v. *Steggall*, 9 Bing. 679; 3 Moo. & Scott, 93; 2 Dowl. 795, *S. C.*

(*d*) *Huntig* v. *Railing*, 8 Dowl. 679: *Hagger* v. *Baker*, 2 Dowl. & L. 855.

(*e*) See Watson on Awards, p. 106: *Lloyd* v. *Archbowle*, 2 Taunt. 324: *Perriman* v. *Steggall*, *supra*.

arbitrator, after the evidence on both sides was closed, and the plaintiff's attorney gone; although upon this second examination he gave a different evidence from what he had given before, and the arbitrator's decision was influenced by it, yet the Court held, that this circumstance would not affect the award, unless it were brought about by the management of the defendant's attorney (*f*). And the same where he excluded the parties and witnesses, except those under examination (*g*). Also, an award cannot be set aside on a mere suspicion of favour; for instance, it cannot be set aside merely because the arbitrator is indebted to one of the parties, though the other party be ignorant of the fact, and object as soon as he becomes aware of it (*h*). If one of several arbitrators take the opinion of counsel upon an incorrect state of facts against the consent of one of the parties, and act upon such opinion, the Court will set aside the award (*i*); but they will not, if it appear that the case was submitted to counsel only respecting the stating certain facts upon the award, and the arbitrators deny by affidavit that the case was stated incorrectly, and that they had made up their minds before the opinion was taken (*i*). It seems, that it is no ground for setting aside an award, that the unsuccessful party was misled by an intimation of opinion on the part of the arbitrator in the progress of the reference, which induced him to rely on the absence of proof on the part of his adversary. At all events, he should shew that he was prepared with negative evidence, and would have produced it, but for that expression of opinion (*k*). Also, any objection on these grounds will be waived, by proceeding with a knowledge of it (*l*).

Excluding witnesses.

Suspicion of favour.

One arbitrator taking opinion of counsel upon incorrect state of facts.

As to arbitrator misleading one party.

Objection waived.

8th. That it appears on the face of the Award that the Arbitrator has mistaken the Law:—

8. Mistake of law on the face of the award.

If the arbitrator make a mistake in point of law, and it do not appear upon the face of the award, the Court will not, in general, set aside the award upon a mere suggestion of the mistake, or upon affidavits of the facts (*m*); but if the mistake appear upon the face of the award, or even upon the face of another paper delivered with it (*n*), or if the arbitrator, on being told that an application is about to be made to the Court, himself assigns the ground for his judgment for the purpose of enabling the party to make such application, and shews that he is mistaken (*o*), the award will be set aside, provided it be

(*f*) *Atkinson* v. *Abraham*, 1 B. & P. 175. See *Re Hick*, 8 Taunt. 694: *Bignall* v. *Gale*, 3 Scott, N. R., 108; 9 Dowl. 631, *S. C.*

(*g*) *Hewlett* v. *Laycock*, 2 C. & P. 574.

(*h*) *Morgan* v. *Morgan*, 1 Dowl. 611.

(*i*) *In Re Hare, Milne, and Haswell*, 8 Scott, 371; 8 Dowl. 71, *S. C.*

(*k*) *Wynne* v. *Wynne*, 3 Scott, N. R., 435; 9 Dowl. 901, *S. C.*

(*l*) *Kingwell* v. *Elliott*, 7 Dowl. 423; *ante*, 1477.

(*m*) *Ashton* v. *Poynter*, 3 Dowl. 201: *Jupp* v. *Grayson*, Id. 199: 1 C., M.. & R. 523, *S. C.*; *Perryman* v. *Staggall*, 3 Moo. & Scott, 93; 2 Dowl. 736, *S. C.*; *Hardy* v. *Ringrose*, 1 H. & W. 185: *Chace* v. *Westmore*, 13 East, 357: *Boutillier* v. *Thick*, 1 D. & R. 366: *Crump* v. *Symons*, 1 Bing. 104: 7 Moore, 434, *S. C.*: *Craven* v. *Craven*, 1 Taunt. 644; 1 Moore, 403, *S. C.*: *Delver* v. *Barnes*, 1 Taunt. 48. And see *Sharman* v. *Bell*, 5 M. & Sel. 504: *Richardson* v. *Nourse*, 3 Id. 237; 1 Chit. Rep. 674, *S. C.*: *Gonsham* v. *Germain*, 11 Moore, 7: *Symes* v. *Goodfellow*, 4 Dowl. 642: *Armstrong* v. *Marshall*, 4 Dowl. 593: *Mathew* v. *Davis*, 1 Dowl., N. S., 697: *Hagger* v. *Baker*, 2 Dowl. & L. 856.

(*n*) *Kent* v. *Elstob*, 3 East, 18.

(*o*) *Jones* v. *Corry*, 5 Bing., N. C.. 187; 7 Scott, 106. See *Doe* d. *Orenden* v. *Cropper*, 2 Per. & D. 490.

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clearly erroneous (*p*). And where an action was brought by an attorney on a bill not taxable, and a verdict was taken subject to a reference as to the amount of the charges, and the arbitrator awarded a certain sum, it was held, that it was competent for the Court to examine whether the arbitrator had adopted the right rule (*q*).

9. That award is bad in a part not separable from residue.

9th. That the award is bad in a part not separable from the residue:—

If an award be good in part, the performance of that part which is good may be enforced, provided it be final in itself and perfectly distinct from, and independent of, that part which is bad (*r*). Therefore, an award directing a defendant to remove certain hatches, part of which belonged to him absolutely, but in other parts of which he had only a share; at the same time providing that the directions of the award should affect the latter only so far as his interest extended; was held good as to all but that part in respect of which the defendant might shew his inability to proceed (*s*). An award of a release to the time of the award was formerly holden to be void *in toto*, not being divisible; but now an award of a release which would extend beyond the arbitrator's power is held to be void only for the time between the submission and the award (*t*). And if the arbitrator direct mutual releases on payment of a sum over which he has jurisdiction, and also of a sum over which he has none, the award is good as to the former (*u*). And it seems that when an arbitrator has ordered a verdict to be entered without authority, if the award dispose of all the matters referred independently of the verdict, that part of the award may be rejected and the rest held good (*x*). And where the arbitrator, after having found on all the issues, awarded a *stet processus*, having no authority so to do, *Coleridge*, J., considered that this part of the award might be separated from the residue (*y*). Where, however, an arbitrator, to whom a cause before being at issue was referred by rule of court, awarded thus:—"I award and direct that a verdict in this cause be finally entered for the plaintiffs, with £— damages:" the Court held, that he had exceeded his authority in directing the entry of a verdict, and that, as the award consisted of only one sentence, that direction could not be rejected, and the residue considered as an award that so much was due and to be paid, and that therefore the award was bad (*z*). And the same, where the

(*p*) *Richardson* v. *Nourse*, 3 B. & A. 237.
(*q*) *Broadhurst* v. *Darlington*, 2 Dowl. 38.
(*r*) *Candler* v. *Fuller*, Willes, 64, 253: *Addison* v. *Gray*, 2 Wils. 293: *Ingram* v. *Milnes*, 8 East, 445: *George* v. *Lousley*, Id. 13: *Stone* v. *Phillips*, 6 Dowl. 249: *Kendrick* v. *Davies*, 5 Dowl. 693: *Ward* v. *Hall*, 9 Dowl. 610: *Manser* v. *Hearer*, 3 B. & Ad. 296: *Tomlin* v. *Mayor of Fordwick*, 5 Ad. & E. 147: *Re Marshall* v. *Dresser*, 3 Q. B., 878; 3 G. & D. 253, *S. C.* In *Doe* v. *Richardson*, 8 Taunt. 697, the defect in the award was only as to the direction of mutual releases. In *Atcheson* v. *Cargey*, (2 Bing. 199), the arbitrator exceeded his authority by directing the mode in which the matters ordered by the award were to be done. See *Price* v. *Popkin*, 2 Per. & D. 304.
(*s*) *Doddington* v. *Bathward*, 7 Dowl. 646; 7 Scott, 733, *S. C.*
(*t*) *Pickering* v. *Watson*, 2 Bla. Rep. 1117.
(*u*) *Kendrick* v. *Davies*, 5 Dowl. 693.
(*x*) See *Price* v. *Popkin*, 2 Per. & D. 304; and per *Alderson*, B., in *Spain* v. *Cadell*, 8 M. & W. 131.
(*y*) *Ward* v. *Hall*, 9 Dowl. 610.
(*z*) *Jackson* v. *Clarke*, 1 M. & Y. 288. And see *Ras* v. *Washbrooke*, 7 D. & R. 221: *Hayward* v. *Phillips*, 1 Nev. & P. 288: *Donlan* v. *Brett*, 4 Nev. & M. 854: overruling *Cartwright* v. *Blackworth*, 1 Dowl. 489. See *Cook* v. *Gent*, 13 M. & W. 364: *Hawkyard* v. *Stock*, 2 Dowl. & L. 966.

arbitrator found an indivisible plea (set-off) partly for the defendant (*a*); but the plaintiff was allowed to waive the objection in that case. And where the arbitrators awarded that the plaintiff should pay the costs of the reference, &c., such costs to be taxed *as between attorney and client;* and that the defendant should pay to the plaintiff 50*l.* towards such costs, the Court considered that the award of the costs as between attorney and client was so connected with the rest of the award that it could not be rejected (*b*).

Who may apply to set aside award, and how objections waived.

Party in whose favour mistake made cannot apply.

Who may apply to set aside the Award, and how Objections may be waived.]—It seems that a party in whose favour a mistake has been made, cannot avail himself of it to set aside the award. Therefore, where an arbitrator erroneously found a plea of set-off in part for the plaintiff, and in part for the defendant, instead of wholly for the plaintiff, the Court refused to set aside the award at the instance of the defendant; and, as they had no power to amend, they gave the plaintiff the option either of having the award set aside, or of letting it stand, if he were willing to pay the defendant's costs on the issue erroneously found in his favour (the merits not being affected, and the order of *Nisi Prius* precluding a writ of error) (*c*).

Objection as to competency or want of parties must be made before award.

After an award has been made, it is too late for the unsuccessful party to object that certain infants have been parties to the submission, and that certain other interested persons have not been made parties to it, for the party entering into the reference "must be taken to have known who were the parties to the actions to which he himself is a party, and to the submissions which he enters into, and it would be most unjust to allow him to take the chance of an award in his favour; and, that failing, to claim to set aside the whole proceedings for a defect in the submission of which he had full cognizance when he entered into it" (*d*).

Waiver of objections by proceeding with a knowledge of it.

An objection to the award being made on account of the time for making it not having been duly enlarged, or to an umpirage on account of the umpire not having been duly appointed, or on account of improper conduct in the arbitrator or umpire, or the like, may be waived by the parties attending the arbitrator or umpire, and proceeding in the reference or umpirage with a knowledge of the fact (*e*). The evidence of waiver ought to be clear (*f*).

Waiver of objections by accepting a benefit under award.

Also, if a party accept a benefit under an award—as, for instance, if an award direct, amongst other things, that the costs of the cause, and of the reference, be paid to the plaintiff, and he accept such costs—he is thereby precluded from afterwards

(*a*) *Moore* v. *Butlin*, 2 Nev. & P. 436. See as to the indivisibility of that plea, *Tuck* v. *Tuck*, 5 M. & W. 109: 7 Dowl. 373, *S. C.*: *Kibner* v. *Bailey*, 3 M. & W. 384.

(*b*) *Seccombe* v. *Babb*, 6 M. & W. 129; 8 Dowl. 167, *S. C.* And see *Tandy* v. *Tandy*, 9 Dowl. 1044.

(*c*) *Moore* v. *Butlin*, 2 Nev. & P. 436. See *Taylor* v. *Shuttleworth*, 8 Scott, 565; 8 Dowl. 281, *S. C.*

(*d*) *Jones* v. *Powell*, 6 Dowl. 483, *Coleridge, J.*: *Wrightson* v. *Bywater*, 3 M. & W. 199: *Re Warner*, 2 Dowl. & L. 148; *ante*, 1465.

(*e*) See *ante*, 1475. And see *Hewlett* v. *Laycock*, 2 C. & P. 574: *Kingwell* v. *Elliott*, 7 Dowl. 423: *Bignall* v. *Gale*, 3 Scott, N. R., 108: 9 Dowl. 631: *Bignall* v. *Gale*, 4 Scott, N. R., 570: *Allen* v. *Francis*, 9 Jur. 691, B. C., T. T. 1845, where the witnesses were not sworn, and the objection was held to be waived.

(*f*) *Atkinson* v. *Jones*, 7 Jur. 881, B. C.: *Re Jenkins* v. *Leggo*, 6 Jur. 207.

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impeaching the award (*g*). Where, however, an award, published nine days before the end of Hilary Term, directed the defendant to pay the plaintiff a sum of money, and the plaintiff to lay out a sum of money on premises which the defendant held of him as tenant, it was held, that the defendant had not waived any objections that might be taken to the award by not giving notice to the plaintiff of his intention to apply to the Court after he had heard that the plaintiff had commenced the repairs, nor by the defendant's attorney attending the taxation of costs, and requesting a week's time to pay the money (*h*).

How and within what time.

How and within what Time.]—Where no action is pending, and where the submission *does not contain a clause of consent that it shall be made a rule of court*, the award cannot be set aside by any application to the Court; but if the party grieved cannot avail himself of the defects in it by pleading, where an action is brought against him upon the bond, &c., his only remedy is by application to a court of equity; but where an action is pending and the submission is by rule of court or judge's order, or where the submission contains the clause above mentioned, the award may be set aside upon application to the Court.

When made, where submission contains a consent to make it a rule of court.

Where the submission *contains the clause of consent* above mentioned, this application must, by the 9 & 10 *W.* 3, *c.* 15, *s.* 2, be made before the *last day of the term* (*i*) *next after the award is made and published to the parties* (*k*). Where a sum is awarded, subject to be reduced by the judgment of the Court on a statement of facts, an application for the exercise of that judgment is, in effect, an application to set aside the award, and must be made within the appointed time (*l*). Even an application that the award be referred back to the same arbitrator to reconsider it, on the ground that he had not sufficient materials before him when he made it, must be made within that time (*m*). If the award be made in vacation, the application to set it aside must be made in the next term; but if made in term, the parties have until the last day of the second term to make the application (*n*). The application cannot be made on the last day of term (*o*); nor will the Court, after the time above mentioned, entertain a motion to set aside an award for any defect whatever (*p*), even although such defect appear upon the face of the award (*q*). In one case, however, where the submission, being in the hands of the successful party,

(*g*) *Kennard* v. *Harris*, 4 D. & R. 272; 2 B. & C. 801, *S. C.*

(*h*) *Hayward* v. *Phillips*, 1 Nev. & P. 288; 6 Ad. & Ell. 119, *S. C.*

(*i*) See *ante*, 1413, 1414.

(*k*) When the award is considered as published, see *ante*, 1479.

(*l*) *Anderson* v. *Fuller*, 4 M. & W. 470; 7 Dowl. 51, *S. C.*: *Paxton* v. *The Great North of England Railway Company*, 10 Jur. 430, Q. B.

(*m*) *Zachary* v. *Shepherd*, 2 T. R. 781.

(*n*) *Re Burt*, 5 B. & C. 668: *Allenby* v. *Proudlock*, 4 Dowl. 45, and cases there cited: *Re Smith* v. *Blake*, 8 Dowl. 133.

(*o*) *Freame* v. *Pinnegar*, Cowp. 23. *Hobdell* v. *Miller*, 2 Scott, N. R., 165. An application made on the last day but one of the term for leave to move, on the last day of the term, to set aside an award, on the ground that the affidavit on which the motion was to be founded had not arrived from the country, was refused by the Court: *Re Evans*, 4 M. & G. 767: *ante*, 1413.

(*p*) *Pedley* v. *Goddard*, 7 T. R. 73: *Reynolds* v. *Askew*, 5 Dowl. 689.

(*q*) *Lowndes* v. *Lowndes*, 1 East, 276: *Sell* v. *Carter*, 2 Dowl. 845.

could not be procured, in order to make it a rule of court, in sufficient time to move in the term next after publication, the time for making the motion was enlarged by the Court until the following term (*r*). But this appears to be an evasion of the statute, and probably would not now be permitted (*s*). Where a rule to set aside an award was obtained in due time, *Littledale*, J., refused to allow it to be amended, by drawing it up on reading an additional affidavit, made on the last day of the term next after the award was published (*t*).

Where the submission is by rule or order.

The statute of 9 & 10 *W.* 3, *c.* 15, however, does not extend to awards where the reference has been by order of *Nisi Prius* (*u*); nor to other cases where an action is pending, and the reference has been by rule of court or judge's order (*x*); yet the Court will not, in such cases, unless under very special circumstances, entertain the motion after any considerable lapse of time (*x*). And the general rule, where the reference is made by rule or order not at *Nisi Prius*, appears to be that the application should be made before the last day of the next term after the publication of the award (*y*). And the same where the reference is made at *Nisi Prius* of the cause *and other matters in difference* (*z*). But where a verdict is taken at *Nisi Prius*, and *the cause only* is referred, and the arbitrator is put merely into the place of a jury, the motion should, in ordinary cases, be made within the time limited for a motion in arrest of judgment, or for a new trial, *viz.* within the first four days of term which occur next after the publication of the award (*a*).

Court will sometimes hear the motion later if delay accounted for.

It is to be observed, however, that, in cases not within the statute, it is not imperative on the Court to refuse motions made after the times above specified, provided very clear and satisfactory reasons be given for the delay (*b*). Therefore, where a rule was obtained in time, and was discharged on grounds merely technical, the Court granted a new rule in the second term after the publication (*c*). But it is not a sufficient excuse for lateness that the arbitrator refused to give up his award without payment of an exorbitant sum (*d*): or that the party moving did not believe that the other party intended to pro-

(*r*) *Re Perring*, 3 Dowl. 98.

(*s*) See per *Coleridge*, J., *Reynolds* v. *Askew*, 5 Dowl. 682: and per the same learned judge, in *Re Smith* v. *Blake*, 8 Dowl. 133.

(*t*) *Re Holloway* v. *Monk*, 8 Dowl. 138.

(*u*) *Synge* v. *Jervois*, 8 East, 466: *Lucas* v. *Wilson*, 2 Burr. 701: *Manser* v. *Heaver*, 3 B. & Adol. 295: *Rawsthorne* v. *Arnold*, 6 B. & C. 629.

(*x*) *Rogers* v. *Dallimore*, 6 Taunt. 111; 1 Marsh. 471, *S. C.*: *Sherry* v. *Oke*, 3 Dowl. 349; 1 Harr. & W. 191, *S. C.*: *Rushworth* v. *Farron*, 9 Dowl. 317; 1 Harr. & W. 122, *S. C.*: *Hobbs* v. *Ferrars*, 8 Dowl. 779.

(*y*) *Potter* v. *Newman*, 4 Dowl. 504: *Brooke* v. *Mitchell*, 6 M. & W. 473; 8 Dowl. 392.

(*z*) *Hayward* v. *Phillips*, 1 Nev. & P. 288: *Moore* v. *Butlin*, 2 Nev. & P. 436: *Allenby* v. *Proudlock*, 4 Dowl. 54. But see *Lyng* v. *Sutton*, 4 Dowl. 38, which seems to limit the time to the first four days of term.

(*a*) *Rawsthorne* v. *Arnold*, 6 B. & C. 629. And see *Paxton* v. *The Great North of England Railway Company*, 10 Jur. 430: *Riccard* v. *Kingdon*, 15 Law J., N. S., 269. Q. B.: *Borrowdale* v. *Kitchener*, 3 B. & P. 244: *Kennard* v. *Harris*, 2 B. & C. 801; 4 D. & R. 272, *S. C.*: *Sell* v. *Carter*, 2 Dowl. 245: *Thomson* v. *Jennings*, 10 Moore, 110: *Reynolds* v. *Askew*, 5 Dowl. 682: *Allenby* v. *Proudlock*, 4 Dowl. 54: per *Coleridge*, J., in *Lyng* v. *Sutton*, 4 Dowl. 38. But see per *Littledale*, J., *Martin* v. *Burge*. 4 Ad. & Ell. 974.

(*b*) See per Lord *Tenterden*, C. J., in *Rawsthorne* v. *Arnold*, 6 B. & C. 629: per *Coleridge*, J., in *Reynolds* v. *Askew*, 5 Dowl. 682: and per *Patteson*, J., in *Sherry* v. *Oke*, 3 Dowl. 349.

(*c*) *Sherry* v. *Oke*, 3 Dowl. 349. *Contra*, if discharged substantially at first: *Carmichael* v. *Hockin*, 3 Nev. & M. 903.

(*d*) *M'Arthur* v. *Campbell*, 5 B. & Ad. 518. And see *Brooke* v. *Mitchell*, 6 M. & W. 473: per *Parke*, B., & *Alderson*, B., *Moore* v. *Darby*, 1 C. B. 445: but see per *Tindal*, C. J., in *Musselbrook* v. *Dunkin*, 1 Dowl. 722.

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ceed upon the award, as there had been a previous revocation (*e*); or that the party making the application is an assignee of one of the parties to the reference who has become insolvent, and that he was only appointed a short time before coming to the court (*f*). Where the *cause* had been referred at *Nisi Prius*, the Court refused to set aside the award after two terms had elapsed from the making of it, upon a suggestion that the arbitrator had been imposed upon by false evidence (*g*).

Motion to set aside judgment on award not limited, &c.

It may be necessary to add, that the motion to set aside a *judgment* entered up on an imperfect award, is not limited to the periods above specified (*h*). But it is, in general, better to apply in proper time to set aside the award itself; for on motion to set aside the judgment entered on it, only such defects as appear *on the face* of the award, and would be available in answer to a motion for an attachment for disobeying it, can be taken advantage of (*i*).

Practical proceedings to set aside the award.

First, move to make the order or submission a rule of court (j); and then, within the time above mentioned, get counsel to move for a rule to shew cause why the award should not be set aside, upon an affidavit of the facts necessary to sustain the objections intended to be made; but if it be intended to object to the award, merely for defects appearing upon the face of it, an affidavit will be unnecessary. If execution has been issued under an order and rule for the payment of the sum awarded, the application should also be to set aside the order and rule and the execution also; and if the latter has been executed, the application should also be for a restoration of the money levied, or in the case of a ca. sa. for the party's discharge out of custody.

Enlargements need not be made a rule of court.

It seems, that if any enlargements of the time for making the award have been made, it is not necessary to make them a part of the rule of court (*k*).

Affidavit.

The affidavit need not be stamped (*l*). As to the title of it, see *ante*, 1450. It is not necessary that there should be an affidavit by one of the attesting witnesses to the award, of its execution (*m*). An affidavit verifying a copy of the award to be a true copy, need not state that the copy has been compared with the original award (*n*). On motion for a rule to set aside an award as not final, in respect of the pleadings in the action, the pleadings should be brought before the Court by affidavit (*o*).

Motion should be made upon original order.

The motion should be made upon the original order or submission (*p*). If the party moving cannot obtain the same in consequence of its being in the hands of the other party, the Court will grant a rule calling on him to produce

(*e*) *Worrall* v. *Deane*, 2 Dowl. 261.

(*f*) *Hobbs* v. *Ferrars*, 8 Dowl. 779; but perhaps under certain circumstances this might be deemed a sufficient excuse: *Hemsworth* v. *Brian*, 8 Scott, N. R., 842.

(*g*) *Pilmore* v. *Hood*, 8 Scott, 180.

(*h*) *Manser* v. *Hester*, 3 B. & Ad. 295: *Doe Madkins* v. *Horner*, 3 Nev. & P. 344; 8 A. & E. 235, *S. C.*; *Brooks* v. *Parsons*, 13 Law J., N. S., 50, Q. B.; 1 Dowl. & L. 691, *S. C.*

(*i*) *Doe Madkins* v. *Horner*, 3 Nev. & P. 344: 8 Ad. & El. 235, *S. C.*

(*j*) 9 & 10 W. 3, c. 15, s. 2: *Clapham* v. *Hyam*, 7 Moore, 403; 1 Bing. 87, *S. C.* See also *Kirkus* v. *Hudson*, 3 Moore, 64; 8 Taunt, 733, *S. C.* The submission may be made a rule of court, though the proceedings under it are void: *Anon.*, 10 Jur. 525.

(*k*) See *Re Welsh*, 1 Dowl., N. S. But before this case, the practice was otherwise: see *Re Smith & Blake*, 8 Dowl. 130; *post*, 1508.

(*l*) 4 & 5 Vict. c. 24, s. 1. See *Re Tamplemann & Reed*, 9 Dowl. 962; *ante*, 1445.

(*m*) *England* v. *Davison*, 9 Dowl. 1052, per *Coleridge*, J.

(*n*) *Hoeksyard* v. *Stocks*, 2 Dowl. & L. 936.

(*o*) *Allen* v. *Lowe*, 12 Law J., N. S., 115, Q. B.: 4 Q. B., 66, *S. C.*

(*p*) *Lord Boston* v. *Mesham*, 8 Dowl. 867; *post*, 1509.

it (*q*). Where, in consequence of the misconduct of the arbitrator, the original order could not be obtained, the Court allowed a duplicate of it to be made a rule of Court (*r*). By *R. E.*, 2 *G.* 4, *Q. B.* (*s*), "where a rule to shew cause is obtained in this Court to set aside an award, *the several objections thereto intended to be insisted upon at the time of making such rule absolute, shall be stated in the rule to shew cause.*" This rule is also adopted in the Exchequer (*t*), and there is a similar rule of *M. T.*, 10 *G.* 4 (*u*), in the Common Pleas. It is necessary, therefore, that the counsel should indorse these objections on his brief, before he sends it in to the officer of the court (*v*). It is not sufficient to state a general head of objection, as "misapprehension of the terms of the reference," or "that the arbitrator has exceeded his authority," or "that the award is uncertain," or "not final" (*x*), or "that the arbitrator has not awarded on all matters referred to him" (*y*), or the like (*z*). The rule applies to the certificate of an arbitrator empowered to ascertain the amount due from the defendant to the plaintiff, and to certify the same to the associate, by whom a verdict is to be entered accordingly (*z*). But the rule does not apply to a case where you move to set aside a judgment entered up on an irregular award, for a defect apparent on the face of it (*a*); and a rule to set aside an award made after action commenced, on account of objections to the declaration, need not refer to the declaration, as it is sufficiently before the Court (*b*). Also, it seems to be unnecessary, in any case, to state the objections in the rule, if they be stated in the affidavit on which the rule is obtained (*c*). *It must also appear on the face of the rule that it is drawn up on reading the award itself, or a copy of it* (*d*). And where a rule was drawn up on reading the *affidavit* and *paper writing* annexed, which was in fact a copy of the award, but was not stated to be so, the Court held that the rule was bad and could not be amended (*e*); but it would have been good if it had stated that the paper writing was a copy of the award (*f*). In the Common Pleas, in moving to set aside an award made under a rule of Court, the rule *nisi* ought to be drawn up on reading the *rule* also under which the matter was referred (*g*).

Objections should be stated in rule.

Should be drawn up on reading award or a copy of it, &c.

It may be necessary to observe, that cause cannot be shewn against this rule on the last day of the term, but the rule must be made peremptory for the following term (*h*), or to shew cause before a judge at chambers, in vacation.

Cause cannot be shewn on last day of term, &c.

The Court, upon the rule being argued, will not look at the

Arbitrator's notes.

(*q*) *Lord Boston* v. *Mesham*, *supra*.
(*r*) *Thomas* v. *Philby*, 2 Dowl. 145.
(*s*) 4 B. & Ald. 539; 2 Chit. Rep. 376.
(*t*) See *Smith* v. *Briscoe*, 11 Price, 57: *Watkins* v. *Philpotts*, 1 M'Clel. & Y. 394.
(*u*) 6 Bing. 348.
(*v*) See *Whatley* v. *Morland*, 2 Dowl. 249; 4 Tyr. 255, *S. C.*
(*x*) *Boodle* v. *Davies*, 4 Nev. & M. 788: *Gray* v. *Leaf*, 8 Dowl. 654: *Staples* v. *Hay*, 1 Dowl. & L. 711; 13 Law J., N. S., 60, Q. B., *S. C.*
(*y*) *Gray* v. *Leaf*, 8 Dowl. 654.
(*z*) *Allenby* v. *Proudlock*, 4 Dowl. 54.
(*a*) *Manser* v. *Heaver*, 3 B. & Ad. 295; *Doe* v. *Horner*, 8 A. & E. 235: *Brooks* v. *Parsons*, 1 Dowl. & L. 691.
(*b*) *Sherry* v. *Oke*, *infra*. And see *Dicas* v. *Jay*, 5 Bing. 281; 2 Moo. & P. 448, *S. C.*
(*c*) *Rawsthorne* v. *Arnold*, 6 B. & C. 629; 9 D. & R. 556, *S. C.*: *Staples* v. *Hay*, 1 Dowl. & L. 711: *Dunn* v. *Warlters*, 1 Dowl., N. S., 626. See *Gray* v. *Leaf*, 8 Dowl. 654.
(*d*) *Sherry* v. *Oke*, 3 Dowl. 349; 1 Harr. & W. 119, *S. C.*: *Price* v. *James*, 3 Dowl. 73: *Barton* v. *Ransom*, 5 Dowl. 597: *Carmichael* v. *Hunter*, 1 H. & W. 120.
(*e*) *Sherry* v. *Oke*, *supra*.
(*f*) *Platt* v. *Hall*, 2 M. & W. 391: *Hayward* v. *Phillips*, 1 Nev. & Per. 293: 6 Ad. & E. 119, *S. C.*: *Lund* v. *Hudson*, 1 Dowl. & L. 236: *Hawke* v. *Stock*, 9 Jur. 461.
(*g*) *Christie* v. *Hamlet*, 4 Bing. 195; 2 Moo. & P. 316, *S. C.*
(*h*) R. M., 36 G. 3, r. 4: *Bignall* v. *Gale*, 2 Scott, N. R., 592; 9 Dowl. 393, *S. C.*; *ante*, 1414.

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arbitrator's notes, nor at a copy of them verified by affidavit (*k*).

Second application.

If a rule to set aside an award has once been obtained and discharged, the Court will not grant another rule on the suggestion of fresh objections (*l*); unless the ground upon which the first rule was discharged was for some slip in form (*m*).

Costs of application.

Costs of Application.]—If a motion for setting aside an award be made on slight grounds, the rule will be discharged with costs (*n*). Where the defendant put a wrong construction on an award, which induced the plaintiff to move the Court to set it aside; the Court held, that the defendant's construction was untenable, and therefore discharged plaintiff's rule; but they would not give him the costs of the motion (*o*).

Referring back matters to arbitrator.

Referring back matters to Arbitrator.]—We have seen, *ante*, 1479, that as soon as the arbitrator has made his award, he is *functus officio*, and cannot afterwards alter it in any material part, unless the parties consent to his doing so; and without such consent the Court have no power to remit the matter back to him to do so. It is now, however, the practice in an order or other submission of reference to insert a clause empowering the Court, in the case of any dispute relative to the validity of the award, or on moving to set it aside, to remit the matters referred to the reconsideration and determination of the arbitrator (*p*). Such a clause should be to remit the matters "or any of them," in order to enable the Court to limit the remittal (*q*). Where there was a clerical error in the award, the Court, under a clause to the above effect, referred the matter back to the arbitrator (*r*). It seems doubtful whether, under such a clause, in the absence of express words, they have power to remit the matter back to the arbitrator a second time (*s*). A cause was referred at *Nisi Prius*, and the order of reference contained a clause enabling the Court to refer it back to the arbitrator; the arbitrator certified that less than 20*l.* was due, and expressed an opinion that the cause was a proper one to be tried in the superior court; it was held, that the Court had no power to refer it back to the arbitrator, to certify as to the propriety of its being tried in the superior court, but that the proper course was to lay the arbitrator's certificate before the judge at *Nisi Prius*, who would then exercise his discretion (*t*). Where, upon a rule to set aside an award, upon the ground that it was not final, and that the arbitrator had not awarded on one of the matters in difference, the Court ordered, under a clause to that effect in the submission, "that the matters referred, &c., be remitted back to the arbitrator for his reconsideration and redetermination;" it was held that the arbitrator was bound to hear evidence tendered by one of the parties respecting the matters in difference, which had come to the know-

(*k*) *Doe* d. *Wasby* v. *Preston*, 1 Bail Court Rep. 77.
(*l*) *Carmichael* v. *Hockin*, 3 Nev. & M. 203.
(*m*) *Sherry* v. *Oke*, 3 Dowl. 361; 1 Harr. & W. 119, *S. C.* See *ante*, 1426.
(*n*) *Snook* v. *Hellyer*, 2 Chit. Rep. 43.
(*o*) *Hocken* v. *Grenfell*, 6 Dowl. 250; 4 Bing., N. C., 103, *S. C.*
(*p*) See *Nickalls* v. *Warren*, 2 Dowl. & L. 549; 14 Law J., N. S., 75, Q. B., *S. C.*
(*q*) *Nickalls* v. *Warren*, *supra*.
(*r*) *Hewitt* v. *Clements*, 8 Scott, N. R., 851; 1 Com. B. 128, *S. C.*
(*s*) *Nickalls* v. *Warren*, *supra*.
(*t*) *Webber* v. *Lee*, 1 Dowl. & L. 594.

ledge of that party since the making of the original award (*u*). But, where, the arbitrator not having determined an issue on an account stated, the Court directed the award to be sent back to him, to be corrected in this particular; the Court held that the arbitrator was not bound to rehear the case (*v*). Nor in such a case would it be necessary for the arbitrator to give any notice to the parties to attend him (*w*). SECT. III.

It may be added, where, in an action of debt, a verdict has been taken for the plaintiff, for the amount mentioned in the declaration, and 1*s.* damages, subject to a reference to an arbitrator of the cause and all matters in difference, and the award is afterwards set aside as defective, the Court will not grant a rule, empowering the plaintiff to issue execution for a nominal amount of debt and the costs, unless the defendant will consent to the case being sent back to the arbitrator to rehear and award (*x*).

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Enforcing Performance of the Award.

Where no Cause in Court, 1507 | *Where a Cause in Court*, 1514.

SECT. IV.

Where no Cause in Court.]—Where there is no cause in court, we have seen that the submission to arbitration is by bond, deed, or other written instrument, containing a clause of consent that the submission should be made a rule of Court; or by bond, deed, or other written instrument, not containing such clause of assent, or by parol. Where no cause in court.

In the two latter cases, in which the submission cannot be made a rule of court, the only means of enforcing a performance of the award is by action. If the submission be by bond, the prevailing party may have an action of debt on the bond, which is in general the preferable remedy (*y*); if by other deed, he may have covenant (*z*); if by instrument not under seal, or by parol, he may have *assumpsit* on the submission; or in any of these cases, if the award be for a sum of money merely, he may have debt on the award (*a*). Before the 3 & 4 *W.* 4, *c.* 42, debt would not in such case lie against an executor or administrator on a submission by his testator or intestate; now, however, by that statute, *s.* 14, an action of debt is given against the executor and administrator. Debt will lie on an agreement to submit with a penalty for revoking an arbitrator's authority (*b*). Where the parties who had submitted disputes to arbitration by mutual bonds, by indorsements under seal on the bonds of submission made within the time limited for making the award, agreed that the time should be By action, where submission cannot be made a rule of Court.

(*u*) *Nickalls* v. *Warren*, *supra*.
(*v*) *Bird* v. *Penrice*, 6 M. & W. 754.
(*w*) *Hewitt* v. *Clements*. 1 C. B. 128; 8 Scott, N. R, 851, *S. C.*
(*x*) *Porch* v. *Hopkins*, 1 Dowl. & L. 881.
(*y*) *Ferrer* v. *Owen*, 7 B. & C. 497; 1 M. & R. 222, *S. C.*
(*z*) *Marsh* v. *Bulteel*, 1 D. & R. 106; 5 B. & Ald. 507, *S. C.*
(*a*) See 2 Saund. 62 b: 2 Chit. Pl. 6th ed. 225, notes: 2 Ld. Raym. 1040: *Kingston* v. *Phelps*, Peake, 227: *Keen* v. *Batshore*, 1 Esp. 194: *Bailey* v. *Lechmere*, Id. 377: *Banfil* v. *Leigh*, 8 T. R. 571: *Antram* v. *Chace*, 15 East, 209: *Hunter* v. *Rice*, Id. 100: *Sutcliffe* v. *Brooke*, 14 M. & W. 855.
(*b*) *Warburton* v. *Storr*, 4 B. & C. 103; 6 D. & R. 113, *S. C.*

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enlarged to a future day, it was decided that an action of debt on the bond would lie for non-performance of an award made after the original time had expired, but within such enlarged time: for such indorsement operated as a defeasance or further defeasance to the original bond (*c*). But if the indorsement had not been under seal, no action could have been maintained on the bond for non-performance of the award (*d*). The remedy in the latter case would be in debt, or *assumpsit* on the award,

Defence to.

or *assumpsit* on the agreement (*e*). It may be necessary to observe, that in an action on an award with a profert, if it be bad on the face of it, the defendant may set it out on oyer and demur (*f*); or if the award be defective for reasons not appearing on the face of it, such as that the arbitrator has exceeded his authority, has not awarded on all matters submitted to him, or that it is uncertain, or not final, or the like, the defendant may take advantage of such matter by plea (*g*). But the corruption, or other misconduct of the arbitrator in making his award, not appearing on the face of the award, is an exception, and cannot be successfully pleaded; the party's only remedy in such a case is by bill in equity, or in some cases by motion.

By action, attachment, or execution, where submission made a rule of court.

Where the submission contains the clause of assent above mentioned, the prevailing party has an option of enforcing a performance of the award, either by action as above directed (*h*), or by attachment (*i*); or, if the award be for payment of money, under the 1 & 2 *Vict. c.* 110, *s.* 18, as noticed, *ante*, 1429. An attachment may be obtained as well where the non-performance consists in the non-payment of money, as in the non-performance of any collateral matter (*k*). Interest accruing due after the making of the award cannot be recovered by attachment, but only by action (*l*). An order of reference of a cause at *Nisi Prius*, may be made a rule of court, although it does not contain the usual clause empowering the parties to that effect (*m*).

Mode of proceeding by attachment. Making submission a rule of court, &c.

In order to proceed by attachment, *let an affidavit be made of the due execution of the bond or other instrument of submission by the subscribing witness* (*n*)*; and if an enlargement of the time for making the award has been made pursuant to a power contained in the submission* (*o*)*, let an affidavit also be made that this has been duly done* (*p*)*. Annex the bond, &c., to it, and give it to counsel, with a motion-paper, to move to make the submission, and such enlargements, if any such there be* (*q*)*, a rule of court. The*

(*c*) *Greig* v. *Talbot*, 3 D. & R. 446; 2 B. & C. 179, *S. C.*: *Ras* v. *Bingham*, 3 Y. & J. 301 to 313; *ante*, 1474.

(*d*) *Brown* v. *Goodman*, 3 T. R. 592, n.

(*e*) Watson on Awards, 202.

(*f*) *Fisher* v. *Pimbley*, 11 East, 188.

(*g*) *Mitchell* v. *Staveley*, 16 East, 58: *Cargey* v. *Aitcheson*, 3 Dowl. & R. 433; 2 B. & C. 170, *S. C.*: *Perry* v. *Mitchell*, 12 M. & W. 792: *King* v. *Bowen*, 1 Dowl., N. S., 21; 8 M. & W. 625, *S. C.*

(*h*) See *Stock* v. *De Smith*, Hardw. 106: *Badley* v. *Loveday*, 1 B. & P. 81.

(*i*) 9 & 10 W. 3, c. 15, s. 1: Willes, 292, n.: *Bailey* v. *Chessely*, 1 Salk. 72; 1 Ld. Raym. 674, *S. C.*; *Hopcroft* v. *Fermor*, 1 Bing. 379; 8 Moore, 424, *S. C.*

(*k*) *Dodington* v. *Hudson*, 8 Moore, 510; 1 Bing. 410, *S. C.*, repaying moiety of costs of award: *Hicks* v. *Richardson*, 1 B. & P. 93: *Stokes* v. *Lewis*, 2 Smith, 12.

(*l*) *Churcher* v. *Stringer*, 2 B. & Ad. 777.

(*m*) *Harrison* v. *Smith*, 1 Dowl. & L. 876.

(*n*) See the form, Chit. Forms, 664, &c. In order to compel an attorney, the attesting witness, to an agreement of reference, to make an affidavit of its execution, the affidavit, and the expenses attending the making of it, ought to be tendered: *Ex p. Pike*, 1 Dowl., N. S, 375.

(*o*) *Ante*, 1473.

(*p*) *Dickins* v. *Jarvis*, 5 B. & C. 528.

(*q*) *Re Smith & Blake*, 8 Dowl. 130, per *Coleridge*, J.: *Re Welsh*, 1 Dowl., N. S., 331. See *Jenkins* v. *Law*, 8 T. R. 87: *Dickens* v. *Jarvis*, 5 B. & C. 528: *Barton* v. *Ranson*, 6 Dowl. 384; 3 M. & W. 222, *S. C.* Where two parts of a deed of submission to arbitration were executed, and

affidavit should, it seems, be intitled in the cause, if there be one in Court (*r*). *If the submission be by order, this affidavit is, of course, unnecessary, and you have merely to annex the order to the motion-paper* (*s*), *unless, indeed, there has been an enlargement of the time for making the award, in which case there must be an affidavit of the due enlargement. The motion is a motion of course, and is absolute in the first instance. Or, in vacation, you may obtain a judge's flat for a rule, upon production of the above affidavit* (*t*), *and take it, together with a motion-paper, signed by counsel, to one of the Masters, who will draw up the rule. If costs be awarded, get an appointment on the rule from the Master; serve a copy of the rule and appointment, if any, on the opposite attorney; and, at the time appointed, attend before the Master, who will tax the costs, and mark them on the rule* (*u*). The motion should be made upon the original submission; therefore, if it be in the possession of the other party, the Court will grant a rule calling upon him to produce it (*x*). Where the original has been lost, the Court will, upon a verified copy thereof, make it a rule of court (*y*). If a cause in the Exchequer has been referred by a judge's order, and it is part of such order that it be made a rule of the Queen's Bench, there is no objection to its being so made (*z*). If the award be not made a rule of court, the Court has no jurisdiction, and will not act, though the opposite party be willing to waive the objection (*a*). It seems that the 8 & 9 *W.* 3, only authorises making the submission a rule of one court, and not of more than one (*b*). Where there is no cause in court, the submission cannot be made a rule of court after it has been revoked (*c*), though a judge's order of reference may, with a view to costs (*d*).

Demand of performance, how, when, and by whom made.

When you have got the costs taxed, if the party who has to perform the award do not perform it within the time thereby limited, (if any be limited), and you are desirous of proceeding by attachment, *make a copy of the rule and allocatur* (*e*), *and of the award, and power of attorney* (*f*), *(if any); and, after examining the copies with the originals, serve the copies upon the party personally, shewing him at the same time the originals, in such a way that he can read their contents* (*g*). The Court will not in general grant an attachment without *personal* service, in any case where the party applying has another remedy; and this, although the party purposely avoid the service (*h*). But

the arbitrator indorsed the enlargements of the time for making the award on one part, the Court compelled the party in whose possession that part was, to make it a rule of court; *Re Smith & Blake, supra.*

(*r*) *Doe* v. *Stilwell*, 6 Dowl. 305.

(*s*) If through the misconduct of the arbitrators the order of reference cannot be obtained, the Court will allow a duplicate to be made a rule of court: *Thomas* v. *Philby*, 2 Dowl. 145.

(*t*) *Re Taylor*, 5 B. & Ald. 217.

(*u*) See the form of rule, Chit. Forms, 663.

(*x*) *Lord Boston* v. *Mesham*, 8 Dowl. 867. See *Re Smith & Blake, supra; ante*, 1504.

(*y*) *Short* v. *Frank*, 3 Jur. 341, B. C. See *Robinson* v. *Davis*, 1 Str. 526. And see *Hill* v. *Townsend*, 3 Taunt. 45.

(*z*) *Milestead* v. *Cranfield*, 9 Dowl. 194, per *Patteson*, J.

(*a*) *Owen* v. *Hurd*, 8 T. R. 643.

(*b*) *Winpenny* v. *Bates*, 2 C. & J. 379.

(*c*) *King* v. *Joseph*, 5 Taunt. 452.

(*d*) *Aston* v. *George*, 2 B. & Ald. 395. See *Gloster* v. *Honan*, 1 Jones, Rep. Irish Exch., 269.

(*e*) *Rex* v. *Smithies*, 3 T. R. 351: *Reed* v. *Derr*, 7 D. & R. 612: *Bellairs* v. *Poultney*, 6 M. & Sel. 230.

(*f*) See *Price* v. *Duggan*, 1 Dowl., N. S., 709.

(*g*) See *Calvert* v. *Redfearn*, 2 Dowl. 506.

(*h*) *Richmond* v. *Porkinson*, 3 Dowl. 703: *Re Lance & Another*, 4 B. & Ad. 412. And see *Stunnel* v. *Tower*, 1 C., M., & R. 88: *Brandon* v. *Brandon*, 1 B. & P. 394: *Brander* v. *Ponteare*, 5 Taunt. 813: *Read* v. *Fure*, 1 Chit. Rep. 170.

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in one case, where the party had personal knowledge of the award and rule of court, the Court of Queen's Bench granted an attachment against him for non-performance of the award, although he had not been personally served (*i*). If the arbitrators have enlarged the original time given them for making their award pursuant to a power contained in the submission, a notice of such fact, and that the award was made within the enlarged time, should also be given to the party who has to perform the award (*j*). A parol notice is sufficient (*k*), though, of course, it is advisable that it should be in writing. *Then let the person in whose favour the award is made demand of the other party the money or other thing awarded.* This demand has been held necessary, even where the award specified the time and place of performance (*l*). It may be made on a day subsequent to that on which the award directs the money to be paid (*m*). If it be inconvenient for the party himself to make the demand personally, he may depute his attorney or any other person to do it for him, by a letter of attorney (*n*), a copy of which must, as already observed, be served with the copies of the rule and award, and the original shewn at the same time. Where *costs* are awarded, a demand by the attorney of the party is sufficient without a power of attorney, even though the costs be by the terms of the rule made payable to the party himself (*o*). And in a case, where the demand of the execution of a deed was made by an agent, without a power of attorney, it was held sufficient (*p*). Care must be taken to demand the exact sum or thing awarded; if you demand more, and it be refused, you cannot have an attachment for the refusal (*q*). If two sums are directed to be paid by the award, one of which the arbitrator had no power to award payment of, the demand should be confined to the other (*r*). Where the award directed that the plaintiff should, on a given day, deliver up to the defendant *a warrant* for a hogshead of port wine lying at the London Docks, describing it by its number and marks; the demand required the plaintiff to deliver up "*one hogshead of port wine*," describing it; it was held that this was not a sufficient demand to support an attachment (*s*). The party making the demand must previously have performed all conditions precedent, otherwise an attachment will not be granted (*t*).

Conditions precedent should be performed.

Affidavit on

If, upon such demand, the opposite party do not pay the

(*i*) *Re Bower*, 1 B. & C. 264. And see *Allen* v. *Newton*, 2 Dowl. 582: *Re Dodington & Bailward*, 7 Scott, 733; 9 Dowl. 640, S. C. See *post*, 1518.

(*j*) *Re Dodington & Bailward*, 7 Scott, 733; 7 Dowl. 640, *S. C.*; *Davis* v. *Vass*, 15 East, 97: *Wholenberg* v. *Lageman*, 6 Taunt. 251; *ante*, 1473.

(*k*) *Re Dodington & Bailward*, *supra*.

(*l*) *Brandon* v. *Brandon*, 1 B. & P. 393. An award directing payment of costs "immediately after the execution of the award," must be construed to mean "within a reasonable time after notice:" *Hoggins* v. *Gordon*, 3 Q. B. 466.

(*m*) *Re Craike*, 7 Dowl. 693.

(*n*) *Laugher* v. *Laugher*, 1 Dowl. 284; 1 C. & J. 368; 1 Tyrw. 352. *S. C.*; *Jackson* v. *Clarke*, 13 Price, 298; M'Clel. 72, *S. C.*; *Ex. p Fortescue*, 2 Dowl. 448: *King* v. *Packwood*, Id. 570. But see *Bass* v. *Maitland*, 8 Moore, 44, which, however, seems a confused report.

(*o*) *Inman* v. *Hill*, 4 M. & W. 7: *Mann* v. *Whitehouse*, 4 Bing., N. C., 632.

(*p*) *Kenyon* v. *Grayson*, 2 Smith, 61: *Tebbutt* v. *Ambler*, 12 Law J., N. S., 280; 2 Dowl., N. S., 677, *S. C.*

(*q*) *Strutt* v. *Rogers*, 7 Taunt. 213; 2 Marsh. 524, *S. C.*

(*r*) *Paynter* v. *Hatton*, 7 M. & W. 211; 8 Dowl. 891, *S. C.* The affidavit in this case was held bad, for not stating that the party of whom the monies were demanded, had not paid *either* of them.

(*s*) *Hemmworth* v. *Brian*, 1 C. B. 131; 2 Dowl. & L. 844, *S. C.*

(*t*) Watson, 210: *Standley* v. *Hennington*, 2 Marsh. 276, 6 Taunt. 56, *S. C.* As to what is not a condition precedent, see *Doe Clarke* v. *Stilwell*, 3 Nev. & P. 707; 8 Ad. & E. 645, *S. C.*

motion for attachment.

money, &c., in compliance with the award, then *let an affidavit be made of the due execution of the award—that the party to perform the same has had notice thereof, (if necessary)—that it still remains unperformed—that a copy of the same, of the rule, and of the allocatur, (if any), has been served, and that their originals were at the time of service shewn (u). If the original time given to the arbitrators for making their award has been enlarged by them pursuant to a power in the submission, then let an affidavit also be made, that the time has been duly enlarged (x), that the award was made within the enlarged time, and that the party to perform the award has had notice of these facts (y). If there has been a letter of attorney, let an affidavit also be made of its execution, by the attesting witness, of a service of a copy thereof, and that at the time of such service the original was shewn. If the motion is made a long time after the making of the award, there should be an affidavit explaining the delay (z). Annex the rule and allocatur (if any).* If there is a cause in court, the affidavit should be intitled in the cause (*a*). But, when the submission is made a rule of court under the statute, there being no cause depending, the affidavit for an attachment need not be intitled (*b*), or it may be intitled "*In the matter*" &c. (*c*) If there was an attesting witness to the award, the affidavit of the due execution of it should be made by him; or, if an affidavit cannot be obtained from him, its absence should be accounted for, and his handwriting proved (*d*). The affidavit, that money is still due under an award, may be made by the attorney, where it has been demanded by letter of attorney (*e*). The affidavit will be sufficient if it disclose a regular service, although the surname of the arbitrator or umpire is misdescribed (*f*). Where a rule *nisi* for an attachment for non-payment of costs pursuant to an award has been obtained in one term, and dropped in consequence of negotiations between the parties, and part of the costs are paid; if it is sought to obtain an attachment for the non-payment of the residue, the rule for that purpose cannot be drawn up on merely reading the dropped rule and an affidavit of fresh demand (*g*).

The motion and rule for the attachment, &c.

Upon these affidavits, let counsel move for a rule nisi (h) for an attachment for the non-performance of the award. Draw up the rule with the Masters (i), and serve a copy of it, at the same time shewing the original in such a manner that the party served can read its contents (k). Make an affidavit of the service, which

(u) See forms, Chit. Forms, 664, 665.

(x) This is not absolutely necessary: *Re Smith & Reeves*, 5 Dowl. 513; *Barton* v. *Ranson*, 6 Dowl. 384: *Dickens* v. *Jarvis*, 5 B. & C. 528. See *post*, 1512.

(y) *Re Dodington & Ballward*, 7 Scott, 733; 7 Dowl. 640, *S. C.* See *Halden* v. *Glasscock*, 5 B. & C. 390; 8 D. & R. 151, *S. C.*: *Davies* v. *Vass*, 15 East, 97; *Wolenbury* v. *Lageman*, 6 Taunt. 254; 1 Marsh. 579, *S. C.*

(z) *Storey* v. *Garrey*, 8 Dowl. 299.

(a) *Doe* v. *Stilwell*, 6 Dowl 305: *Bainbrigge* v. *Houlton*, 5 East, 21 a: *Whitehead* v. *Firth*, 12 East, 166 a.

(b) *Anon.*, 1 Smith, 338: *Bainbrigge* v. *Houlton*, 5 East, 21.

(c *Whitehead* v. *Firth*, 12 East, 166 a: *In re Houghton*, 2 Moo. & P. 452.

(d) *England* v. *Davison*, 9 Dowl. 1052: *Bolton* v. *Jarrett*, 8 Jur. 83, B. C.

(e) *Regimer* v. *Paget*, 9 Dowl. 946.

(f) *Re Smith & Reeves*, 5 Dowl. 513. And see *Dickens* v. *Jarvis*, 5 B. & C. 528; 8 D. & R. 285, *S. C.*

(g) *Baker* v. *Wells*, 9 Dowl. 323.

(h) If the attachment be moved for, for non-payment of costs under an award, it is a rule *nisi* only: *Thompson* v. *Billingsby*, 2 Chit. 57; and this is the case, though only the cause be referred: *Daniell* v. *Beadle*, 2 Scott, N. R., 155; 1 M. & G. 960: *Dickenson* v. *Allsop*, 8 Jur. 1033, Exch.

(i) See the form, Chit. Forms, 646.

(k) *Culvert* v. *Redfearn*, 2 Dowl. 505.

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must be intitled the same as the rule (l), and give it, with a brief, to counsel, to move to make the rule absolute. If made absolute, draw up the rule with the Masters (m), and take it to the Crown Office, to one of the clerks in court, who will thereupon make out the attachment. Take it to the sheriff's office, and get a warrant on it; give the warrant to your officer, who will thereupon arrest the party. Where service of the rule *nisi* had been on defendant's wife, and there was reason to believe the defendant himself had kept out of the way, and had ultimately received the rule, personal service was dispensed with, and the rule made absolute (n).

Title of affidavits shewing cause.

The affidavits in answer to the rule nisi should be intitled "The *Queen* v. ——" (o).

What defects may be shewn for cause against the rule.

In shewing cause against the rule for the attachment, the other party may impeach the award for any defect appearing upon the face of it, although the time limited for applying to set aside the award may have elapsed (p); but not for matter extrinsic (q). A cross demand is no defence to the application (r). Where it was proposed to shew corruption in the arbitrator as cause against the rule for the attachment, the Court of Common Pleas held, that, although that might be a good reason for setting aside the award, it was no answer to an application for an attachment (s): nor is a mere mis-recital in the award (t). Nor (where an order of reference and enlargement had been made a rule of court) can it be shewn as cause that there was no affidavit that the time was duly enlarged: but, if there be no such affidavit, the proper course is to move to set aside the rule, making the order of reference, &c. a rule of court (u). On shewing cause against the motion, reference cannot be made to the pleadings in the cause, unless there be an affidavit connecting them with the award (x). Where, upon shewing cause, the Court discharges the rule without costs, on a preliminary objection to the insufficiency of the affidavit, demanding the performance of the award, the objecting party has a right to enter into the merits, in order to have the rule discharged with costs, and does not thereby waive his right to the discharge of the rule without costs (y).

In what cases and on whose behalf the attachment will be granted or not.

The Court will not grant an attachment against a peer (z), or member of the House of Commons (a); or against an administrator or executor, where the submission was made by the intestate or testator (b). But an attachment will be granted

(l) *Re Houghton*, 2 Moo. & P. 452.

(m) See as to its being competent for the officer of the court to refuse to draw up the rule, if the award be not stamped, *ante*, 1490.

(n) *Potter* v. *Williams*, 6 Jur. 508, B. C. See *ante*, 1416, and *post*, 1522.

(o) *Bevan* v. *Bevan*, 3 T. R. 601. See *Bainbrigge* v. *Houlton*, 5 East, 21 a.

(p) *Pedley* v. *Goddard*, 7 T. R. 73. See *Lowndes* v. *Lowndes*, 1 East, 276: *Hutchins* v. *Hutchins*, Andr. 297.

(q) *Holland* v. *Brooks*, 6 T. R. 161; *Paull* v. *Paull*, 2 Dowl. 340: 2 C. & M. 235, *S. C.*: *M'Arthur* v. *Campbell*, 2 Ad. & E. 52; 4 Nev. & M. 208, *S. C.* But query the correctness of the principle on which these decisions were founded. It would seem that any matter which might be set up as a defence to an action on an award, might be set up as an answer to an attachment for the performance of it.

(r) *Smith* v. *Johnson*, 15 East, 213.

(s) *Brazier* v. *Bryant*, 3 Bing. 167; 10 Moore, 587, *S. C.*

(t) *Paull* v. *Paull*, 2 C. & M. 235; 3 Dowl. 340, *S. C.*

(u) *Barton* v. *Ransom*, 6 Dowl. 384. See *ante*, 1512.

(x) *Rowe* v. *Sawyer*, 7 Dowl. 691.

(y) *Re Chamberlain*, 8 Dowl. 695.

(z) *Walker* v. *Earl Grosvenor*, 7 T. R. 171.

(a) *Catmur* v. *Knatchbull*, 7 T. R. 448.

(b) *Newton* v. *Walker*, Willes, 315: *post*, 1521. But they will when the submission was made by himself. (*Spicer* v. *Webster*, 2 Dowl. 46).

against one of several of the parties against whom the award is made (*c*); or against a party residing out of the jurisdiction of the court (*d*). An attachment will not be granted on behalf of a stranger to the award (*e*); nor even on behalf of the administrator or executor of a party who died after the award made, and to whom the money awarded was to be paid (*f*). Nor will the Court grant an attachment pending the rule for setting aside the award (*g*), nor pending an action on it; nor will they allow the plaintiff to waive the action in order to apply for the attachment (*h*), unless the defendant was in contempt before the action was brought (*i*). The rule for an attachment has, however, been made absolute, on the terms of the plaintiff discontinuing his action and paying the costs (*k*). Where a party obtained an attachment to enforce an award, and afterwards proceeded by action, the Court set aside the attachment, upon the terms of the defendant giving a bond to the plaintiff, with sureties to the Master's satisfaction, and conditioned to the same effect as in the case of a recognisance of bail (*l*). The Court, however, have granted an attachment pending a foreign attachment in London upon the same award (*m*). And an attachment will not be granted, unless the award contain a distinct order to do the act, the omission of which forms the ground of the application. Therefore, where an arbitrator finds by his award, that, on the balance of accounts, the defendant has overpaid the plaintiff a certain sum, but does not award that the plaintiff is to repay it to defendant, the Court will not grant an attachment against the plaintiff for the non-payment of that sum (*n*). And ordering a verdict to be entered for a certain sum, where the arbitrator has no authority to do so, cannot be treated as an order to pay that sum, so as to support an attachment (*o*). Where, in an action against E. H. and W. T., the award purported to be made in an action against E. H. and E. T., and awarded that E. H. and E. T. should pay a certain sum of money to the plaintiff, the Court refused to grant an attachment (*p*). An attachment will not be granted for not making a payment on a Sunday (*q*). The Court, in one case, under peculiar circumstances, made absolute a rule for an attachment for non-payment of a sum awarded to the wife of one of the parties, although it was sworn that the money had been demanded and paid to her husband (*r*). If a

(*c*) *Richmond* v. *Parkinson*, 3 Dowl. 703. If an award directs costs to be paid by parties in equal shares, there must be separate attachments. (*Gulliver* v. *Summerfield*, 5 Dowl. 401).

(*d*) *Hopcraft* v. *Fermor*, 8 Moore, 494; 1 Bing. 260, *S. C.*

(*e*) *In re Skote*, 7 Dowl. 618.

(*f*) *Rex* v. *Massey*, 1 Dowl. 538: *semble*, overruling *Rogers* v. *Stanton*, 7 Taunt. 576. And see *ante*, 1466. *In re Hare, Milne & Hasrell*, 8 Scott, 371.

(*g*) *Dalling* v. *Matchett*, Willes, 215.

(*h*) *Bedley* v. *Loveday*, 1 B. & P. 81. See *Baker* v. *Wells*, 9 Dowl. 323: *Mandell* v. *Tyrrell*, 9 M. & W. 217; *ante*, 1430.

(*i*) *Paull* v. *Paull*, 2 C. & M. 235; 2 Dowl. 340, *S. C.*: *Higgins* v. *Willes*, 3 M. & R. 382.

(*k*) *Paull* v. *Paull*, 2 Dowl. 340.

(*l*) *Earl of Lonsdale* v. *Whinnay*, 3 Dowl. 268; 1 C., M., & R. 591, *S. C.*

(*m*) *Coppell* v. *Smith*, 4 T. R. 313, n.

(*n*) *Re Seaward*, 7 Dowl. 318: *Thornton* v. *Hornby*, 1 Dowl. 237; 1 Moo. & Scott, 48; 8 Bing. 13, *S. C.* And see *Scott* v. *Williams*, 3 Dowl. 508: *Hopkins* v. *Davies*, 1 C., M., & R. 846: *Edgell* v. *Dallimore*, 3 Bing. 634; 11 Moore, 541, *S. C.*: *Re Lee*, 3 Nev. & M. 860.

(*o*) *Donlan* v. *Brett*, 4 Nev. & M. 854. See *ante*, 1500.

(*p*) *Lees* v. *Hartley*, 8 Dowl. 883.

(*q*) *Hobdell* v. *Miller*, 2 Scott, N. R., 163.

(*r*) *Wynne* v. *Wynne*, 3 Scott, N. R., 442; 1 Dowl., N. S., 723; 4 M. & G. 253.

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party has performed the award as far as was in his power, the Court will not grant an attachment against him (*s*).

Attachment for filing bill to set aside award.

Where a party filed a bill in equity to set aside an award, after entering into a rule of court to abide by it, the Court held it to be a contempt, and granted an attachment against him; but they afterwards, by consent on his paying all costs, discharged him without fine, rather than set a small one for so high an offence (*t*).

Enforcing award under 1 & 2 Vict. c. 110, s. 18.

As to enforcing award by execution, under 1 & 2 *Vict. c.* 110, *s.* 18, see *ante*, 1428.

Where there is a cause in court.

Where there is a Cause in Court.]—If no verdict have been taken, the mode of proceeding is by attachment or action, or execution on the rule in the manner above mentioned. But if a verdict were taken, the *plaintiff* may proceed either by attachment or action, as above directed, or he may enter up judgment upon the verdict (*u*) and sue out execution: and the *defendant* (if the award be made in his favour) may proceed by attachment or action; or, if the order of reference direct that the party in whose favour the award is made shall be at liberty to sign judgment for the amount payable thereunder, he may sign judgment, and issue execution for his costs (*v*). Where the cause and all matters in difference are referred, and the award directs that the costs of the cause and of the award shall be paid by the defendant, the plaintiff is entitled to have these costs taxed at once, without waiting for the expiration of the time during which the defendant may move to set aside the award (*x*).

Judgment on, how signed, &c.

In order to proceed to judgment on the verdict, *move to make the order of Nisi Prius a rule of court, and draw up the rule as before directed; and the Master or associate will thereupon give you the Nisi Prius record. Enter the postea on it for the amount of the sum awarded* (*y*)*; give the usual one day's notice of the taxation of costs* (*ante*, 1385); *then take the postea, together with the rule and award and the papers in the cause, to one of the Masters, who will thereupon mark the postea, and tax the costs, and sign judgment.* It is not necessary that the defendant, in this case, should be personally served with a copy of the award; nor is it necessary to obtain leave of the Court to sign judgment (*z*), unless it be required to enter up the judgment as of the term next after the finding of the verdict, where the award was not made until the term after that term (*a*). Where the award was lost, the Court, upon an affidavit stating that fact, and the substance of the award, allowed the plaintiff to sign a judgment (*b*). A rule for delivering the *postea* to the plaintiff, that he might enter the verdict pursuant to the award of an arbitra-

(*s*) *Dodington* v. *Bailward*, 7 Scott, 733; 7 Dowl. 640, *S. C.*

(*t*) *Rex* v. *Wheeler*, 3 Burr. 1256; 1 W. Bl. 311, *S. C.* And see *Davila* v. *Almanza*, 1 Salk. 73.

(*u*) See *Rex.* v. *Gore*, 8 Dowl. 103, per *Denman*, C. J.

(*v*) *Maggs* v. *Yanston*, 6 Dowl. 481.

(*x*) *Little* v. *Newton*, 1 M. & Gr. 978. And see *Cromer* v. *Court*, 16 M. & W. 310, *infra*.

(*y*) *Lee* v. *Lingard*, 1 East, 401: *Grimes* v. *Naish*, 1 B. & P. 480: *Borrowdale* v. *Hitchener*, 3 Id. 244: *Haywood* v. *Ribton*, 4 East, 310: *Bonner* v. *Charlton*, 5 Esp. 139, 143, 144: *Prentice* v. *Reed*, 1 Taunt. 151. And see *Grundy* v. *Wilson*, 7 Id. 709. See *ante*, 1463, as to an arbitrator not being able, so far as relates to an action referred, to award the payment of a greater sum than that laid in the declaration.

(*z*) *Lee* v. *Lingard*, 1 East, 401: *Grimes* v. *Naish*, 1 B. & P. 480: *Borrowdale* v. *Hitchener*, 3 Id. 244.

(*a*) *Brook* v. *Fearne*, 2 Dowl. 144.

(*b*) *Hill* v. *Townsend*, 3 Taunt. 45.

tor, may be drawn up on reading the affidavit, "and the *paper writing* thereunto annexed," provided the affidavit verify the *paper writing* as being a copy of the award (*c*). Where a verdict is taken by consent for the plaintiff at *Nisi Prius*, subject to the award or certificate of a barrister, and the latter in vacation, after more than four days have elapsed from the return-day of the *distringas juratores* or *habeas corpora juratorum*, gives his certificate that the verdict shall stand for a smaller amount, the plaintiff is entitled to sign judgment immediately, and is not bound to wait until after the expiration of the first four days in the next term (*d*).

Execution.

After signing judgment, you may sue out execution, as in ordinary cases. If the award state any particular time at which the money is to be paid, execution should not be sued out, nor indeed in strictness, perhaps, should judgment be signed, before that time has elapsed (*e*).

(*c*) *Platt* v. *Hall*, 2 M. & W. 391. See *Heyward* v. *Phillips*, 1 Nev. & Per. 293: *Sherry* v. *Oke*, 1 H. & W. 119.

(*d*) *Cromer* v. *Churt*, 16 M. & W. 310; 10 Jur. 671, *S. C.* And see *Little* v. *Newton*, *ante*, 1514.

(*e*) *Callard* v. *Patterson*, 4 Taunt. 319.

PART VIII.

ATTACHMENT.

PART VIII.

Contemptuous expressions towards the Court or its process.

In what Cases.]—If a person, upon being served with the process of the court, use contemptuous expressions of such process, or of the Court itself, the Court, upon affidavit of the fact, will grant an attachment against him (*a*); if of the Court, the rule for this purpose is granted absolute in the first instance; if of the process, it is a rule *nisi* only (*b*).

Rescue.

If the sheriff return a rescue, the Court will grant an attachment against the rescuers, absolute in the first instance (*c*).

Misbehaviour of attornies or officers of court, &c.

The courts at Westminster have a power of punishing attornies and other officers of the court, by attachment, for misbehaviour in the exercise of their profession. See different instances in which attornies may be thus punished, *ante*, *Vol.* 1, 115.

Sheriff or coroner not executing writ, or executing it oppressively, &c.

If the sheriff do not obey the rule to return the writ or bring in the body, the Court will grant an attachment against him, absolute in the first instance (*d*). So, in other cases, for not executing writs or for executing them in an oppressive manner, or for not executing them effectually, &c., the Court will punish the sheriff or his officers by attachment (*e*). So, where an attachment against the sheriff was directed to the coroner, and the latter was ruled to bring in the body, the Court granted an attachment against him, absolute in the first instance, for not obeying the rule (*f*). The sheriff, however, is not liable to an attachment for not taking a bond in replevin; but the defendant, if damnified, may have his remedy against him by action (*g*). It may here be added, that an attachment cannot be obtained against the late sheriff for disobedience of an order directed to "the sheriff" generally (*h*).

Against judges of inferior courts, justices of peace, gaolers, &c.

As to the cases in which the Court will punish the judges of inferior courts, justices of peace, gaolers, &c., by attachment, see 2 *Hawk. P. C. c.* 22, *ss.* 25 *to* 32; and *Rex* v. *Justices of Seaford*, 1 W. Bl. 432.

Suitors perverting the course of justice.

Suitors amenable to the authority of the Court, who by force or fraud wilfully pervert or obstruct the course of justice, are guilty of a contempt of court, and are liable to an attach-

(*a*) 2 Hawk. c. 22, s. 36. See *ante*, 157, as to obstructing service of writ of summons, &c.

(*b*) 2 Hawk. c. 22, s. 36; *Rex* v. *Jones*, 1 Str. 185: *Rex* v. *Kendrick*, Say. 114: *Anon.*, 1 Salk. 84; R. T., 17 G. 3.

(*c*) As to this, see *ante*, 713, and Corner's Crown Practice, 32.

(*d*) Vol. 1, 558, 720.

(*e*) 2 Hawk. c. 22, ss. 2 to 5. See *Chapman* v. *Maddison*, 2 Str. 1088.

(*f*) *Andrews* v. *Sharp*, 2 W. Bl. 911: *Rex* v. *Peckham*, Id. 1218.

(*g*) *Ante*, 1006: *Rex* v. *Lewis*, 2 T. R. 617.

(*h*) *Reg.* v. *Sheriff of Cornwall*, in *Fleming* v. *Tremere*, 7 Dowl. 696.

ment. In a recent case, an order having been made by a judge upon the plaintiff's attorney to declare the place of abode of the plaintiff, on pain of being guilty of contempt, the plaintiff caused his attorney to deliver a false account of the same, the Court intimated their opinion that he was guilty of contempt of court, and subject to an attachment (*h*). Where the defendant endeavoured to prevent a material witness for the plaintiff from giving evidence at the trial, *Williams*, J., refused an attachment, it not being shewn that the witness could not be subpœnaed in consequence of the defendant's interference (*i*).

Disobedience of process.

If any person wilfully disobey the process of the Court, he is punishable by attachment (*k*). Thus the Court will in general grant an attachment against a witness, if he, in contemptuous disregard of the process of the Court, do not attend at a trial when duly served with a subpœna for that purpose. As to this, see *Vol.* 1, 344. The motion for the attachment in such a case must be made as soon as possible, and at all events in the term succeeding the trial (*l*).

Disobedience of rule or order.

If a party wilfully and contemptuously disobey (*m*) any rule of court, or judge's order, or order of *Nisi Prius* made a rule of court (*n*), he is punishable by attachment, if the rule or a copy of it has been personally served upon him, the rule itself at the same time shewn to him (*o*), a demand personally made upon him to comply with the rule (*p*), and a neglect or refusal to do so (*q*). Thus, the non-performance of an award, if made under a rule of court, or if the submission, order of *Nisi Prius*, or judge's order be made a rule of court, is punishable by attachment (*r*). And if the rule require the party to do a thing forthwith,—as, for instance, to reinstate certain premises,—the Court, upon application, will grant an attachment, if the party do not presently begin the work, although the work be of such a nature that it may take some time to complete it (*s*). But the Court will not grant an attachment against a party for disobedience of a rule or order, if he has obeyed it as far as was in his power (*t*), or for not making a payment on a Sunday (*u*). If by the rule or order the party to whom the money is payable has to perform some act before it is so, he cannot apply for an attachment before performing such act (*x*). It should be here mentioned, that a final order for protection from process obtained under the 5 & 6 *Vict. c.* 116, and the 7 & 8 *Vict. c.* 96

(*h*) *Smith* v. *Bond*, 14 Law J., N. S., Exch., 114; 2 Dowl. & L. 460, *S. C.*

(*i*) *Schlesinger* v. *Flersheim*, 14 Law J., N. S., Q. B., 96; 2 Dowl. & L. 737.

(*k*) See the subject of attachment for disobedience of process discussed in the learned judgments delivered by the judges in Dom. Proc., *Miller* v. *Knox*, 4 Bing. N. C. 574.

(*l*) *Thorpe* v. *Graham*, 3 Bing. 223; 11 Moore, 55, *S. C.*

(*m*) *Ex parte Lawrence*, 2 Dowl. 231.

(*n*) See *Baker* v. *Rye*, 1 Dowl. 639.

(*o*) *Rex* v. *Smithies*, 3 T. R. 351: *Barnard* v. *Berger*, 1 New Rep. 121: *Baker* v. *Rue*, 1 Dowl. 639: *Re Lowe*, 4 B. & Ad. 412; *ante*, 1511. The judge's order need not be served. (*Greenwood* v. *Dyer*, 5 Dowl. 255).

(*p*) *Doddington* v. *Hudson*, 8 Moore, 510; 1 Bing. 410, *S. C.*; *infra*.

(*q*) 2 Hawk. c. 22, s. 37. See *Davies* d. *Povey* v. *Roe*, 2 W. Bl. 892: *Camden* v. *Edie*, 1 H. Bl. 21, 49: *Cooke* v. *Tunnicell*, 8 Taunt. 131; 2 Moore, 513, *S. C.*: *Boddington* v. *Harris*, 1 Bing. 187: *North* v. *Evans*, 2 H. Bl. 35.

(*r*) *Ante*, 1510, 1513.

(*s*) *Doddington* v. *Hudson*, 1 Bing. 464; 8 Moore, 510, *S. C.* See *Doddington* v. *Ballward*, 7 Dowl. 640.

(*t*) *Clare* v. *Blakesley*, 1 Scott, N. R., 397.

(*u*) *Hobdell* v. *Miller*, 2 Scott, N. R., 163.

(*x*) *Bowker* v. *Tabbutt*, 2 Dowl. & L. 787; where it was held that the performance of certain acts directed to be done, was not a condition precedent to the granting of the attachment.

PART VIII.

(*s.* 26), "extends to all process issuing from any court for any contempt of court, ecclesiastical or civil, for non-payment of money, or of costs or expenses, in any such court; and that in such case, such final order shall be deemed to extend also to all costs which the petitioner would be liable to pay, in consequence or by reason of such contempt, or on purging the same," &c.

Where a person is ordered by a rule of court *absolutely* to pay money or costs (*y*), and a copy of the rule (*z*), with the Master's *allocatur* thereon (if any) (*a*), is *personally* (*b*) served on him, and the rule itself at the same time (*c*) shewn to him (*d*), and a demand made of the money or costs by the person to whom they are payable, according to the terms of the rule, or by some person deputed by him by letter of attorney (*e*), such letter being shewn to the party at the time the demand is made (*f*), and a copy of it served on (*g*), and left with him (*h*); if he do not pay the money or costs when thus demanded, the Court will grant an attachment against him, absolute in the first instance (*i*); unless they be costs taxed between attorney and client, pursuant to the Master's *allocatur*, in which case the rule for the attachment will be a rule *nisi* only in the first instance (*k*). The demand, in case of a judge's order, should be made *after* the judge's order has been made a rule of court (*l*). It should, in general, be made by the person pointed out as the recipient by the rule; therefore, where money, &c. is payable to several parties, the demand must be made by all, or by their deputy appointed by joint power of attorney (*m*). In the case of costs, however, there is a distinction; and where the plaintiff's attorney demanded the costs, without a letter of attorney authorising him to do so, it was deemed sufficient; for the attorney was, in fact, entitled to the costs when received (*n*).

(*y*) See 1 & 2 Vict. c. 110, s. 18, *ante*, 1428, which gives a remedy by execution to recover such money or costs. It is in general preferable to proceed under this enactment to proceeding by attachment.

(*z*) *Dalton* v. *Tucker*, 5 Dowl. 550. It must in every respect be a correct copy. (*Rex* v. *Calvert*, 2 C. & M. 189; 2 Dowl. 276, *S. C.*)

(*a*) *Dalton* v. *Tucker*, *supra*. An *allocatur* is the property of the person in whose favour it is made. (*Doe* v. *Robinson*, 2 Dowl. 503).

(*b*) *Birkett* v. *Holme*, 4 Dowl. 556; the *dictum* of *Patteson*, J., in that case throws great doubt upon *Stannall* v. *Towers*, 1 C., M., & R. 88; 2 Dowl. 673, *S. C.*; *Woollen* v. *Hodgson*, 3 Dowl. 178; *Doe Steer* v. *Bradley*, 1 Dowl., N. S., 259; *Allier* v. *Newton*, 2 Dowl. 582, where a personal service was, under circumstances, dispensed with. If the defendant admits that he has received, (*Phillips* v. *Hutchinson*, 3 Dowl. 583), or refuses to receive, (*Rex* v. *Koops*, 3 Dowl. 566), or by knocking down or other violence prevents the serving of the rule and *allocatur*, this is equivalent to personal service. (*Wenham* v. *Downes*, 3 Dowl. 573).

(*c*) To obtain an attachment, all the necessary steps must be taken at the same time. (*Rogers* v. *Tweedel*, 3 Dowl. 572: *Doe Sturgess* v. *Ward*, 2 Dowl., N. S., 706. See *Davies* v. *Sherlock*, 7 Dowl. 592).

(*d*) It need not be placed in his hands: if it be shewn so that he can read its contents, that is sufficient. (*Calvert* v. *Redfearn*, 2 Dowl. 505). A service of the original rule would be sufficient. (*Leaf* v. *Jones*, 3 Dowl. 315).

(*e*) *Doe Sturgess* v. *Ward*, 2 Dowl., N.S., 707.

(*f*) *Doe Hickman* v. *Hickman*, 1 Scott, N. R., 398: *Doe Sturgess* v. *Ward*, *supra*.

(*g*) See *ante*, 1509: *Price* v. *Dugan*, 4 Scott, N. R., 734; 4 M. & G. 225; 1 Dowl., N. S., 707.

(*h*) *Doe Cope* v. *Johnson*, 7 Dowl. 530.

(*i*) R. T., 17 G. 3. See *Rex* v. *Stoke*, Cowp. 136: *Rex* v. *Ireland*, 3 T. R. 512: *Price* v. *Dugan*, 1 Dowl., N. S., 709, where the application was against the guardian of an infant. In the Exchequer. It is now grantable without first issuing a subpœna, which was formerly requisite. (*Doe* v. *Fry & Barker*, 2 Dowl. 217; 2 C. & M. 234, *S. C.*)

(*k*) *Bray* v. *Yates*, 1 Dowl. 459.

(*l*) *Chilton* v. *Ellis*, 2 Dowl. 338.

(*m*) *Spikes* v. *Hayn*, 4 Dowl. 114, a case of a bond.

(*n*) Per *Holroyd*, J., MS., T. 1820, and this though the costs were by the terms of the rule made payable "to the plaintiff." *Inman* v. *Hill*, 4 M. & W. 7: *Doe Sturgess* v. *Ward*, *supra*: *Reg.* v. *Pembridge*, 19 Law J., N. S., 259: but see *Mason* v. *Whitehouse*, 6 Dowl. 612; 6 Scott, 246, *contra*. It appears, however, from the report of

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Where a rule directs costs to be paid to the party or his attorney, a demand not made by the attorney who had conducted the cause in London, but by the attorney in the country who employed him, is sufficient (*o*). And a demand of costs payable to the high sheriff may be made under the authority of a power of attorney, executed by the under-sheriff, after the high sheriff has gone out of office (*p*). But a demand by the attorney's clerk, or any other party not named as the party to whom the costs are to be paid, unless acting under a power of attorney, as above mentioned, is not sufficient (*q*), even where the money is made payable to the party (not an attorney) "or his agent" (*r*). Although a party is at one time in contempt for not paying costs which have been duly demanded, yet, if before an attachment is moved for the sum due becomes reduced in amount, a fresh demand of the reduced sum must be made to ground a motion for an attachment (*s*). A demand may be dispensed with if the party by violence prevent it (*t*). Also, if the rule be that the party should do the act within a specified time, "*or that, in default thereof, an attachment should issue against him*," no demand is necessary (*u*). Where a party is ordered *conditionally* only to pay costs, then an attachment will not be granted against him for the non-payment of them (*x*). Therefore, where a plaintiff obtains a rule to discontinue upon payment of costs, he is not punishable by attachment if he do not pay them (*y*). So, if the defendant obtain a rule or order to stay proceedings upon payment of debt and costs, he cannot in general be punished by attachment, if he do not afterwards pay the debt and costs; but the plaintiff should proceed in his action (*z*). So, where the defendant obtained a rule for changing the venue from Middlesex, on payment of costs of the motion, and all other costs *bonâ fide* incurred, and rendered useless by the rule, and, after taxation, the defendant gave notice that he abandoned the rule, it was held by the Court of Exchequer, (*Maule*, B., *dissentiente*), that the rule was conditional only, and that the defendant was not bound to abide by it, though the plaintiff had, in the meantime, incurred the costs of his witnesses, who were on their way to town when the rule was made absolute (*a*). An attachment cannot be obtained for non-payment of costs, pursuant to the Master's *allocatur*, if there was no undertaking or order to pay them (*b*).

Upon obtaining leave to compound a penal action, the rule must express that the defendant doth thereby undertake to pay the sum for which he has leave to compound the action (*c*); Breach of undertaking.

this last case, in 4 Bing., N. C., 692, that the Court subsequently discharged the rule and allowed the attachment to stand, on the authority of *Inman* v. *Hill*, (*ubi supra*), and another case in the Exchequer.

(*o*) *Dennett* v. *Pass*, 1 Scott, 566; 3 Dowl. 632; 1 Bing., N. C., 638, S. C.

(*p*) *Reg.* v. *Matty*, 6 Dowl. 515.

(*q*) *Ex p. Fortescue*, 2 Dowl. 448: *Clark* v. *Dignum*, 3 M. & W. 319.

(*r*) *Brown* v. *Jenks*, 4 Dowl. 581: but *Patteson*, J., said, that if the party were an attorney, and the demand made by his London agent, it might have been different. (Id.)

(*s*) *Spicy* v. *Webster*, 1 Dowl. 696.

(*t*) *Wenham* v. *Downes*, 3 Dowl. 573. See *Rex* v. *Keeps*, 3 Dowl. 566.

(*u*) *Woollison* v. *Hodgson*, 3 Dowl. 178.

(*x*) *Turner* v. *Gill*, 3 Dowl. 31: *Rex* v. *Fenn*, 2 Dowl. 182: *Handy* v. *Collett*, 7 Dowl. 599.

(*y*) *Ante*, 1287: *Stokes* v. *Woodeson*, 7 T. R. 6.

(*z*) *Ante*, 1192.

(*a*) *Pugh* v. *Kerr*, 5 M. & W. 164. And see *Pugh* v. *Kerr*, 6 M. & W. 17; 8 Dowl. 218, S. C.

(*b*) *Harrison* v. *Ward*, 3 Dowl. 541: *Ryalls* v. *Emerson*, 2 Dowl. 357. And see *Price* v. *Philcox*, 7 Dowl. 559.

(*c*) R. E., 33 G. 2, r. 2.

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and if he do not afterwards pay it, the Court, upon application, will award an attachment against him (*d*). Before the rule of *H. T.*, 4 *W.* 4 (*e*), if a defendant paid money into court, and did not afterwards pay the costs, an attachment might be granted against him for the non-payment of them; but now, perhaps, the only course is to sign judgment for them (*f*).

Abuse of process of court.

If any person abuse the process of the court, he is punishable for it by attachment: as, where execution was sued out without a judgment to warrant it (*g*); where a woman brought an appeal of the death of her husband, knowing at the same time that her husband was alive (*h*); where a *latitat* was sued out merely for the purpose of bringing a defendant within the jurisdiction of an inferior court, in order to sue him there (*i*); where the plaintiff, after bringing an action in one court, commenced an action in another for the same debt, and against the same defendant (*k*); or, where a person sued out bailable process, and thereupon arrested a witness, for the purpose of preventing him from giving evidence before an arbitrator (*l*), or the like. So, if a person forge the process of the court, or alter or fill it up after it has been sealed; or, if he obtain judgment in ejectment, by an affidavit of service of the declaration on one who was procured to personate the tenant; in these and the like cases, the Court will punish the person so offending by attachment (*m*). But merely altering a sheriff's warrant is not a contempt of court, unless an improper use be made of it (*n*). And it is, as we have seen, a common practice to alter and re-seal writs of mesne process (*o*). The Court have also granted an attachment against a person for sending inflammatory papers to the jurors summoned upon a certain trial, and for preventing some of them from attending, by sending them notice that the trial was put off (*p*). And, in another case, they granted an attachment against a man for threatening a prosecutor with danger of his life because he had prosecuted another for some offence (*q*).

Contempts committed in face of court.

As to contempts committed in the face of the Court, there is of course no necessity for an attachment, that being merely a process to bring the defendant before the Court; but he may be instantly apprehended and imprisoned at the discretion of the judge, without any other proof or examination. See as to the punishment of jurors for misconduct, 2 *Hawk. c.* 22, *ss.* 14 *to* 24. Where parties attending a reference for taxation before the Master left the office at the conclusion of the reference for the day, and one of those parties who during the reference had insulted the other, then, on the steps of the Master's office, assaulted the latter; the Court refused to grant an attachment against the party committing the assault (*r*).

(*d*) *Rex* v. *Clifton*, 5 T. R. 257.
(*e*) *Ante*, 1185.
(*f*) See *ante*, 1185.
(*g*) *Waterhouse* v. *Saltmarsh*, Hobart, 264; Fortesc. 267.
(*h*) 3 H. 4, 7; 2 Hawk. c. 22, s. 39.
(*i*) 2 Hawk. c. 22, s. 40.
(*k*) 14 H. 7, s. 6; 6 Co. 60; 2 Hawk. c. 22, s. 41. And see Id. s. 42.
(*l*) *Rex* v. *Hall*, 2 W. Bl. 1110.
(*m*) 2 Hawk. c. 22, s. 43. See *Finnerty* v. *Smith*, 1 Scott, 743; 1 Bing., N. C., 649, *S. C.*
(*n*) *Hale* v. *Castleman*, 1 W. Bl. 2.
(*o*) *Ante*, 162.
(*p*) *Rex* v. *Lucas*, 3 Burr. 1586.
(*q*) *Rex* v. *Carroll*, 1 Wils. 75.
(*r*) *Ex p. Wilton*, 1 Dowl., N. S., 885; and per *Coleridge*, J., "If any misconduct takes place before a Master, which he finds to impede him in the effective and orderly discharge of his duties, he would,

If a client, when his business in court is despatched, refuse to pay the officer the fees that are due to him for doing business, the Court on motion will grant an attachment against him to have him committed until he pay the fees; for not paying the fees is a contempt of court, and the Court is bound to protect its officers in their rights (*s*). For not paying officer's fees.

It may be necessary to add, that, although the courts will not grant an attachment against peers or members of Parliament for the non-performance of an award, non-payment of costs, or the like (*t*); yet for very gross contempts, such as rescues, disobedience of the Queen's writs, or the like, they will (*u*). Against peers or members of Parliament.

The Court will not grant an attachment against an executor of the lessor in ejectment for costs (*x*), such lessor having died after entering into the consent rule. But it may be doubted whether a *scire facias* would not now lie, in such a case, to have execution on the rule in the same way as on a judgment against the testator (*y*). Against executor.

The Motion and Rule for the Attachment.]—The application for an attachment *must be founded on an affidavit of the facts necessary to constitute the contempt* (*z*), *to which should be annexed the rule* (*if any*) *disobeyed, and referred to in the affidavit;* excepting in the case of a rescue, where the sheriff's return of the rescue is deemed sufficient, although he returns that the rescue was from his bailiff (*a*). As to the title of affidavits in cases of attachment generally, see *ante*, 1450. An affidavit in support of a motion for an attachment for the non-delivery of a bill to a party, pursuant to rule of court, should in general be made by the party himself (*b*). Where, on moving for a rule for an attachment, absolute in the first instance, it appeared that accidentally it had not been stated that the original rule was shewn at the time of the service, the Court allowed the attachment to be in the office until the defect was supplied (*c*). The application should be made promptly (*d*), or the delay explained by affidavit (*e*). It should in general be made by a barrister (*f*). *The Court will thereupon grant either a rule for the attachment absolute in the first instance, or a rule to shew cause why the attachment should not issue.* The motion and rule for the attachment.

For non-payment of costs on the Master's *allocatur*, although

I presume, refuse to proceed, and report the matter to the Court, who would not be slow to protect him, or to indemnify the injured party at the expense of the offender, and prevent by due punishment the recurrence of such misconduct."

(*s*) 1 Lil. Prac. Reg. 598; Tidd's Suppl. 51.

(*t*) *Walker* v. *Earl Grosvenor*, 7 T. R. 171: *Catmur* v. *Knatchbull*, Id. 448; *ante*, 1512.

(*u*) 2 Hawk. c. 22, s. 33: *Rex* v. *Earl Ferrers*, 1 Burr. 634: *Foley* v. *Langhorne*, Say. 50. See *R.* v. *Bishop of St. Asaph*, 1 Wils. 332: *Lechmere Charlton's case*, 2 Myl. & Cr. 316.

(*x*) *Doe Payne* v. *Grundy*, 1 B. & C. 284. See *ante*, 956, 1512.

(*y*) See 1 & 2 Vict. c. 110, s. 18.

(*z*) What these facts are, has been fully stated in the preceding pages, from 1516 to 1521 inclusive. The contempt must be clearly made out. (*Gardner* v. *Cresswell*, 2 M. & W. 319). If the affidavit describe a rule of court as "an order," an attachment will not be granted. (*Re Turner*, 6 Dowl. 6). It is not necessary to state, in terms, that a rule has been *personally* served. (*Short* v. *Smith*, 1 Scott, N. R., 153).

(*a*) *Gobbey* v. *Dewes*, 3 Moo. & Scott, 556; 10 Bing. 112, *S. C.*

(*b*) *Potter* v. *Back*, 8 Dowl. 872.

(*c*) *Davies* v. *Skerlock*, 7 Dowl. 592: *King* v. *Smithies*, 3 T. R. 351.

(*d*) *Rex* v. *Stretch*, 4 Dowl. 30; 3 A. & E. 503; 5 N. & M. 178, *S. C.*, and per Lord *Denman*, C. J.

(*e*) *Storey* v. *Garry*, 8 Dowl. 299: *R.* v. *Rogers*, 3 Dowl. 605: *Rex* v. *C. D.*, 1 Chit. 723.

(*f*) *Ex p. Fenn*, 2 Dowl. 527: *Ex p. Pitt*, Id. 439. But see *Reg.* v. *Lord John Russell*, 7 Dowl. 693.

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Rule when absolute in first instance, or only nisi.

the application be against a married woman (*g*), or the guardian of an infant (*h*); or though the rule and *allocatur* have only been served on the day of the application (*i*), or against the sheriff for not obeying the rule to return the writ or bring in the body, or for a contempt of the court in the execution of process of the court, or where the rule or order disobeyed orders in the alternative (*k*), the rule is absolute in the first instance (*l*); in almost all other cases it is a rule *nisi* only (*m*). And before the 6 & 7 Vict. c. 73, where, on the taxation of an attorney's bill, the client signed the usual undertaking to pay the amount of the Master's *allocatur*, it was a rule *nisi* only if for an attachment for non-payment of the amount of the *allocatur*, the *allocatur* in that case being in the nature of an award (*n*). So, it is a rule *nisi* only, if the attachment be for not paying costs pursuant to a rule of court, where these costs form part of a rule, for disobedience to which a rule *nisi* only for an attachment can be granted (*o*). So it is, it seems, a rule *nisi* only for non-payment of costs under an award (*p*), though the reference be of the cause only (*q*). So it is a rule *nisi* only for disobedience to a side-bar rule by a clerk of the assize (*r*). If a rule *nisi* merely, it cannot be moved for on the last day of term (*s*); but if absolute in the first instance, it may (*t*).

Rule and service of.

If the rule be granted, *draw it up with the Masters; and* (*if a rule nisi*) *serve a copy of it personally on the opposite party, at the same time shewing him the original rule.* Where it appeared from circumstances that the defendant kept out of the way for the purpose of avoiding a personal service of the rule, the Court, upon an affidavit of these circumstances, ordered, that leaving it for him at his last and most usual place of abode should be deemed good service (*u*); but, in other and later cases, the Court have ruled otherwise (*x*); and the rule, as now understood, and more especially since the late rule of all the courts of *H. T.*, 2 *W.* 4, is, that a personal service will not be dispensed with (*y*), even where the party is an attorney (*z*); unless, indeed, it appears that the rule has been seen in the actual personal possession of the party who should have been served with it (*a*), or under some very strong facts (*b*). *Make an affidavit*

(*g*) *Reg.* v. *Johnson*, 13 Law J., N. S., Q. B., 33; 1 Dav. & M. 231; 5 Q. B., 335, *S. C.*

(*h*) *Price* v. *Duggan*, 1 Dowl., N. S., 709.

(*i*) *Steel* v. *Compton*, 9 Jur. 181, B. C.

(*k*) *Ex p. Grant*, 3 Dowl. 320. See *Garner* v. *Brown*, 2 Jur. 82.

(*l*) R. T., 17 G. 3.

(*m*) See *Ex p. Burgin*, 1 Dowl., N. S., 292; *ante*, 120, where a rule absolute was granted.

(*n*) *Spragg* v. *Willis*, 2 Dowl. 531: *Boomer* v. *Mellor*, Id. 533: *Green* v. *Light*, Id. 578.

(*o*) *Ex p. Townley*, 3 Dowl. 39. See *Hatfield* v. *Hatherfield*, 1 Dowl. & L. 809.

(*p*) *Thomson* v. *Billingsby*, 2 Chit. 57: *Daniell* v. *Beadle*, 2 Scott, N. R., 155: *Dickenson* v. *Allsop*, 8 Jur. 1033. But see *Daniel* v. *Weakle*, 9 Dowl. 44.

(*q*) *Daniell* v. *Beadle*, 2 Scott, N. R., 155.

(*r*) *Anon.*, B. C., E. 1839, 3 Jur. 364: *Ashmore* v. *Ripley*, 2 Scott, N. R., 203.

(*s*) *Anon.*, 3 Smith, 118.

(*t*) See *ante*, Vol. 1, 137.

(*u*) MS., M. 1814: and *Green* v. *Fraser*, 2 Dowl. 99.

(*x*) *Stunnell* v. *Tower*, 1 C., M., & R. 88: *Rex* v. *Carpenter*, MS., H. 1825: *Anon.*, 1 Chit. Rep. 99. And see *M'Ilham* v. *Smith*, 8 T. R. 86: *Re Barwick* Dowl. 703.

(*y*) *Birkett* v. *Holmes*, 4 Dowl. 536. See R. H., 2 W. 4, r. 51: *Anon.*, 1 D. & R. 520: *Stunnell* v. *Tower*, 1 C., M. & R. 88.

(*z*) *Wilkinson* v. *Pennington*, 6 Dowl. 183; 5 Scott, 401, *S. C.*; *Re Pyne*, 1 Dowl. & L. 703; 13 Law J., N. S., 37, Q. B.: *Allen* v. *Toomer*, 3 Dowl. 563.

(*a*) *In the matter of Beaver*, 1 B. & C. 64: *Re Pyne*, 1 Dowl. & L. 703. And see *Allier* v. *Newton*, 2 Dowl. 382: *Rex* v. *Koops*, 3 Id. 806: *Phillips* v. *Hutchinson*, Id. 583.

(*b*) *Re Barwick*, 3 Dowl. 703: *Re Fennell*, Id.: *Dicas* v. *Warne*, 1 Scott, 537: *Wenham* v. *Downe*, 3 Dowl. 573: *Re Whalley*, 14 M. & W. 731: *Re Guard*, 6 Jur. 916, B. C.: *Potter* v. *Williams*, 6 Jur. 808, B. C.

of service, and give it with brief to counsel, to move to make the rule absolute. The Court will not allow cause to be shewn at chambers (*c*).

Shewing cause, what sufficient.

It will be no answer to this rule for the party to say that he was not personally served with the rule *nisi* or the original rule; if the affidavit of the party applying for the attachment state a personal service, that will be deemed conclusive of the fact (*d*). And when a party against whom a rule *nisi* for an attachment had been obtained, appeared, and objected that the rule *nisi* had not been personally served, the Court notwithstanding made the rule absolute (*e*). Although the party, in shewing cause, deny by his affidavit what is imputed to him, yet, if what he states be incredible, the Court will make the rule absolute (*f*). Where money was ordered to be paid to the wife of a party, the Court, under circumstances, granted an attachment for non-payment, although it was sworn that the money had been paid to the husband upon demand made by him (*g*). It is, however, good cause against an attachment for disobeying a rule of court, that every possible exertion has been made to comply with the rule, but without effect (*h*), or that the disobedience arose from a wrong construction of the rule, which the party was advised and believed to be correct (*i*), or it would seem that the rule, though purporting to be made with his consent, was, in reality, entered into without his knowledge (*k*). And in general it would seem that an attachment will not be granted unless the contempt be intentional. An attachment has been set aside on the ground, that, in the copy of the original rule and *allocatur*, the defendant's name was written "Calver," instead of "Calvert," and the Master's name "Day," instead of "Dod;" the *allocatur*, therefore, not appearing to be the Master's (*l*).

Rule absolute.

If the rule be made absolute, draw it up with the Masters; make out the attachment (*m*), *and get it signed at the Crown Office, and sealed. Or, in the Common Pleas or Exchequer, make out the attachment yourself on parchment, and get it signed at the Master's Office, and sealed* (see *ante*, 560). In the Queen's Bench, after the rule absolute is drawn up for the attachment, all the proceedings are on the Crown side of the court.

Form of the attachment, and how sued out and executed.

Form of the Attachment, and how sued out and executed.]— The attachment, although a judicial writ, must be returnable on a general return-day, and not on a day certain (*n*). It must bear *teste* in term time. *Indorse on it the name and address of the attorney, and also, in the Queen's Bench* (*by the R. H.*, 2 & 3 *G.* 4), *the place of abode and addition of the party against whom the writ is issued, or such other description of him as such attorney may be able to give* (*o*). *Take the attachment to the she-*

(*c*) *Ashmore* v. *Ripley*, 2 Scott, N. R., 203; *Fall* v. *Fall*, 2 Dowl. 88.

(*d*) *Hopley* v. *Granger*, 1 N. R. 256.

(*e*) *Levy* v. *Duncombe*, 3 Dowl. 447. See *ante*, 1418.

(*f*) *In the matter of Crossley*. 6 T. R. 701.

(*g*) *Wynne* v. *Wynne*, 1 Dowl., N. S., 733.

(*h*) *Cooke* v. *Tunswell*, 8 Taunt. 131. See *Doddington* v. *Bailward*, 7 Scott, 733; 7 Dowl. 640; *Clare* v. *Blakesley*, 1 Scott, N. R., 397; 1 M. & G. 567; 8 Dowl. 835.

(*i*) *Fuller* v. *Prentice*, 1 H. Bl. 49: *Camden* v. *Edir*, 1 H. Bl. 21.

(*k*) See *Bodington* v. *Harris*, 1 Bing. 187.

(*l*) *Smith* v. *Calvert*, 2 Dowl. 276.

(*m*) See form No. 9, in Corner's Crown Practice.

(*n*) *Rex* v. *Wilkin*, 1 Str. 624.

(*o*) See *ante*, Vol. 1, 613.

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riff's office, if it be directed to him, and obtain a warrant on it; give the warrant to your officer, who will thereupon arrest the defendant. See *ante*, 558, where the proceedings by attachment against the sheriff for not returning writs have been considered. Several writs, bearing the same *teste* and return, may issue at the same time into different counties or boroughs; but in that case care must be taken, when the defendant has been arrested in one county, to countermand his instructions to execute the writ in any other, because if this be not done, the defendant may, after having been taken and given bail in one county, be taken a second time, which might subject the parties to an action for false imprisonment (*p*).

Execution of writ.

It may be necessary to mention, that the defendant cannot be arrested on a Sunday (*q*); nor can even the rule *nisi* be served on that day (*r*). The sheriff is not entitled to poundage. It seems the sheriff is not the proper person to receive, and cannot be called upon to pay into court, money paid him under an attachment (*s*). Where a party had been taken upon an attachment for non-payment of money, and permitted to go at large, and returned again into custody, and continued in custody at the return of the writ; it was held, that the sheriff was not liable to an action for an escape (*t*).

Where prisoner in custody of keeper of Queen's Prison.

There seems to be much doubt as to the course to be adopted for the purpose of charging a prisoner in custody of the keeper of the Queen's Prison with an attachment. It seems to have been the usual practice in the Queen's Bench to have the prisoner brought up on *habeas* for the purpose of so charging him, and to have him charged accordingly; but this, it seems, could not have been done in the Exchequer, where the prisoner was in the custody of the marshal (*u*). Inasmuch, however, as the Queen's Prison is now the prison of all the courts, perhaps the course of proceeding according to the former practice of the Court of Queen's Bench may be adopted. If this course cannot be adopted, then the only remaining course seems to be to direct the attachment to the sheriff of Surrey, and obtain a warrant thereon from him to the keeper, making him a bailiff *pro hâc vice:* or, should the keeper refuse to receive such warrant, then, as the Court or a judge cannot compel him to receive it, the officer to whom the sheriff's warrant is directed must be left to watch the opportunity of taking the party when he comes out of the keeper's custody.

Rule to return.

If the sheriff or other officer, to whom the writ of attachment is directed, does not return it when necessary, you may rule him to do so. In the Queen's Bench, the rule must be obtained from the Crown Office.

Alias writs.

As stated by Mr. *Corner*, in his work on the Practice of the Crown Side of the Court of Queen's Bench, if the defendant cannot be found on or before the return-day of the writ, upon a return by the sheriff of *non est inventus*, *alias* and *pluries* writs of attachment may issue from term to term in like man-

(*p*) See Corner's Crown Pract. 27; *ante*, Vol. 1, 690.

(*q*) *Rex* v. *Myers*, 1 T. R. 265, 266. But see *Anon.*, Willes, 459: *Ex p. Whitchurch*, 1 Atk. 55.

(*r*) *M'Ilcham* v. *Smith*, 8 T. R. 86.

(*s*) *Rex* v. *Palmer*, 2 East, 441: *Rex* v. *Sheriff of Devon*, 3 Dowl. 10.

(*t*) *Lewis* v. *Morland*, 2 B. & A. 56.

(*u*) *Boucher* v. *Sims*, 2 C., M., & R. 389: 4 Dowl. 173, S. C. And see *Bristol* v. *Chatton*, 5 Dowl. 95.

ner as the original writ, until the defendant be found; but if an interval of four terms elapse, an application must be made to the Court or a judge to revive the attachment, on an affidavit accounting for the delay. An *alias* attachment lies against a defendant who, being in custody on an attachment for non-payment of money, has been allowed by the plaintiff to go at large, upon terms which he has failed to comply with (*x*).

Commitment, and bail on.

Commitment, and Bail on.]—When the defendant is arrested upon this writ or warrant, he is (except where the attachment is for non-payment of money or costs, in which case he is detained until he pays, *post*, 1528) brought into Court or before a judge at chambers, and sworn to answer interrogatories; he is then committed, unless, with the leave of the Court or a judge, he enter into a recognisance, with sureties, for his appearance in court from day to day, to answer interrogatories concerning such matters as may be objected against him. Or the defendant may appear voluntarily, and be sworn, and enter into the recognisance, as above mentioned. Serve a notice on the opposite attorney that the defendant will appear in court, or before a judge at chambers, on a certain day, in order to enter into a recognisance, and be sworn to answer all such interrogatories as shall be exhibited against him, stating the names and additions of the bail, as in ordinary cases (*y*). This notice should be given twenty-four hours, at least, previously to the defendant being brought up, if the bail reside in town; or two days, or more, if they reside elsewhere, according to the distance (*z*). Then get a rule from the clerk of the rules on the Crown side to bring up the defendant, if he be in the custody of the keeper; but if in the custody of the sheriff, it seems a writ of *habeas corpus* will be necessary (*a*). When brought up, the recognisance is taken as in ordinary cases. It has been said that no justification of such bail is necessary (*b*). But it would seem, that in this, as in other criminal cases, "the sureties may be examined on oath concerning their sufficiency by him that takes the bail; and if a person be bailed by insufficient sureties, he may be required, either by him who took the bail, or by any other who hath power to bail him, to find better sureties; and, on his refusal, may be committed; for insufficient sureties are as none" (*c*). It is entirely discretionary with the Court or a judge, whether they will allow the defendant to be bailed or not; and in very gross cases, or where the defendant appears evidently guilty, they generally refuse it (*d*).

Interrogatories, &c.

Interrogatories, &c.]—Upon the defendant being bailed or committed, the Court, upon application, will grant a rule, that unless the prosecutor exhibit interrogatories against him in the Crown Office within four days (*e*), the defendant shall be dis-

(*x*) *Good* v. *Wilks*, 6 M. & Sel. 413.
(*y*) See *Anon.*, 4 D. & R. 393.
(*z*) See *Rex* v. *Hall*, 2 W. Bl. 1110.
(*a*) Imp. C. P. 570.
(*b*) *R.* v. *Hall*, *supra*.
(*c*) Bac. Abr., "Bail in Criminal Cases," F.
(*d*) 2 Hawk. c. 22, s. 1.
(*e*) It was formerly considered that the four days for filing the interrogatories were court days in term, but of late years this rule has been departed from, several cases having occurred in which the defendants have been discharged in vacation, no interrogatories having been filed within four days: see Corner's Crown Pract. 29.

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charged. *Draw up the rule with the clerk of the rules on the Crown side, and serve a copy of it on the prosecutor or his attorney;* and if the interrogatories be not exhibited within the time limited by the rule, the defendant may move to be discharged out of custody, or (if he be out on bail) that his recognisance be discharged. The prosecutor, however, may exhibit his interrogatories at any time before the motion is actually made (*e*).

These interrogatories must be exhibited in all cases, excepting in the case of an attachment for non-payment of money or costs, which is in the nature of a civil execution (*f*). These interrogatories alone contain the charge against the defendant, the attachment being but process to bring him in to answer to the charge when exhibited. Therefore, the defendant cannot come in and confess the contempt before the interrogatories are filed; for until they are filed there is no charge in court against him to which he can plead (*g*). The case of an attachment for a rescue, indeed, depends upon different grounds; for there the sheriff's return of the rescue is in itself a conviction, and not traversable (*h*). Yet, even in that case, it is the invariable practice of the Court to put the defendant to answer interrogatories, unless the prosecutor consent to his confessing the contempt without them (*i*).

Proceedings before and at examination on the interrogatories.

Engross these interrogatories on parchment, and get them signed by counsel (*j*). *In the Queen's Bench, file them at the Crown Office. After the interrogatories have been filed, either party may obtain an appointment from the Master of the Crown Office for the defendant's examination, which appointment is to be served upon the opposite party, or his attorney; and if the defendant be in custody in the Queen's Prison, a side-bar rule may be obtained by either party from the Crown Office to bring him up for that purpose. If in custody of the sheriff, the defendant must perhaps be brought up by habeas corpus.* The defendant is allowed four court days in term to answer the interrogatories, although they may be filed in vacation; and if he do not appear to answer them within such four days, he may be committed, or his recognisances estreated for the default (*k*).

The Master examines the defendant upon the interrogatories, and will afterwards make out copies of the examination for the parties upon paper. Where a defendant in ejectment was in custody on an attachment for non-performance of an award, the prosecutor was ruled to exhibit interrogatories; he did so, and they were filed; but, not ruling the defendant to appear before the examiners, the Court discharged the defendant on bail (*l*).

Refusal to answer.

If the defendant, upon being brought up, refuse to answer the interrogatories, he shall be recommitted; or if out on bail, and he do not attend to be examined, his recognisance may be

(*e*) 2 Hawk. c. 22, s. 1.

(*f*) See *Doe Clarke* v. *Stillwell*, 2 Dowl., N. S., 18: *Bonafous* v. *Schoole*, 4 T. R. 316.

(*g*) *Rex* v. *Edwards*, 4 Burr. 2105; 1 W. Bl. 637, *S. C.*

(*h*) *Rex* v. *Elkins*, 4 Burr. 2129; 1 W. Bl. 640., *S. C.*

(*i*) *Rex* v. *Horsley*, 5 T. R. 362.

(*j*) R. M., 34 G. 3. By this rule interrogatories are to be "so framed as to secure a full, fair, and *bonâ fide* investigation of the whole subject of alleged criminality." See the form, 10 West. 494; Chit. Forms, 668.

(*k*) See Corner's Crown Pract. 30; *Holland's case*, 12 Mod. 509.

(*l*) *Doe Clarke* v. *Stillwell*, 2 Dowl., N. S., 18.

estreated, or the Court may again attach him for this second contempt, and punish him at their discretion. It should be observed, however, that the defendant is not obliged to answer any interrogatories tending to convict him of any other offence (*m*), or which may subject him to a penalty (*n*).

The reference to Master. Report and judgment thereon.

When he has been examined, the prosecutor then moves that the examination, &c. be referred to the Queen's coroner and attorney, or Master on the Crown side, which is a motion of course. *Draw up the rule with the clerk of the rules on the Crown side; get an appointment upon it from the Queen's coroner, &c., and serve a copy of the rule and appointment on the opposite attorney.* If either party intend to appear by counsel, he must give notice thereof to the opposite party. *Let each attorney then attend the appointment with counsel, if thought necessary, and the Queen's coroner, &c. will hear the statements and arguments on both sides. After which, when you learn that he is ready, move the court for his report; a notice of which motion should be given to the defendant and his bail (if he is out on bail), as he must attend personally in court at the time the Queen's coroner, &c. makes his report. If the defendant be in custody in the Queen's Prison under process from the Court of Queen's Bench, a side-bar rule may be obtained from the Crown Office for the keeper to bring him into court on the day it is intended to move for the report; but if in custody in any other prison, or under process from any other court, a habeas corpus must be obtained for that purpose, which will be issued on the production of counsel's hand to a motion-paper.* It may be necessary to observe, that this motion cannot be made on the last day of term, without the permission of the Court, or under very special circumstances (*o*). The report is binding and conclusive, unless an objection be pointed out to some specific portion of it (*p*). If the defendant have cleared himself of his contempt in his answer, the Master will report accordingly (*q*), and the Court will thereupon order him to be discharged out of custody, or, if he be out on bail, will order his recognisance to be discharged; but he is still liable to an indictment for perjury, if his answer be false (*r*). But if sufficient be confessed by the answer to prove him guilty of the contempt, the Master accordingly reports him in contempt, and the Court gives judgment of fine or imprisonment, or both, and sometimes of corporal punishment (*s*), at their discretion, in the same manner as upon a conviction for a misdemeanor at common law. The Court, however, if they think fit, may waive the giving of judgment, and order the recognisance to be discharged (*t*); or the Attorney-General may consent that the defendant continue at large, upon his recognisance to appear, under a rule of court, at some future time (*u*). If judgment be not given during the same term, the cause will be set down in the peremptory paper with

(*m*) *Rex* v. *Barber*, Str. 444.

(*n*) B. C., H. 239; 2 Hawkins' P. C. by Curwood, 207, 1.

(*o*) *Rex* v. *Wheeler*, 1 W. Bl. 311; 3 Burr. 1256, *S. C.*

(*p*) *Re Isaacson*, 8 Moore. 217, *per cur.*: *Coulson* v. *Graham*, 2 Chit. 57.

(*q*) See *In the matter of Isaacson*, 8 Moore, 214; 1 Bing. 272, *S. C.*

(*r*) *Saunders* v. *Melhuish*, 6 Mod. 73. See 2 Hawk. c. 22, s. 1: *Rex* v. *Wheeler*, 3 Burr. 1257.

(*s*) *Royson's case*, Cro. Car. 146: *Rex* v. *Vaughan*, 1 Wils. 22.

(*t*) *Rex* v. *Wheeler*, 3 Burr. 1256; 1 W. Bl. 311, *S. C.*

(*u*) *Rex* v. *Beardmore*, 2 Burr. 797.

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those motions appointed to come on peremptorily in the ensuing term (*x*). It is stated in Mr. *Corner's* Crown Practice, "*Upon proceeding to sentence, any affidavits in mitigation of punishment which the defendant may be prepared with are first put in and read, and then any affidavits in aggravation; the defendant is then heard either in person or by counsel, and then the prosecutor's counsel in reply; after which the Court passes sentence, and may award costs to the prosecutor, which may be taxed by the Master, in the Crown Office, upon an appointment to be obtained for that purpose on the rule for costs, which, as well as the rule for sentence, must be drawn up at the Crown Office; and if the defendant be sentenced to imprisonment, the rule for sentence must be lodged with the gaoler or keeper of the prison to which he is committed.*"

Costs.

If the defendant clear himself of his contempt and be discharged, he is not in strictness entitled to costs; yet, if it clearly appear to the Court that the prosecutor must have known his complaint to be ill-founded and vexatious, they will order him to pay costs to the defendant (*y*).

Proceeding on attachment for non-payment of money, &c.

In the case of an attachment for the non-payment of money or costs, the attachment being in the nature of a civil execution (*z*), interrogatories are never filed, but the party is detained in custody until he pay the money or costs. Yet, in cases where the rule for the attachment is absolute in the first instance, if the defendant wish to dispute the fact of the contempt, he may rule his adversary to exhibit interrogatories as above mentioned. The sheriff cannot, it seems, be required to pay into court money levied by him under an attachment (*a*). Indeed, in strictness, the money should not be paid to the sheriff, but to the opposite party or his attorney. As to the proceedings upon an attachment against the sheriff, see *Vol.* 1, 558.

Discharge for irregularity.

Discharge for Irregularity.]—If there be a misnomer of the christian name of the defendant, or other irregularity in the attachment, the prisoner may obtain his discharge by application to the Court. Even where the mistake in his name was amended by judge's order, the defendant was discharged (*b*). But he might be retaken, though not detained on such amended writ (*b*). The application must be made in reasonable time; from the 3rd of February to the 10th day of Easter Term is unreasonable (*c*). The Court refused to grant a writ of *habeas corpus* to bring up a party in custody under an attachment, in order to enable him to move in person to set it aside (*d*).

(*x*) R. H., 34 G. 3.
(*y*) *Rex* v. *Plunket*, 3 Burr. 1329.
(*z*) See *Doe Clarke* v. *Stillwell*, 2 Dowl., N. S., 18: *Bonafous* v. *Schoole*, 4 T. R. 316: *Ex p. Jeyes*, 3 Deac. & C. 764: *Re M'Williams*, 1 Scho. & Lef. 169.
(*a*) *Rex* v. *Sheriff of Devon*, 3 Dowl. 10.
(*b*) *Reg.* v. *Burgess*, Bail Court, H. 1838, *Coleridge* and *Patteson*, JJ., 2 Jur. 856.
(*c*) *Reg.* v. *Burgess*, 3 Nev. & P. 306; 8 Ad. & E. 275.
(*d*) *Ford* v. *Nassau*, 1 Dowl., N. S., 631.

APPENDIX.

SCALE OF COSTS.

[*The following is a Table of the Scale of Costs in Actions under Twenty Pounds, appended to the Directions to the Taxing Officers, promulgated by the Judges in Easter Term*, 1844; *ante*, 1393.]

General Allowance for Plaintiffs and Defendants, as well between Attorney and Client as between Party and Party.

In Actions not exceeding 20*l.*

	£	*s.*	*d.*
Writing letters, where letters are usually allowed	0	2	0
Instructions to sue, defend, or to draw pleadings or special affidavits, where instructions are usually allowed	0	3	4
Writ of summons	0	12	6
Alias	0	10	0
Pluries	0	10	0
Indorsing costs on writs	0	2	0
Service of writ of summons, alias, or pluries	0	5	0
Extra service at 6*d.* per mile, if served out of the town in which the attorney resides, not exceeding	0	5	0
Affidavit of service, including oath	0	5	0
If writ sent to a correspondent, writing him with writ and instructions, and his writing in reply, 2*s.* each	0	4	0
Paid correspondent's charge extra for mileage, 6*d.* per mile, as before, not exceeding 5*s.*	0	5	0
Drawing and ingrossing special affidavits, per folio	0	1	0
Nothing for attendance to be sworn.			
Searches, such as for appearance, declaration when filed, and rule to plead	0	3	4
Attending to procure duplicate of order, office copy of any rule or affidavit, writ, judgment, or other document when necessary	0	3	4
Entering appearance for defendant, or sec. stat.	0	6	0
Drawing pleadings, per folio	0	1	0
Ingrossing, per folio	0	0	4
Close copy, when country agency, per folio	0	0	4
Fee for counsel or pleader, when special			
Attending him	0	3	4
No advising on evidence as between party and party, but to be allowed as between attorney and client when necessary.			

	£	s.	d.
Drawing special notices to admit or produce copy and service	0	5	0
Copy for judge	0	2	0
Extra for service, *if necessarily* served at a distance, or sent to a correspondent, the same as for serving writs.			
Copy notice sent, served by adverse party, if agency	0	2	0
Notice of declaration, copy and service	0	5	0
Short particulars to accompany	0	2	6
If notice served at a distance, or sent to a correspondent, the same as for serving writs, &c.			
Drawing long particulars *and fair copy*, exceeding 3 folios, at per folio	0	0	4
Rule to plead	0	1	6
Rule to reply, rejoin, &c., copy and service	0	4	0
Demanding pleadings, residence of plaintiff, authority for issuing writ and other common notices, copy and service	0	3	0
Copy and service of summonses	0	3	0
Attending summonses, or giving consent	0	3	4
Copy and service of orders usually served	0	3	0
When costs taxed under an order or rule, attending to get an appointment thereon	0	3	4
Copy and service of rules	0	4	0
Paying money into court	0	3	4
Taking it out	0	6	8
Replication, accepting money in full demand	0	3	0
Close copy, agency	0	1	0
Similiter, by replication, or rejoinder, or the like, where a separate pleading, and not made up with the issue	0	3	0
Nothing for close copy.			
Drawing interlocutory or final judgment	0	3	4
Attending to sign	0	3	4
Ingrossing proceedings on paper, per folio	0	0	4
Entering on roll, per folio	0	0	4
Plea of general issue	0	3	0
Close copy, agency	0	1	0
Close copy of common rules	0	1	0
Ditto of orders, ditto	0	1	0
Ditto of special rules or orders, per folio	0	0	4
Drawing abstract of pleas and fair copy, and copy for judge	0	3	0
No close copy.			
Drawing issue, of whatever length	0	3	4
Attending to pay pleading fee	0	3	4
Notice of trial, or inquiry	0	3	0
No close copy.			
If served on defendant, or at a distance, or sent to a correspondent to be served, the same as serving writ, &c.			
Ingrossing writ of trial or inquiry, per folio	0	0	4
Fee thereon, but no fee on drawing	0	3	4
Copy particulars to annex, if short	0	1	0
If more than three folios, per folio	0	0	4
Subpœna	0	5	0
Copy and service	0	3	0
Subpœna duces tecum	0	7	0
Copy and service	0	4	0
If either served at a distance or sent to a correspondent to serve same, extra as serving writ.			
Minutes of evidence, or instructions for brief	0	13	4
Drawing brief and *one fair copy*, where cause tried before a judge of a court of record, where attornies are not allowed to act as advocates, not exceeding	2	0	0

	£	s.	d.
Paid fee to counsel, (one guinea), and clerk	1	3	6
Attending him	0	3	4
Attending to enter cause for trial	0	3	4
Attending court on writ of trial or inquiry in same town	0	13	4
Attending court when cause did not come on, each day	0	6	8
When necessary, attending for and altering writ of trial or inquiry, and attending to relodge same	0	3	4
Altering and resealing subpœnas, whether one or more besides what is paid	0	3	4
Re-serving same when done and necessary, if at a distance, or sent to correspondent, as before.			
If the attorney attending a writ of trial has to go a distance, mileage 1*s.* one way.			
Attorney attending trial at a distance one guinea per day as long as necessarily detained in going to, attending, and returning from the trial, if on other business; or, if other business, in the whole not to exceed two guineas a day.			
If more than one cause, mileage to be apportioned; if more than two other causes, no mileage.			
Attending for special rules, when not made upon motion in court	0	3	4
Affidavit of increase, including oaths	0	5	0
Copy for the opposing party	0	2	0
Bill of costs and copy, at 8*d.* per folio, not to exceed	0	4	0
Copy for the opposing party, 4*d.* per folio, not exceeding	0	4	0
Notice of taxing	0	3	0
Attending taxing	0	3	4
If long, in Master's discretion	0	6	8
Instructions to counsel on common motions	0	3	4
Attending court on motion, rule nisi granted, and attending to draw up rule	0	6	8
Attending court each day on special motions or argument, not exceeding 20*s.* a term	0	3	4
Ditto when heard	0	6	8
Attending to settle and drawing and fair copy cognovit, and getting same signed	0	10	0
Copy for agent to keep	0	2	0
Attending filing, when filed under the statute	0	3	4
Attending stamping when done, and necessary	0	3	4
Attending judges with pleadings, demurrer book, special case, &c., one fee	0	3	4
Attending searching, if copy delivered to the other judges, one fee	0	3	4
Term fee in town	0	10	0
Country	0	12	0
Letters when on term fee, town	0	2	0
Ditto, country	0	4	0
N.B.—When proceedings commenced in vacation and continued to following term, or commenced in term and continued in the following vacation, only one term fee in respect thereof, and no additional charges for letters.			

Costs on Writ of Distringas.

Attending at defendant's house to make appointment	0	3	4
Attending appointment, and copy and service of writ	0	5	0
If appointment and service at a distance, or writ sent to a correspondent, the same for mileage and correspondence, &c. as upon the service of writs.			

	£	s	d.
Searching for appearance	0	3	4
Drawing and ingrossing affidavit to ground distringas, per folio	0	1	0
(No instructions, or attending to be sworn).			
Paid oath			
Affidavit of no appearance being entered, and oath	0	5	0
This is to be allowed when it cannot be incorporated in the special affidavit.			
Attending the judge for order of distringas	0	3	4
Paid for same	0	3	0
Writ of distringas	0	12	6
Attending for warrant	0	3	4
Copy, writ and notice for defendant	0	2	0
The like for sheriff	0	2	0
Paid for warrant as usual.			
Instructing sheriff's officer	0	3	4
Paid officer as per scale of sheriff's fees.			
Attending for order to return writ	0	3	4
Paid for same	0	2	0
Copy and service, and paid sheriff therewith	0	4	0
Short copy of writ and return	0	1	0
Paid for return	0	2	0
Attending for return and to file same, when sheriff not ruled or ordered to return it	0	3	4
Drawing and ingrossing affidavit of officer, nulla bona, and oath	0	5	0
(No instructions, or attending to be sworn).			
Searching again for appearance	0	3	4
Affidavit of no appearance and oath	0	5	0
Attending judge for order for leave to enter appearance	0	3	4
Paid for the order, and filing affidavit, if writ obtained	0	3	0

In Term Time, additional.

Briefing affidavit for counsel, per folio	0	0	4
Instructing counsel	0	3	4
Fee to counsel	0	10	6
Attending him and court, and to draw up rule	0	3	4
Paid for the rule, and filing affidavit	0	5	0
The like charges on obtaining rule for leave to enter an appearance for defendant.			

Bill of Costs upon Writ of Summons.

Where debt and costs paid within the four days, or upon a judge's order, when time given for payment.			
Letter before action, if sent	0	2	0
Instructions to sue	0	3	4
Writ of summons	0	12	6
Bill of costs to indorse	0	2	0
Copy and service	0	5	0
If served at a distance, or sent to a correspondent, (same as on service of writs, ante).			
Attending settling	0	3	4
Letters, as before.			

If Time given.

Attending defendant on his applying for time to pay debt and costs, and attending on plaintiff, and getting his con-

	£	s.	d.
sent, and agreeing on terms, &c. Drawing consent for a judge's order and fair copy, and attending getting same signed (*one fee*) not exceeding	0	6	8
Paid for summons and order			
Attending for same	0	3	4
Attending for appointing to tax, if necessary	0	3	4
Copy and service of order, if necessary	0	3	0
Bill of costs and copy	0	3	0
Copy for the other side, if made	0	1	6
Attending taxing	0	3	4
Paid			
Letters, &c., as before.			

Declaration in Debt and final Judgment by Default.

(*For the previous costs, see ante*).

Searching appearance	0	3	4
Affidavit of service	0	5	0
Entering appearance sec. stat.	0	6	0
Instructions for declaration	0	3	4
Drawing same, folio 4	0	4	0
Fee to pleader, if special			
Attending him	0	3	4
Ingrossing declaration	0	1	4
Close copy, if agency	0	1	4
Particulars of demand	0	2	6
Rule to plead	0	1	6
Demand of plea (if appearance entered by defendant)	0	3	0
Drawing final judgment	0	3	4
Attending to sign	0	3	4
Ingrossing proceedings on paper, folio 9	0	3	0
Entering on the roll	0	3	0
Paid roll	0	0	10
Paid signing judgment	0	7	0
Paid usher	0	1	0
In C. P., 3*s.* extra for docket.			
Drawing bill of costs and copy, as before.			
Copy for defendant's attorney, ditto.			
Notice of taxing, if defendant entitled thereto	0	3	0
Attending taxing	0	3	4
Paid taxing			
Term fee in town	0	10	0
Ditto in country	0	12	0

Interlocutory Judgment and Inquiry.

Drawing interlocutory judgment	0	3	4
Attending to sign same	0	3	4
Paid signing	0	5	0
Ingrossing proceedings on paper, folio 8; if declaration, folio 4	0	2	8
Entering on the roll	0	2	8
Paid for roll	0	0	10
Instructions for and drawing inquiry	Nil.		
Ingrossing inquiry, folio 8	0	2	8
Paid for parchment	0	2	0
Paid signing and sealing	0	5	0

	£	s.	d.
Fee thereon	0	3	4
Notice of inquiry, copy and service	0	3	0
If at a distance, or sent to a correspondent, the extra charges the same as serving writ as before.			
Attending to leave inquiry with the sheriff	0	3	4
Paid thereon	0	4	0
If sent to a correspondent to lodge with sheriff or to under-sheriff, writing therewith	0	2	0
For agent's charges for lodging writ with sheriff, and letter in reply	0	5	4
Paid for deputation, if a saving of expense	1	1	0
Attending for same and writing therewith	0	3	4
Subpœna	0	5	0
Copy and service on each witness	0	3	0
If served at a distance, or sent to a correspondent, as before.			
Minutes of evidence	0	6	8
Attending inquiry, if in same town with attorney	0	13	4
If attended by agent to him	1	1	0
Paid sheriff executing inquiry, bailiffs, jury, &c., (including the 4*s.* paid on leaving), not exceeding	1	15	0
Paid sheriff for travelling expenses, according to scale.			
Paid for use of room, where necessary, according to scale.			
Paid witnesses, according to general allowance.			
Affidavit of increase	0	5	0
Attending for inquiry	0	3	4
Paid for same	0	1	0
Drawing judgment	0	3	4
Attending to sign	0	3	4
Paid signing	0	7	0
Paid ushers	0	1	0
In C. P. 3*s.* more.			
Paid filing affidavit of increase	0	1	0
Copy for defendant's attorney, not exceeding	0	2	0
Drawing bill of costs and copy, as before	0	4	0
Copy for defendant's attorney, *if done*, as before.			
Notice of taxing, if defendant has appeared, or is entitled thereto	0	3	0
Attending taxing	0	3	4
Paid taxing, as usual.			
No attending to complete judgment on roll.			
Term fee, as before.			

Writ of Trial.

General issue pleaded, drawing replication, including close copy, if agency	0	3	0
Paid for summons for writ of trial	0	1	0
Copy and service	0	3	0
Attending	0	3	4
Paid for order	0	1	0
Copy and service	0	3	0
Drawing issue, of whatever length	0	3	4
Ingrossing to deliver, folio 8, (if declaration, folio 4)	0	2	8
Entering on the roll	0	2	8
Paid for roll	0	0	10
Close copy, if agency	0	2	8
Notice of trial, including close copy, if agency	0	3	0
Ingrossing writ of trial, folio 12	0	4	0

	£	s.	d.
Paid parchment	0	2	0
Paid signing and sealing	0	2	0
Fee thereon	0	3	4
Copy particulars to annex	0	1	0
Attending to leave writ at sheriff's office, subpœna and serving witnesses, the same as upon writ of inquiry.			
Notice to produce copy and service, not exceeding	0	5	0
The like to admit ditto	0	5	0
Attending *inspection*, (plaintiff or defendant)	0	3	4
Paid summons to admit			
Copy and service	0	3	0
Attending	0	3	4
The like charge on second summons, if first not attended	0	8	4
Affidavit of service and attendance	0	5	0
Paid for order			
Copy and service	0	3	0
Attending trial, as before.			
If writ altered or re-sealed, and witnesses reserved, as before.			
Paid sheriff's fees, (*including the 4s. paid for writ*), not exceeding, in country causes	1	15	0
Paid for room, where necessary, according to scale			
Paid for deputation, &c.			
Paid sheriff extra for travelling, same as on inquiry; such payments in *town causes not exceeding*	1	13	0
The charges for final judgment, the same as upon writ of inquiry			
Bill of costs and copy, and attending taxing, as before.			
Term fee, as before.			

If Special Pleas.

The charges to be regulated according to the lengths, and order and rules to plead several matters, as usual.

Motion for a new Trial upon Writ of Trial.

Attending the under-sheriff for a copy of his notes	0	3	4
Paid for same			
Affidavit to verify same	0	5	0
Instructions for counsel to move	0	6	8
Taking copy of sheriff's notes to accompany, per folio	0	0	4
Paid fee	1	3	6
Attending	0	3	4
Attending court, rule nisi granted, and for rule	0	6	8
Paid for rule and filing affidavit	0	5	0
Copy and service	0	4	0
Affidavit of service	0	5	0
Instructions for counsel to move rule absolute	0	3	4
Copy rule to annex	0	1	0
Paid counsel to move, from one guinea to two guineas.			
Attending him	0	3	4
Attending court, motion did not come on, 3*s.* 4*d.* each day, not to exceed 20*s.* in a term.			
Attending court, rule absolute	0	6	8
Paid for the rule and filing affidavit	0	5	0
Copy and service	0	4	0
Copy sent, if agency	0	1	0
Term fee, as usual.			

Computing Principal and Interest on Judge's Order.

	£	s.	d.
Costs of declaration and judgment, as before, according to length of declaration.			
The usual charges for summons and order to compute the same, as upon order to admit upon writ of trial.			
Instructions for counsel to move for rule	0	3	4
Paid counsel to move	0	10	6
Attending him to draw up rule	0	3	4
Paid for rule	0	5	0
Attending for appointment to tax	0	3	4
Copy and service of rule and appointment	0	4	0
Bill of costs and copy and for final judgment, the same as in judgment in debt.			
If defendant served at a distance, extra for serving summons and rules to compute, same as serving writ.			

If in Term Time.

Affidavit of cause of action	0	5	0
Instructions for counsel to move	0	3	4
Fee to him	0	10	6
Attending him and court, and to draw up rule	0	6	8
Paid for rule	0	5	0
Copy and service	0	4	0
Affidavit of service	0	5	0
Instructions to make rule absolute	0	3	4
Copy rule to annex	0	1	0
Fee to counsel	1	3	6
Attending him and court, and to draw up rule	0	6	8
Paid for rule	0	5	0
Attending for appointment to tax	0	3	4
Copy and service	0	4	0
No attending at Westminster to complete roll.			
If defendant served at a distance, extra for serving summons and rule to complete, the same as serving writ.			

Costs of Execution.

Writ of fi. fa., if only one writ, or a testatum	0	7	0
Attending for warrant	0	3	4
Paid for warrant, as usual.			
Instructing officer	0	3	4
If previous writ issued, where venue is laid to ground testatum, writ fi. fa.	0	6	0
Attending to lodge same with sheriff, and instructing him to return nulla bona, and afterwards for return	0	3	4
Paid for return	0	2	0
Short copy of writ, and return to keep	0	1	0
Paid filing writ and return, and attending	0	3	4

[See the direction *ante*, 1394, as to foregoing charges being intended as examples, and leaving much to the discretion of the Masters.]

TABLE OF COSTS IN ALL CASES, WHETHER ABOVE OR UNDER £20.

The Courts, on the 1st January, 1838, promulgated the following directions to the taxing officers, which are still in force, though in some respects modified and altered by the foregoing directions in Easter Term, 1844.

In all actions *commenced* upon or after this day—and in all actions *previously* commenced in which *further* proceedings shall be taken—the Masters, on the taxation of costs, will allow as follows:—

PLAINTIFF'S COSTS.

	In cases above 20*l.*	20*l.* and under.
Instructions to prosecute	*as usual.*	*as usual.*
Affidavit of debt	*ditto*	*ditto*
Summons, capias, or detainer	£0 14 6	£0 12 6
Alias or pluries	0 12 0	0 10 0

Arrest.

Paid for warrant in London and Middlesex	0 2 6
——— in other counties not exceeding 100 miles from London	0 5 0
——— not exceeding 200 miles	0 6 0
——— exceeding 200 miles	0 7 0
Attending to procure same	0 3 4
——— to instruct officer (*as usual*)	0 3 4
Paid caption fee	———

Detainer.

Paid lodging same and attending	*as usual.*

Service of Summons or Capias.

Copy service	*as usual.*	*as usual.*
Affidavit of service	*ditto*	*ditto*
Appearance sec. stat.	0 7 6	0 6 0

Declaration.

Where case within printed directions to taxing-officers—March, 1834—Instructions, &c. &c.	1 18 0 *as usual.*	*Instructions and actual length as usual.*

Judgment by Default.

Where case within the above printed directions—instead of the 1*l.* 11*s.* 4*d.* there mentioned (including rule to plead, 2*s.*)	1 3 2 Rule to plead, 1*s.* 6*d.*	*actual length as usual.*
(*Exclusive* of demand of plea, if made).		
Paid signing judgment	———	———
Ushers and docket	0 4 0	0 4 0
Attending to sign judgment	0 3 4	0 3 4

Issue.

	In cases above 20*l.* £ s. d.	20*l.* and under. £ s. d.
Paid entering		
Attending	0 3 4	0 3 4
Ushers and docket	0 4 0	0 4 0

Record.

Ingrossing, &c. and fee on passing	*as usual.*	*as usual.*
Venire	0 6 0	0 6 0
Distringas	0 7 0	0 7 0
		Where less than 20*l.* recovered at Nisi Prius.

Writ of Trial.

If of common length	——	0 14 0

Subpœna.

Subpœna before judge	0 7 0	
——— before sheriff, or where less than 20*l.* recovered at Nisi Prius	——	0 5 0

Final Judgment—Taxing Costs, &c.

Attending to sign final judgment *previously* to taxing costs on posteas, writs of trial, writs of inquiry, and rules to compute	0 3 4	0 3 4
Attending taxing	*as usual.*	
Attending at Westminster to get final judgment entered on roll (fee to officer abol.)	0 3 4	0 3 4
Fi. fa. or ca. sa.	0 8 0	0 7 0
Paid for warrant		
Attending for same	0 3 4	0 3 4
——— to instruct officer	0 3 4	0 3 4
Term fee and letters	*as usual.*	

DEFENDANT'S COSTS.

Instructions to defend	*as usual.*

Special Bail.

Bail-piece—affidavits, attendances exclusive of fees paid	*as usual.*

Bail Bond.

The fees paid pursuant to the sheriff's table.

Appearance.

Entering and fee	0 7 0	0 6 0
Notice thereof, copy and service	0 4 0	0 3 0
Searching for declaration	*as usual.*	
Paid taking declaration out of the office	Nil.	Nil.

	In cases above 20*l.* £ s. d.	20*l.* and under. £ s. d.
Summons for time to plead—Copy and service *In Term*	0 4 0	0 4 0
In Vacation	0 5 0	0 5 0
Attending	0 3 4	0 3 4
Order, copy and service . . *In Term*	0 4 0	0 4 0
In Vacation	0 5 0	0 5 0
Attending to sign judgment of nonpros. .	0 3 4	0 3 4
Ushers and docket	0 4 0	0 4 0
Attending to enter issue where *not* done by *plaintiff*	0 3 4	0 3 4
Usher and docket . . .	0 4 0	0 4 0
Trial, &c.		
Subpœna	0 7 0	0 5 0
Attending to sign final judgment on postea or writ of trial	0 3 4	0 3 4
Attending taxing costs . . .	*as usual.*	
Attending to get final judgment entered on roll (fee to officer abolished) . .	0 3 4	0 3 4
Fi. fa. or ca. sa.	0 8 0	0 7 0
Paid for warrant . . .		
Attending for same . . .	0 3 4	0 3 4
Attending to instruct officer . .	0 3 4	0 3 4
Prisoners.		
Proceedings by	Nil.	Nil.
Money into Court.		
Attending to pay money into court .	0 6 8	0 3 4
—— to take it out of court . .	0 10 0	0 6 8

[Note.—*For all other matters, the usual fees, attendances, &c., addition to what actually paid.*]

A Table of Fees to be taken by the Sheriffs, Under-Sheriffs, Deputy-Sheriffs, Sheriffs' Agents, Bailiffs, and others the Officers or Ministers of Sheriffs in England and Wales, pursuant to the Statute of 1 Vict. c. 55 (*a*).

For every Warrant which shall be granted by the Sheriff to his Officers, upon any Writ or Process:—[See post, 1542, as to the charge where there are several Defendants.]

	£ s. d.
In London and Middlesex	0 2 6
And on Crown and Outlawry process, an additional .	0 2 6
In all other counties, where the most distant part of the county shall not exceed 100 miles from London . .	0 5 0

(*a*) See the statute, Vol. 1, p. 18; and see as to sheriff's fees and poundage, &c. in general, Vol. 1, 19, 461.

	£	s.	d.
Not exceeding 200 miles	0	6	0
Exceeding 200 miles	0	7	0
For an arrest in London	0	10	6
In Middlesex, not exceeding a mile from the General Post Office	0	10	6
Not exceeding seven miles from same place	1	1	0
In other counties, not exceeding a mile from officer's residence	0	10	6
Not exceeding seven miles	1	1	0
Exceeding seven miles	1	11	6
For conveying the defendant to gaol from the place of arrest, *per mile*	0	1	0
For an undertaking to give a bail bond	0	10	6

For a Bail Bond—Deposit in Lieu of Bail.

If the debt shall not exceed	£50	0	10	6
Ditto	£100	1	1	0
Ditto	£150	1	11	6
Ditto	£300	2	2	0
Ditto	£400	3	3	0
Ditto	£500	4	4	0
If it shall exceed	£500	5	5	0
For receiving money under the statute upon deposit for arrest, and paying the same into court, if in London or Middlesex		0	6	8
If in any other county		0	10	0

For Filing the Bail Bond.

If the arrest be made in London or Middlesex	0	2	0
If in any other county	0	4	0

Assignment of Bail or other Bond.

If in London or Middlesex	0	5	0
If in any other county, including postage	0	7	6
For the return to any writ of Habeas Corpus, if one action	0	12	0
And for each action after the first	0	2	6
For the bailiff to conduct prisoner to gaol *per diem*	0	10	0
And travelling expenses *per mile*	0	1	0
For searching offices for detainers	0	1	0
Bailiff's messenger for that purpose	0	2	6

Bailiffs executing Warrants, &c.

To the bailiffs, for executing warrants on extent, capias utlagatum, levari facias, fieri facias, ca. sa., ne exeat, attachment, elegit, writ of possession, forfeited recognisance, process from pipe office, and other like matters, for each, if the distance from the sheriff's office or the bailiff's residence do not exceed five miles	1	1	0
If beyond that distance *per mile*	0	0	6
On Distringas in London	0	5	0
In Middlesex, not exceeding five miles from General Post Office	0	5	0
Exceeding five miles	0	10	0
In other counties, not exceeding five miles from officer's residence	0	5	0
Exceeding five miles	0	10	0

	£	s.	d.
For each man left in possession, when absolutely necessary—			
If boarded *per diem*	0	3	6
If not boarded *per diem*	0	5	0
For every sale by auction, notwithstanding the defendant should become bankrupt or insolvent, where the property sold does not produce more than 300*l.*, 5 per cent.—480*l.*, 4 per cent.—500*l.*, 3 per cent.—and where it exceeds 500*l.*, 2½ per cent.			
For the certificate of sale to save auction duty . .	0	2	6
Bond of indemnity, besides stamps . . .	1	10	0
Certificate of execution having issued for record .	0	5	0

On Writs of Trial and Inquiry.

For a deputation	1	1	0
On lodging writ for entering cause and warrant for summoning jury, which fee shall be forfeited in case of countermand of trial	0	4	0

On Trial or Inquisition.

Sheriff for presiding	1	1	0
Bailiff for summoning jury, and attendance in court .	0	4	0
And if held at the office of the under-sheriff—			
For hire of room, if actually paid, not exceeding .	0	10	0
For travelling expenses of under-sheriff from his office to place where trial or inquisition held . *per mile*	0	1	0
To the bailiff, from his residence . . *per mile*	0	0	6
In all cases in which it shall appear to the Master that a saving of expense has accrued to the parties by reason of a writ of trial having been executed by deputation, the fee for such deputation shall be allowed.			
On Writs of Extent, Elegit, Capias Utlagatum, and others of the like nature; for summoning the jury, use of room, presiding at the inquisition, &c.	2	2	0
Jury	0	12	0
For travelling expenses of under-sheriff from his office to the place of inquisition . . . *per mile*	0	1	0
For drawing and engrossing the inquisition . *per folio*	0	1	6
For a summons for the attendance of a witness . .	0	5	0

[*As to the apportionment of the travelling expenses of the under-sheriff and bailiff, see* post, 1542.]

In Replevin.

[*Bond, see* post, 1542.]

In precept to bailiff	0	2	6
Notice for service on defendant	0	2	6
Broker, where the sum demanded and due shall exceed £20, and shall not exceed £50, for appraisement and affidavit of value	0	10	6
Where it shall exceed £50	1	1	0
And his travelling expenses from his residence to the place where the goods are *per mile*	0	0	6
Bailiff for summoning parties and delivering goods to tenant	1	1	0
And his travelling expenses same as broker.			
For the warrant, record, and return of a re. fa. lo., accedas ad curiam, pone, or writ of false judgment . .	0	16	6
For writ retorno habendo	0	4	6

In Scire Facias Service of Capias, Outlawry, Error, Supersedeas, &c.—Return of Writs.

	£	s.	d.
For each summons on a writ of sci. fa., or for the service of writ of capias where no arrest	0	5	0
And mileage *per mile*	0	1	0
For recording each demand or proclamation under writs of outlawry	0	2	0
For bailiff for making each demand or proclamation on writs of outlawry in London and Middlesex	0	2	6
In other counties	0	5	0
And travelling expenses, if the distance shall exceed five miles, then for every mile beyond that distance	0	0	6
For any supersedeas, writ of error, order liberati or discharge to any writ or process, or for the release of any defendant in custody (unless in the prison of the county), or of goods taken in execution	0	4	6
For the return of any writ or process, and filing the same, exclusive of the fee paid on filing	0	1	0

Jury Process—Sheriff's attendance in Court, &c.

For return to common venire	0	3	6
The like to special	0	5	0
The like on distringas or habeas corpus for common jury	0	12	0
The like for special jury	0	14	0
The like with a view	1	0	0
The like to traverse venire	0	14	6
For attendance naming special jury	2	2	0
Twenty-four warrants to summon special jury	1	4	0
For bailiff for summoning each special juror	0	2	0
Sheriff attending in court	1	1	0

For attending a view, the fees as allowed by rule of court, Trinity Term, 7 Geo. 4, 1826.

For any duty not herein provided for, such sum as one of the Masters of the Court of King's Bench or Exchequer, or one of the Prothonotaries of the Court of Common Pleas, may upon special application allow.

[*Signed by all the Judges.*]

Bond in Replevin.

Instead of the allowance of the fees upon the same scale as the bail-bond, the fee of one pound one shilling only is allowed, whatever be the amount, if above £20	1	1	0

Fees on Writs of Trial and Inquisition.

The travelling expenses of the under-sheriff from his office, and of the bailiff from his residence, to the place where the trial or inquisition is held, are to be apportioned rateably to the parties, if more than one trial or inquisition be held at the same time and place.

[*Signed by all the Judges.*]

Where there are several defendants in a writ of capias, and warrants are issued thereon by the under-sheriff against more than one defendant, no more shall be charged in any case for each warrant, after the first than two shillings and sixpence.

[*Signed by eight of the Judges.*]

ADDENDA ET CORRIGENDA.

Page 14.—An attorney sent a *ca. sa.* to a sheriff's officer, with a letter directing him to make the arrest, instructing him where the party was likely to be found; and desiring him to use caution in taking him. The officer having returned the writ, it was then sent to the under-sheriff, with a letter directing him to forward a warrant to the same officer, and informing him that the officer had been instructed as to the execution thereof: *Held*, that these circumstances did not constitute the officer a special bailiff, so as to exonerate the sheriff. *Alderson* v. *Davenport*, 1 D. & L. 966; 13 M. & W. 42; 13 Law J., N. S., Exch., 352, *S. C.*

Page 19.—For "29 Eliz. c. 44," read "28 Eliz. c. 4."

To note (*n*), add the case of *Davies* v. *Edmonds*, 13 Law J., N. S. 1, Exch.

Page 21.—The stat. 6 & 7 Vict. c. 73, repeals the 2 Geo. 2, c. 23, except so far as relates to anything done at any time before the passing of this act.

An attorney's bill having been taxed under 2 Geo. 2, before the passing of the 6 & 7 Vict.—*Held*, that a motion might be made respecting the costs of that bill after that act had passed. *Hodge* v. *Bird*, 13 Law J., N. S., C. P., 87; 1 D. & L. 956, *S. C.* See, also, *Doe* d. *Potts* v. *Jinders*, 2 D. & L. 986; 14 Law J., N. S., 245, Q. B., *S. C.*

Page 24.—To note (*b*), add 1 D. & L. 892, *S. C.*

Page 26.—Service as clerk under articles to an attorney by a barrister will not do, though he never during the service practised as a barrister. *Re Bateman*, 14 Law J., N. S., 89, Q. B.

Page 29, *line* 25 *from top.*—Instead of "*receive*" read "*exercise.*"

Page 33, *line* 9 *from bottom.* In the 1st question, instead of "*on the day of the date,*" say "*at the date.*"

[Page 31—37.]—*Examination and Admission of Attornies.*

The Judges, in Easter Term, 1846, made the following rules relating to the examination and admission of attornies:—

"Whereas, by section 15 of the stat. 6 & 7 Vict. c. 73, it was enacted, 'That it shall be lawful for the Judges of the Courts of Queen's Bench, Common Pleas, and Exchequer, or any one or more of them, and he and they is and are hereby authorised

and required, before he or they shall issue a fiat for the admission of any person to be an attorney, to examine and inquire, by such ways and means as he or they shall think proper, touching the articles and service, and the fitness and capacity, of such person to act as an attorney; and if the Judge or Judges as aforesaid shall be satisfied by such examination, or by the certificate of such examiners as hereinafter mentioned, that such person is duly qualified, and fit and competent to act as an attorney, then, and not otherwise, the said Judge or Judges shall, and he and they is and are hereby authorised and required to administer, or cause to be administered, to such person the oath hereinafter directed to be taken by attornies and solicitors, in addition to the oath of allegiance, and, after such oaths taken, to cause him to be admitted an attorney of such Court;' and by section 16 of the said statute, it was enacted, 'For the purpose of facilitating the inquiry touching the due service under articles as aforesaid, and the fitness and capacity of any person to act as an attorney, that it shall be lawful for the Judges of the Courts of Queen's Bench, Common Pleas, and Exchequer, (or any eight or more of them, of whom the Chiefs of the said Courts shall be three,) from time to time, to nominate and appoint such persons to be examiners for the purposes aforesaid, and to make such rules and regulations for conducting such examination as such Judges shall think proper:' And whereas, in order to carry the said statute more fully into effect, it is expedient annually to appoint examiners, subject to the control of the Judges in manner hereinafter mentioned:

"It is ordered, that the several Masters for the time being for the Courts of Queen's Bench, Common Pleas, and Exchequer, respectively, together with sixteen attornies or solicitors, be appointed by a rule of Court in every year to be examiners for one year, any five of whom (one whereof to be one of the said Masters) shall be competent to conduct the examination; and that, subject to such appeal as hereinafter mentioned, no person who shall not have been previously admitted a solicitor of the High Court of Chancery shall be admitted to be sworn an attorney of any of the Courts, except on production of a certificate signed by the major part of such examiners actually present at, and conducting his examination, testifying his fitness and capacity to act as an attorney; such certificate to be in force only to the end of the Term next but one following the date thereof, unless such time shall be specially extended by the order of a Judge.

"II. It is further ordered, that the examiners so to be appointed shall conduct the said examinations under regulations to be first submitted to and approved by the Judges.

"III. And it is further ordered, that in case any person shall be dissatisfied with the refusal of the examiners to grant such certificate, he shall be at liberty to apply for admission by petition in writing to the Judges, to be delivered to the Clerk of the Lord Chief Justice of the Court of Queen's Bench, upon which no fee or gratuity shall be received, which application shall be heard in the Serjeants' Inn Hall by not less than three of the Judges.

"IV. And whereas the Hall or Building of the Incorporated

Law Society of the United Kingdom, in Chancery-lane, will be a fit and convenient place for holding the said examinations, and the said Society have consented to allow the same to be used for that purpose: it is further ordered, that, until further order, such examinations be there held on such days as the said examiners, or any five of them, shall appoint; and that any person not previously admitted an attorney of any of the three Courts, and desirous of being admitted, shall, in addition to the notices already required, give a Term's notice to the said examiners of his intention to apply for examination, by leaving the same with the secretary of the said Society at their said Hall; which notice shall also state his place or places of residence or service for the last preceding twelve months; and, in case of application to be admitted on a refusal of the certificate, shall give ten days' notice, to be served in like manner, of the day appointed for hearing the same.

"V. And it is further ordered, that three days at the least before the commencement of the Term next preceding that in which any person not before admitted shall propose to be admitted an attorney of either of the Courts, he shall cause to be delivered at the Masters' office, instead of affixing the same on the walls of the Courts, the usual written notices, which shall state, in addition to the particulars now required, his place or places of abode or service for the last preceding twelve months; and the Master shall reduce all such notices as in this rule first mentioned into an alphabetical table or tables, under convenient heads, and affix the same, on the first day of Term, in some conspicuous place within or near to and on the outside of each Court. And such person shall also, for the space of one full Term previous to the Term in which he shall apply to be admitted, enter or cause to be entered in two books kept for that purpose, one at the chambers of the Lord Chief Justice or Chief Baron of the Court in which he applies to be admitted, and the other at the chambers of the other Judges or Barons of such Court, his name and place or places of abode, and also the name or names, and place or places of abode of the attorney or attornies to whom he shall have been articled,

"And it is further ordered, that a printed copy of the list of admissions be stuck up in the Queen's Bench, Common Pleas, and Exchequer Offices, and at the Judges' hall or chambers of each Court in Rolls Garden." [Signed by all the Judges.]

"*The following Regulations were approved of by the Judges in Easter Term*, 1846, *for the Examination of Persons applying to be admitted as Attornies of the Courts of Queen's Bench, Common Pleas, or Exchequer, pursuant to the above Rule of Court made in Easter Term*, 1846.

"Whereas, by a rule of the Courts of Queen's Bench, Common Pleas, and Exchequer, made in Easter Term, 1846, it was ordered, that the several Masters for the time being of the said Courts respectively, together with sixteen attornies or solicitors, should be appointed by a rule of court in every year to be examiners for one year of persons applying to be admitted

attornies of the said Courts, any five of whom, (one whereof to be one of the said Masters,) should be competent to conduct the examination, and that, subject to such appeal as therein-after mentioned, no person not previously admitted a solicitor of the High Court of Chancery should be admitted to be sworn an attorney of any of the said Courts, except on production of a certificate, signed by the major part of such examiners actually present at and conducting his examination, testifying his fitness and capacity to act as an attorney; such certificate to be in force only to the end of the Term next but one following the date thereof, unless such time should be specially extended by the order of a Judge: And it was further ordered, that the examiners so to be appointed should conduct the said examinations under regulations to be first submitted to and approved by the Judges; and that, until further order, such examinations should be held in the hall or building of the Incorporated Law Society of the United Kingdom in Chancery-lane, on such days as the said examiners, or any five of them, should appoint, and that any person not previously admitted of any of the three Courts, and desirous of being admitted, should give a Term's notice of his intention to apply for examination, by leaving the same with the secretary of the said Society at their said Hall."

In pursuance of the said rule the following regulations for conducting the said examinations have been submitted to and approved by the Judges of the said Courts.

"I. That every person applying to be admitted an attorney of any of the said Courts, pursuant to the said rules, shall, within the first seven days of the Term in which he is desirous of being admitted, leave, or cause to be left with the secretary of the said Incorporated Law Society his articles of clerkship duly stamped, and also any assignment which may have been made thereof, together with answers to the several questions hereunto annexed, signed by the applicant, and also by the attorney or attornies with whom he shall have served his clerkship.

"II. That in case the applicant shall shew sufficient cause, to the satisfaction of the examiners, why the first regulation cannot be fully complied with, it shall be in the power of the said examiners, upon sufficient proof being given of the same, to dispense with any part of the first regulation that they may think fit and reasonable.

"III. That every person applying for admission shall also, if required, sign and leave, or cause to be left with the secretary of the said Society, answers in writing to such other written or printed questions as shall be proposed by the said examiners, touching his said service and conduct, and shall also, if required, attend the said examiners personally, for the purpose of giving further explanations touching the same, and shall also, if required, procure the attorney or attornies with whom he shall have served his clerkship as aforesaid, to answer either personally or in writing, any questions touching such service or conduct, or shall make proof to the satisfaction of the said examiners of his inability to procure the same.

"IV. That every person so applying shall also attend the said examiners at the Hall of the said Society, at such time or

times as shall be appointed for that purpose, pursuant to the said rule, as the said examiners shall appoint, and shall answer such questions as the said examiners shall then and there put to him by written or printed papers touching his fitness and capacity to act as an attorney.

"V. That, upon compliance with the aforesaid regulations, and if the major part of the said examiners actually present, at and conducting the said examination (one of them being one of the said Masters), shall be satisfied as to the fitness and capacity of the person so applying to act as an attorney, the said examiners so present or the major part of them, shall certify the same under their hands in the following form, viz.:

"In pursuance of the rules made in Easter Term, 1846, of the Courts of Queen's Bench, Common Pleas, and Exchequer, We, being the major part of the examiners actually present at and conducting the examination of A. B. of &c., do hereby certify that we have examined the said A. B. as required by the said rules: And we do testify that the said A. B. is fit and capable to act as an attorney of the said Courts."

See the questions as to the due service of the articles of clerkship, Vol. I. p. 33.

Page 34, *line* 5 *from bottom.*—Instead of "attorney *and* solicitor," say "attorney *or* solicitor."

Page 52.—If the neglect to take out the certificate was before the 6 & 7 Vict. c. 73, then, it seems, the application should be for *readmission*, the same as before the passing of that act.

[Page 53.] *Renewal of Attornies' Certificates.*

The Judges, in Easter Term, 1846, made the following rules as to the renewal of attornies' certificates.

"Whereas, by section 25, of the stat. 6 & 7 Vict. c. 73., it was enacted, That, if any attorney shall neglect to procure an annual stamped certificate, authorising him to practise as such within the time by law appointed for that purpose, then and in such case the registrar of attornies and solicitors shall not afterwards grant a certificate to such attorney without the order of one of the Courts of Queen's Bench, Common Pleas, or Exchequer, or of one of the Judges thereof, to issue such certificate:

"And whereas it is expedient, that, upon the application of an attorney having neglected for the space of one whole year to procure or to renew an annual stamped certificate, the Judges should have means of inquiring as to the circumstances under which he has omitted to commence or has discontinued to practise, and as to his conduct and employment during the term of such omission or discontinuance:

"It is ordered, that, from and after the last day of Trinity Term next, every person who shall intend to apply on the last day of Jerm or in vacation for such order, shall, three days at the least previous to the first day of the Term, on the last day of which the application is intended to be made, or, in case

the application is to be made in the vacation, shall, previous to the first day of the preceding Term, leave at the office of the Masters of the Court in which he intends to make the application a notice in writing, containing his name and place or places of abode for the last preceding twelve months. And that, before the said first day of Term, he shall enter or cause to be entered a like notice in two books kept for that purpose, one at the chambers of the Lord Chief Justice or Chief Baron, and the other at the chambers of the other Judges or Barons, and shall before the said first day of Term cause to be filed the affidavit upon which he seeks to obtain or renew his said certificate at the office of the Masters aforesaid, and a copy thereof to be also left at the chambers of the Lord Chief Justice of the Court of Queen's Bench.

"And it is further ordered, that the Masters reduce such notices into alphabetical order, and add the same to the list of admissions, and the order for the granting the certificate shall be drawn up on reading such affidavit and also an affidavit of such copy having been left in compliance with this rule (*a*)."

[Signed by all the Judges.]

Page 55.—Applications for an order for the registrar to grant his certificate for a renewal of the stamped certificate are frequently made to the Court. If the application is made to the Court, three days' notice before the first day of the Term must be given; if to a Judge at chambers, then one day's notice before the Term must be given.

Page 56.—By the 7 & 8 Vict. c. 101, s. 68, a person, though not at attorney, may act for a board of guardians.

Page 59.—In note (*q*), after 7 B. & Cres. 638, add *Cutts* v. *Surridge*, 13 Law J., N. S., 2, Q. B.

Page 60.—If an attorney is an attorney of more than one of the superior Courts he may be sued in either. *Walford* v. *Fleetwood*, 14 Law J., N. S., 271, Exch.; 14 M. & W. 449, *S. C.*

In note (*r*), after 2 Jurist, 1041, add *Cutts* v. *Surridge*, 16 Law J., N. S., 2, Q. B.

In note (*b*), add *Rastrick* v. *Beckwith*, 2 D. & L. 624; 7 M. & Gr. 905, *S. C.*

Page 64.—A party cannot appear by two attornies; and the appearance, if he did, will be irregular, but not a nullity. *Williamson* v. *Williams*, 10 M. & W. 178. Per *Abinger*, C. B., and *Alderson*, B.

Page 70.—In line 11 from the bottom, after the words "by him," add "or for money paid by him in business." See *Lewis* v. *Samuel*, 15 Law J., N. S., 218, Q. B.

See, as to an attorney's duty to see to the sufficiency of a security, *Hayne* v. *Rhodes*, 15 Law J., N. S., 137, Q. B.

Page 72.—As to what is a reasonable notice to the client for

(*a*) There must be an affidavit of the service of the notices in addition to these affidavits. See the Practice, vol. 1, p. 53.

a supply of money, &c., see *Smith* v. *Roche*, Exch., 5th June, 1845, reported in *Law Times* of that date, p. 243.

Pages 74, 75.—It would seem from *Hubbard* v. *Phillips*, 14 Law J., N. S., 103, Exch., that either party may apply to stay or set aside the proceedings, where an attorney acts without authority, and whether the attorney be solvent or not, and, at all events, the defendant may.

Page 77.—The Court will compel an attorney to perform his undertaking as such, even though it be void as a contract, in consequence of non-compliance with the Statute of Frauds. *Re Hilliard*, 14 Law J., N. S., 225, Q. B.

See as to the Court's enforcing an attorney's undertaking, *Re Fairthorne*, 3 D. & L. 548; *Thompson* v. *Gordon*, 15 Law J., N. S., 344, Exch.

Page 78.—It is no answer to a rule calling on an attorney to pay money pursuant to his undertaking, that more than two years have elapsed since he gave it. *Re Swan*, 15 Law J., N. S., 402, Q. B.

Page 79.—If an order be made, that an attorney state his client's abode, &c., and the client cause his attorney to deliver a false address, &c., he will be guilty of a contempt, and subject to an attachment. *Smith* v. *Bond*, 14 Law J., N. S. 114, Exch.

Page 86.—In note (*d*), for "*Godye*" read "*Gedye*," and add to the note the case of *Re Symons*, 3 D. & L. 157.

To note (*c*), add *Scadding* v. *Eyles*, 15 Law J., N. S., 364, Q. B.

Page 87.—The bill ought to contain a statement of the Court in which the business is alleged to have been done, either in the heading or some other part. *Engleheart* v. *Moore*, 2nd June, 1846, Exch.; 7 Law Times, 211.

If an unsigned bill be inclosed in a letter signed by the attorney, and the bill does not on the face of it shew who is the party chargeable, the letter may be referred to, to supply the defect. *Taylor* v. *Hodgson*, 3 D. & L. 115.

To note (*l*), add *Martindale* v. *Faulkner*, 15 Law J., N. S., 91, C. P.

Page 89.—In line 2 from top strike out the words "but this has not been decided." In the recent case of *Jefferys* v. *Evans*, 3 D. & L. 52, the Court of Exchequer held that the defendant might apply to the Court to tax the bill and to stay the proceedings on payment into Court of the sum found to be due on taxation.

Page 91.—The Master of the Rolls in *Re Pender*, 10th April, 1845, decided that a bill might be ordered for taxation without being signed.

Page 92.—As to who is a party not chargeable by the bill, to entitle him to apply for taxation, see *Re Barber*, 15 Law J., N. S., 9, Exch.; *Re Carew*, 14 Law J., N. S., 100, Chanc.

Page 93.—As to what are special circumstances sufficient to warrant an application to tax after verdict, or twelve months after delivery, see *Re Wicker*, 12 M. & W. 549.

As to the cases of fraud and pressure, in which the Court will order a taxation after payment, see *Sayer* v. *Wagstaff*, 14 Law J., N. S., 116, Chanc.; *Re Alcock*, Vice Chancellor's Court, 3rd May, 1845; *Re Carew*, 14 Law J., N. S., 100, Chanc.

Page 94.—As regards what shall be deemed payment of an attorney's bill, if a bill or note be given on account, the payment of the attorney's bill dates from the payment of the bill or note, and not from the giving it. *Re Harris*, 1 D. & L. 1018; 13 M. & W. 3, *S. C.* It would be otherwise if the bill or note were taken as actual satisfaction of the debt.

In note (*l*), for "13 Law J.," read "14 Law J."

The summons or rule must be intitled "In the matter of A. B. (the attorney)," or the application will be refused. *Re Hair*, 8 Scott, N. R., 231.

Page 95.—In line 15 from the bottom, it is stated, that the order to tax admits the retainer, and a liability *pro tanto*. This, however, appears to have been the case only where the applicant entered into the usual undertaking to pay, which, before the 6 & 7 Vict. c. 73, he was generally compelled to do by the order. But this is not the case now.

Pages 95, 97.—Under the common order in Chancery directing the reference of a solicitor's bill for taxation, the Taxing Master has jurisdiction to decide, on a question of retainer and liability, as to any of the charges contained in the bill, except those in respect of which the petitioner has in his petition admitted the claims of the respondent. *Re Bracey*, 14 Law J., N. S., 299, Chanc. In that Court, the Master has power to examine both the parties and witnesses.

Page 100.—As to the costs of taxation, where there was a compromise, see *Sadler* v. *Palfrayman*, 3 N. & M. 599.

Page 105.—As to an attachment for the amount of the Master's allocatur, it is laid down in the text as if this were obtainable as of course. Formerly, this was the case, where the party to be charged gave the usual undertaking to pay the amount of the allocatur, for then that undertaking was in the nature of a submission to arbitration, and the Master's allocatur in the nature of an award. But this undertaking is not now entered into, so that the attachment cannot be granted unless there has been a rule of court ordering the payment, of a Judge's order ordering it, and that order made a rule of court.

In line 11 from the bottom, instead of "*each*," read "*such*."

An affidavit for a rule or order should be intitled, "In the matter of —— (the attorney)"—and not in the matter of the client as well as the attorney, or in any other way. *Re Hare*, 2 D. & L. 269; 8 Scott, N. R., 231, *S. C.*

Page 106.—In line 3 from top, add, "Still the security would be valid, and there would be no defence to an action on

it, that it was given to secure future costs. *Jeffereys* v. *Evans*, 3 D. & L. 54."

Page 108.—To note (*d*), add "*Kemp* v. *Davy*, 2 Mood. & Rob. 437."

As to how an attorney's lien is enforced where an award and bankruptcy, see *Holcroft* v. *Manby*, 8 Scott, N. R., 473; 7 M. & W. 843, *S. C.*

Page 112.—Where an attorney was entrusted by executors with a sum of money to pay the legacy duty, and failed so to apply it, the Court refused to interfere summarily to compel him to refund the money, as it did not appear that the employment was necessary to his professional character, or that he had on other occasions ever acted as attorney for the parties. *Re Webb*, 14 Law J., N. S., 244, Q. B.

Page 125.—As to the delivery of an agent's bill—a signed bill need not be delivered by an agent for business, &c., by him as such, see *Re Gedyes*, 2 D. & L. 519; *Re Simons*, 3 Id. 157.

Page 129.—To note (*m*), add "see 15 Law J., N. S., 39, Exch."

Page 131.—As to the days at Easter, the rule of Easter Term 2 W. 4, applies to an entry of an appearance by plaintiff for the defendant where the last of the eight days falls between them, see *Harris* v. *Robinson*, 15 Law J., N. S., 208, C. P.

Page 132.—It seems a Term's notice of motion for a rule to discharge a rule for a new trial is necessary. See *Lord* v. *Wardle*, 15 Law J., N. S., 592, C. P.

To note (*n*), add "*Smith* v. *Paul*, 3 Smith, 101; and see per *Parke*, B., in *Simpson* v. *Heath*, 7 Dowl. 837."

Page 144.—As to the name of the plaintiff: A writ of summons was issued directing the defendant to cause an appearance to be entered at the suit of "Henry Walker & Co.," with a notice, that, in default of his so doing, "the said Henry Walker & Co." might enter an appearance for him. The writ was indorsed "The plaintiff claims 20*l.* 1*s.*" *Coleridge*, J., refused to set aside the writ, as it did not appear on the face of it that Henry Walker & Co. necessarily meant more than one person. *Walker* v. *Parkins*, 14 Law J., N. S., 214, Q. B.

Page 145.—As to defendant's residence: A writ directed to the defendant as "of Bristol, in the county of Gloucester," only a part of Bristol being in that county, was deemed irregular. *Levi* v. *Perrott*, 15 Law J., N. S., 4, C. P.

A writ served in Middlesex, but describing defendant as "of W. in the county of S., but now in the county of Middlesex," is irregular. *Downes* v. *Garbutt*, 2 D. & L. 944.

Describing defendant as of "A Street in London," would be bad, if it be sworn that the street is in Middlesex and not in London. *King* v. *Hopkins*, 14 Law J., N. S., 106, Exch.

An affidavit to set aside for a wrong service in a county adjoining another, should state that there is no dispute as to boundaries. *Lewis* v. *Newton*, 2 C., M., & R. 732.

A copy of a writ of summons was directed to "J. S. late of B., in the county of York, but now in the castle of York, of the city of York, merchant." The affidavit stated "that the said castle of York was not situate in the city of York, but was wholly situate in the county of York." On a motion to set aside the copy of the writ, on the ground of its not stating correctly the place where the debtor was "supposed to be," pursuant to the 2 & 3 W. 4, c. 39, the Court refused a rule, as the affidavit did not sufficiently negative the existence in the city of York of a place called "the castle." *Balman* v. *Sharp*, 16 Law J., N. S., 39, Exch.

Page 150.—As to the indorsement: A writ of summons was indorsed "This writ was issued by A. and B. of ——, agents for J. T., of the city of Exeter, in the county of Devon, the plaintiff within named." The Court set aside the copy and the service for irregularity, as it did not appear to be issued either by the plaintiff in person or by an attorney for him. *Toby* v. *Hancock*, 16 Law J., N. S. 33, Q. B.

Page 153.—In note (*l*), add the case of *Chapman* v. *Becke*, 3 D. & L. 350.

Page 154.—As to the costs of the taxation: The defendant's course is, to pay the whole of the costs indorsed, and then procure a taxation. *Hopkinson* v. *Finney*, 4th May, 1845, C. P.

As to the costs of taxation, where the defendant pays less than the sum indorsed on the writ, see *Young* v. *Crompton*, 2 D. & L. 557.

Page 158.—In line 14 from bottom, after the words "at any time," add "within twelve months from the issuing of the preceding writ." See *Harmer* v. *Johnson*, 14 Law J., N. S. 292, Exch.

Page 159.—By *R. M.*, 3 *W.* 4, *s.* 6, it is ordered, "that any alias or pluries writ of summons may, if the plaintiff shall think it desirable, be issued into another county, and any alias or pluries writ of capias may be directed to the sheriff of any other county; the plaintiff, in such case, upon the alias or pluries writ of summons describing the defendant as late of the place of which he was described in the first writ of summons, and upon the alias or pluries writ of capias referring to the preceding writ or writs, as directed to the sheriff to whom they were in fact directed."

As to the application to set aside the writ or copy—in the absence of proof to the contrary, the defendant has a right to assume that the copy served is a true copy of the writ, and that if the copy is defective so is the writ. *Chapman* v. *Becke*, 3 D. & L. 352. It would seem, that, if the application be to set aside the writ as well as the copy and service, and it turns out that the latter only are irregular, the rule will be granted to set aside the latter.

Page 160.—The affidavit need not state that the party is the defendant in the cause. *Stevenson* v. *Thorne*, 13 M. & W. 149.

Page 162.—The Court will not set aside proceedings on the ground that the defendant has not been personally served with

process, unless it be distinctly shewn by him that it has not come to his knowledge. *Emerson* v. *Brown*, 8 Scott, N. R., 219.

Page 164.—To note (*l*), add "Per *Coleridge*, J., in *Rennie* v. *Bruce*, 14 Law J., N. S., 207, Q. B."

Page 167.—Note (*x*), instead of "*Man* v. *Curtis*," read "*Nunn* v. *Curtis*," and add "*Stephens* v. *Lowndes*, 3 D. & L. 205."

Page 168.—It must now be considered as fully settled, that there is no equivalent to *personal* service. *Russell* v. *Lowe*, 2 Dowl. N. S. 599; 12 M. & W. 583, *S. C.*

Page 169.—As to setting aside an appearance for irregularity.—If the appearance entered by the plaintiff is irregular, and the plaintiff has declared, the application should be, to set aside both the appearance and the declaration, and not merely the latter. *Brooks* v. *Roberts*, 3 D. & L. 13; 1 Com. B. 636, *S. C.*

If the plaintiff enter an appearance for the defendant in ignorance that the defendant has already appeared, this is an irregularity, but not a nullity; and the defendant must take advantage of it in due time. *Maple* v. *Woodgate*, 28th April, 1846, B. C., Cor. *Wightman*, J.

Page 170.—An affidavit to set aside a judgment, on the ground that no appearance has been entered, and stating that defendant has searched the appearance book, in which appearances are entered, and that no appearance has been entered by or for the defendant, is sufficient. *Charlesworth* v. *Ellis*, 12th June, 1845, Q. B.

Page 171.—A writ of *distringas* for the purpose of outlawry may be allowed if the defendant be abroad to avoid process, &c.

Page 174.—Where the defendant was ill in bed, and three calls, &c. were made, it was considered not necessary to state that the defendant kept out of the way to avoid the service. *Wilkins* v. *Jones*, 15 Law J., N. S., 226, Q. B.

Service on a clerk of the defendant, at his place of business, is sufficient for a distringas for outlawry. 15 Law J., N. S., 192, C. P.

To obtain a distringas for outlawry, a copy of the summons should be left at the defendant's last known place of abode, or with some person (if any known) who is likely to forward it to him. *Vernon* v. *Parncett*, 8 May, 1846.

Page 175.—As to the course of proceeding to obtain a *distringas* where the defendant is a *lunatic*, see further, Vol. 2, "*Actions against Idiots and Lunatics.*"

Page 176.—An affidavit for a *distringas* should distinctly state where the defendant's residence is; and the Court will set aside a *distringas* when such statement is not distinctly made, though it should appear from the defendant's own affidavit that the writ was really left at his residence. *Crofts* v. *Brown*, 14 Law J., N. S., 232, Q. B.

Page 178.—A *distringas* returnable out of Term s void and not amendable. *Badham* v. *Bateman*, 13 Law J., N. S., 263, Q. B.

Page 185.—In line 6 from bottom of the text, after the words "last rule," add "for further time."

Page 203.—In line 20 from top, strike out the words "as we have just seen," and add, as an authority for the position, the case of *Bartrim* v. *Williams*, 4 Bingh. N. S., 301.

Page 210.—As to time for pleading after an order for particulars, see *Doe* v. *Roe*, 2 D. & L. 673.

Page 213.—To note (*d*) add—See *Ramme* v. *Duncombe*, 7 M. & Gr. 425, where the application was ten days after the service of the notice.

Page 220.—Where a plea is so framed as to leave it doubtful whether any answer is given to one of the counts, the plaintiff may sign judgment generally. *Hughes* v. *Pool*, 6 M. & Gr. 271.

Note (*n*), strike out "But see *Wettenhall* v. *Graham*," and add "*Wilkinson* v. *Page*, 6 M. & Gr. 1012.

Page 221.—A plea of no signed bill delivered is an issuable one. *Wilkinson* v. *Page*, 6 M. & Gr. 1012.

Page 222.—Obtaining an order for a particulars of set off is a waiver of an objection that the plea is not issuable. *Scott* v. *Watson*, 14 Law J., N. S., 240, C. P.; 1 Com. B., 826, *S.C.* What is not a waiver, see *Verbist* v. *De Keyser*, 3 D. & L., 392.

Page 234.—In note (*f*), for "407," read "487."

Page 245.—To note (*d*), add "*Lazarus* v. *Cowie*, 3 A. & E., N. S., 459."

Page 254.—In detinue a plea of lien, with a plea of *non detinet* and not possessed, has been allowed. *Barnewell* v. *Williams*, 7 M. & Gr. 403.

Page 260.—Note (*d*), for "5 Dowl. 262," read "562."

Page 263.—In line 6 from bottom of text, for "the above" days, read "those" days.

Page 265.—In line 15 from top, add, as an authority for the position, the case of *Waterman* v. *Carden*, 6 M. & Gr. 752.

Page 266.—As to signing judgment where the plea answers only part of the declaration:—Where, to a declaration on a bill of exchange, and on an account stated, the defendant pleaded *non assumpsit*, whereupon the defendant signed judgment for want of a plea, it was held, the plaintiff was not warranted in signing judgment, and that the proper course was to demur; and the Court refused to amend such judgment by confining it to the first account. *Eddison* v. *Pigram*, 16 Law J., N. S., 33, Exch.

Page 271.—As to setting aside a plea of release on the ground of fraud, see *Wright* v. *Burroughs*, 15 Law J., N. S., 277, C. P.; *Rashborne* v. *Jamble*, 15 Law J., N. S., 291, Exch.

Page 274.—If the defendant withdraws his plea, or one of several pleas, after a demurrer, the safest course seems to be, not to notice that plea or any subsequent pleading as to it in the Nisi Prius record or judgment. See *M'Intrye* v. *Butler*, 13 M. & W. 735. It would seem, the plaintiff may get his costs on such plea and demurrer. *Cooper* v. *Painter*, Id. 734; *Hutton* v. *Turk*, Id. 734.

Page 277.—To note (*y*), add "*Gray* v. *Parnell*, 1 Dowl. 120."

Page 283.—There is no necessity in C. P. to insert the names of counsel who signed the pleadings. *Jefferies* v. *Zablouski*, 15 Law J., N. S., 213, C. P.

In the award of venire a blank may, it seems, be left for the date of the return. Id.

Page 285.—In lines 10, 11, 12, from the top, erase the words in a parenthesis, for the exception no longer exists, since the 5 & 6 W. 4, c. 64. See *Cole* v. *Jane*, 3 D. & L. 369.

Page 292.—Note (*e*), for the cases cited in this note, substitute these: viz. *King* v. *Jones*, 1 Dowl. 640; 1 C. & M. 71, *S. C.*: *Doncaster* v. *Cardwell*, 5 Dowl. 582; 2 M. & W. 390, *S. C.*

Page 297.—Where plaintiff gives short notice of trial, there can be no countermand so as to prevent defendant getting the costs of the day. *Doncaster* v. *Cardwell*, 5 Dowl. 582; 2 M. & W. 390, *S. C.*

Page 304.—As to the effect of an admission of a bill where the defendant was described in it as a company, see *Wilkes* v. *Hopkins*, 3 D. & L. 184; 1 Com. B. 737, *S. C.*

Page 306.—To note (*a*), add "*Doe* v. *Somerton*, 14 Law J., N. S., 210, Q. B."

Page 308.—As to what is reasonable time for the service of a subpœna must depend on the circumstances of each particular case. Per cur. *Lawrence* v. *Clarke*, 3 D. & L., 89-90; and see *Holt* v. *Rogers*, 9 C. & P. 634.

Page 320.—As to the rule or order for additional questions, see *Williamson* v. *Lee*, 14 Law J., N. S., 172, C. P.

Page 322.—If the commissioners have power to put additional questions, they should decide positively whether they should be put, and not leave it for the Court to decide. *Williamson* v. *Lee*, 14 Law J., N. S., 172, C. P.; 1 Com. B. 464; 3 D. & L., 15, *S. C.*

Page 327.—Where the defendant endeavoured to prevent a material witness for the plaintiff from giving evidence at the trial, the Court refused an attachment, it not being shewn that the witness could not be subpœnaed in consequence of the defendant's interference, and left the plaintiff to his remedy upon

the subpœna, if, after service, it should turn out that the witness disobeyed it. *Schlesinger* v. *Flersheim*, 14 Law J., N. S., 97, Q. B.

Page 328.—The subpœna is no longer sealed at the Seal Office. The clerk at the Masters' Office will sign and seal it.

In note (*f*), for "9 Dowl.," read "Dowl."

Page 333.—The *habeas corpus ad test.* is no longer sealed by the sealer of the writs. The clerk at the Masters' Office will sign and seal it.

Page 335.—As to an action for not obeying a subpœna, see *Needham* v. *Fraser*, 1 Com. B. 815.

Page 338.—In note (*f*), for "9 Dowl.," read "8 Dowl."

Page 345.—It is stated in the text that the jury process in the case of a trial at the assizes must be sent to the sheriff in the case of common jurors ten days, in the case of special jurors three days at the least, before the commission-day. But this is said not to be correct

Page 347.—In line 6 from top, strike out "or in the Common Pleas by a Serjeant;" also strike out the next sentence, and substitute this: "*In vacation, in the Common Pleas, the practice is to obtain a judge's order for it, but this is not so in Queen's Bench or Exchequer.*"

Page 351.—As to the costs of a special jury, see *Geeve* v. *Gorton*, 3 D. & L. 481; *Jones* v. *Tobin*, 4 Bingh. N. S. 123.

Page 409.—The writ of trial must be made returnable in the course of the Term in which the trial is had. *Billing* v. *Railton*, 14 Law J., N. S., Exchequer of Pleas, and Bail Court, 192.

Page 411.—In note (*t*), after 7 M. & W. 721, add *Harrison* v. *Greenwood*, 1 D. & L. 354.

Page 412.—The plaintiff has no power to order a reference as in the case of a judge at Nisi Prius. *Wilson* v. *Thorpe*, 6 M. & W. 721; *Harrison* v. *Greenwood*, 3 D. & L. 356.

As to the return of the writ.—Where an action was tried in Hilary Term, under a writ which was not made returnable until the first day of Easter Term, the Court ordered the plaintiff to return the writ previous to the return-day stated in it. *Billing* v. *Railton*, 14 Law J., N. S., 192, Q. B.

Page 413.—Page 13 from top, after the words "even on the same day," add "if it be the return-day, but not before."

Page 417.—In line 7 from bottom of text, strike out the sentence commencing with the words, "The sheriff's notes," &c., and substitute the following: "The sheriff's notes must be filed unless the cause be tried before a *judge* of an inferior court. It is not now necessary to take copies of the plaintiff's notes for the purpose of shewing cause." *Hawkyard* v. *Stocks*, 2 D. & L. 936.

To note (*g*), add "*Bodles* v. *Reynolds*, 15 Law J., N. S., 153, Q. B."

Page 439.—In line 15 from bottom of text, strike out the words "*one of the Masters,*" and substitute the words "*the clerk of Nisi Prius.*"

The fee of 1*s.* is abolished.

Page 442.—In line 12 from bottom of text, it is stated to be the practice to obtain leave of the Court or a judge to set down the special case for argument. This, at all events, is not the practice of the Court of Common Pleas.

In the case of delay of the opposite party, the Court may order the case to be set down for argument. *Doe* d. *Phillips* v. *Rollings*, 15 Law J., N. S., 186, C. P.

To note (*c*), add "*Doe* d. *Phillips* v. *Rollings*, 15 Law J., N. S., 186, C. P."

Page 449.—As to damages where several defendants, see *Eliot* v. *Allen*, 1 Com. B. 18.

Page 453.—As to an amendment of the postea after a judgment in error, see *Jackson* v. *Galloway*, 1 Com. B. 280.

Page 458.—In line 4 from top, after the words "time of," add "entering it in the Master's book," and strike out the words "signing it without carrying in the roll."

A motion for arresting the judgment must be made in four days after the trial, if had in Term; and this although the distringas is not returnable till afterwards. *Morn* v. *Robinson*, 14 Law J., N. S., 310, Exch.

Page 459.—That a judgment may be signed immediately after the certificate, without waiting the four days formerly allowed by the rule for judgment, see the cases of *Nicholls* v. *Chambers*, 4 Tyr. 836; 2 Dowl. 693; 1 C., M., & R. 385, *S. C.*: *Gill* v. *Rushworth*, 2 D. & L. 416, cases decided as to signing judgment on a writ of trial. But see *Snooks* v. *Smith*, 8 Scott, N. R., 273, from which it would seem, that, where the trial and certificate are in Term, the judgment cannot be signed until after the expiration of the four days. The 4th section of the 1 *W.* 4, *c.* 7, does not, however, appear to have been noticed. It may also be added, that it is not the practice to grant a certificate for speedy execution on a trial had in Term time.

Page 463.—It seems that where the plaintiff declares on a judgment, the Court will stay the proceedings until the judgment-roll is carried in. *Hopkins* v. *Francis*, 2 D. & L. 664.

Page 496.—In line 20 from the bottom of text, strike out the sentence commencing with the words "*If you except,*" &c., and substitute this: "*If you except to them you must give notice to the defendant's attorney in error of the exception, which exception is marked in the bail-book.*"

In line 15 from the bottom of text, instead of the word "*after service of the rule for better bail,*" read "*after notice of the exception.*"

Page 498.—In line 6 from bottom of text, read on this sentence thus, "take it to the Treasury Office, and examine it with the roll; you may leave the manuscript there, and it will be returned from thence to the Masters."

Page 509.—By 5 & 6 Vict. c. 97, double costs are abolished, but increased costs are given instead. See the Chapter on Costs, *Vol.* 2.

Page 529.—A *ca. sa.* may be executed after the death of the plaintiff, if issued in his lifetime. *Ellis* v. *Griffith*, 10 Jur. 1014.

Page 532.—One writ may issue in continuation of another, and be tested accordingly at any time. *Harmer* v. *Johnson*, 3 D. & L. 38.

Page 540.—The teste of an *alias* need not be on the return-day of the preceding writ. *Ib.*

Page 554.—As to the rule or order to return the writ issued into the counties Palatine of Lancaster or Durham, the practice is to obtain two rules; one on the Chancellor to return the writ, and the other on the sheriff to return the mandate.

Page 560.—In line 24 from top, instead of the words "*Take it to the Crown Office, and one of the clerks will make out the attachment,*" substitute the following words: "*Prepare the attachment, and take it to the Crown Office.*"

Page 562.—As to levying for the expenses of the keep of cattle, see *Gaskell* v. *Sefton*, 3 D. & L. 267; 15 Law J., N. S., 107, Exch., *S. C.*

Page 563.—In line 19 from top, instead of the word "*proceedings,*" read "*poundage.*"

Page 564.—The sheriff claiming too much possession-money in his return, is no ground for quashing it. *Reynolds* v. *Barford*, 7 M. & Gr. 449.

Page 565.—As to levying under a *ca. sa.* the expenses of a previous *fi. fa.* see *Carp* v. *Satchell*, 12 Law J., N. S., 122, Q.B.

Page 570.—In lines 4 and 6 from bottom, instead of the words "*sealer of the writs,*" read "*one of the Masters.*"

Page 575.—As to the form of the sheriff's return, and his duty where rent due, see *Reynolds* v. *Barford*, 7 M. & Gr. 449; *Cocker* v. *Musgrove*, 15 Law J., N. S., 364, Q. B.

Page 590.—As to seizing goods let or pawned, see *Rogers* v. *Kennedy*, 15 Law J., N. S., 381, Q. B.

To note (*u*) add "See *Turner* v. *Ford*, 15 Law J., N. S., 215, Q. B."

To note (*y*) add "And see *Bradley* v. *Copley*, 1 Com. B. 685, 698, and *Cooper* v. *Willemott*, Id. 672."

Page 592.—Line 8 from top, strike out the sentence beginning with the words "And so" &c.

Page 597.—As to the teste of an *alias*, &c., it need not be on the return of the previous writ. *Harmer* v. *Johnson*, 3 D. & L. 38.

Page 611.—In line 26 from the top, for the word "*preceding,*" read "*pending.*"

As to the defendant's protection by a commissioner in bankruptcy, see 14 Law J., N. S., 283, Exch.

To note (*r*) add "*Mason* v. *Nicholls*, 14 M. & W. 118; *Joseph* v. *Buxton*, 1 M. & Gr., N. S., 221."

Page 621.—To note (*o*) add "See *Franklin* v. *Hodgkinson*, 3 D. & L. 355."

Page 638.—In (*d*), dele Ex parte *Cullingford*, 8 B. & Cres. 220.

Page 661.—Note (*y*) add "*Neal* v. *Snoulton*, 15 Law J., N. S., 48, C. P."

Page 667.—To note (*r*) add "And see Per *Coleridge*, J., in *Rennie* v. *Bruce*, 14 Law J., N. S., 207, Q. B."

Page 680.—One of the Masters will seal as well as sign the writ. There is now no Seal Office.

Page 695.—A mistake in the name in the copy of the writ, if it be idem sonans, will be immaterial. *Macdonald* v. *Mortlock*, 14 Law J., N. S., 244, Q. B.

Page 695.—At end of line 4 of text from bottom, add "or allow a fresh copy to be served." *Rennie* v. *Bruce*, 14 Law J., N. S., 207, Q. B.

Page 699.—As to a defect in the copy of the writ served, see *Copley* v. *Madeiros*, 8 Scott, N. R., 172.

Page 775.—In line 15 from bottom of text, strike out the sentences beginning at the words "Pay the money" &c. and ending with the words "draw up the rule," and substitute the following: "*Pay the money into the Master's Office and get a receipt; take this præcipe and receipt to the Rule Office, and on production of them a rule will there be drawn up.*"

Pages 816, 819.—As to the residence of the party whose nonjoinder is pleaded in abatement, and the affidavit as to it, see *Newton* v. *Stewart*, 15 Law J., N. S., 384, Q. B.; *Henry* v. *Golding*, 15 Law J., N. S., 298, Exch.

Page 840.—A præcipe or a rule for judgment is not it seems necessary in Queen's Bench.

Page 845.—The notes (*d*) and (*e*) should be transposed.

Page 913.—It seems not necessary to have an affidavit on a summons to compute in vacation.

Page 938.—In line 17 from top, strike out as to the essoign-day, and read, "*two days before the following term.*"

Page 990.—In Queen's Bench, it seems that there is no rule granted for defendant to appear in replevin when removed by the plaintiff.

Page 992.—It seems that there is no rule for time to declare in replevin, but the plaintiff takes out a summons and obtains an order for time to declare.

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